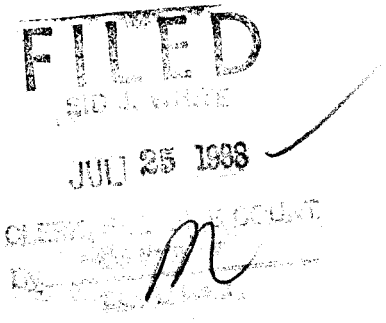
IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,471



LAUREL D. SCHUTZ,

Petitioner,

vs.

RICHARD R. SCHUTZ,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

In the District Court of Appeal, Third District, the Petitioner, LAUREL D. SCHUTZ, was the Appellant, and the Respondent, RICHARD R. SCHUTZ, was the Appellee.

In this brief, the Petitioner shall be referred to by name "the former Wife." The Respondent shall be referred to name "the former Husband." The symbols for reference used in the Petitioner's brief will be adopted in this brief also.

SUMMARY OF ARGUMENT

The former Husband respectfully submits that this Court should decline to exercise its discretionary jurisdiction to review this case. The opinions of the Trial Court and of the District Court of Appeal conclusively demonstrate that this Court's conflict jurisdiction does not exist in this case, and that the Order and Opinion constitute a permissible interpretation the Constitution of the United States, expressly warranted by the facts of this case.

The Petitioner asserts that the District Court's opinion "may compel a parent to express opinions and make statements about the other parent even where such opinions are not held by the parent to whom the order is directed." That assertion is an inaccurate interpretation of the District Court's pronouncement. Rather, the Third District Court of Appeal held that: "it is just as wrong for the appellant to refuse affirmatively to encourage the relationship between these children and this parent." The construction of the Opinion upon which the Petitioner relies to invoke this Court's discretionary jurisdiction is not found the face of this Opinion. Accordingly, conflict jurisdiction does not exist.

Additionally, this Court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure, is not warranted. The Trial Court's Order and the District Court's opinion do no more than compel the Petitioner to remedy damage to the Constitutionally protective relationship between the children and the non-resident parent. The Trial Court and the District

Court of Appeal both found the Petitioner to be the sole cause of this damage, and the Order and Opinion under review merely directed her to undo the damage that she alone caused. The relationship between the children and the non-resident parent is constitutionally protected, and entitled to great deference vis-a-vis the Petitioner's competing claims.

ARGUMENT

I.

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE IS A PROPER INTERPRETATION OF THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

The Third District Court of Appeal summarized this case as follows:

> "this is an Appeal by the Custodian Mother/Former Wife from a Post Dissolution Order on Child Support and Visitation, which had been made been made necessary by the fallout from the Appellant's assiduous and unfortunately largely successful efforts both to secrete physically the parties' two daughters from their father and to poison their hearts and minds against him. None of the points asserted for reversal have any merit. We find it appropriate to discuss only one point: what we regard as the baseless claim that the requirement that she instruct the children to love and respect their father violates her rights to free speech." [Notes omitted].

The Third District Court of Appeal found the former Wife's claims entirely baseless. The Court expressly found that it was wrong for the former Wife to refuse to affirmatively encourage the relationship between the minor children and the non-custodial parent, and that the lower Court properly ordered her to do so.

The District Court of Appeal's interpretation of the First Amendment is entirely correct. Although the former Wife has yet to acknowledge the fundamental notion that the relationship between the minor children and their father is constitutionally protected, it is clear that the Trial Court's Order does no more than what is necessary to protect this relationship. Moreover, it is fundamental that the rights of both parents must be balanced

against the rights of their children's right to an adequate home and education. In the matter of S.D. Jr., 549 P. 2d 1190, 1201, (Alaska 1976). That opinion demonstrates that it is proper to compel either or both parents to take specified actions when their Constitutional Rights must be balanced against the Constitutional Rights of the minor children. In that case, the parents were required to encourage their children to attend school. The alternative faced by the parents was the possibility of loosing custody of their children. The Supreme Court of Alaska found that parents may properly be ordered to take the specified actions, despite their conflicting Constitutional Rights to the care and custody of their children.

The court in this case did no more than balance the former Wife's First Amendments claims against the rights of the former Husband and the minor children, while explicitly recognizing the Court's duty toward those minor children. The effect of the District Court of Appeals Opinion is to require the former Wife to take those steps necessary to undue the damage that she alone has caused to the minor children and the non custodial parent. The facts of this case clearly demonstrate the propriety of the Orders under review. This Court should decline to exercise its discretionary jurisdiction to review the Opinion of the District Court of Appeal.

ARGUMENT

II.

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN COCA COLA COMPANY, FOOD DIVISION, POLK COUNTY VS. STATE, 406 So. 2d, 1079 (Fla 1982).

In Coca-Cola Company, Food Division vs. State, 406 So. 2d 1079 (1982), this Court recognized that, with respect to a First Amendment interest, competing interests must be balanced against the interest served by the regulation. This Court's discussion involved commercial speech, and the Court's opinion specified as follows: "when there is a First Amendment interest at stake in commercial speech, that interest must be balanced against the public interest served by the regulations." Coca-Cola, supra, at 1088.

The Opinion of the Trial Court and the District Court of Appeal clearly balanced the competing interests that are at stake. The former Wife, through her conduct prior to the proceedings and throughout the pendency of these proceedings, has clearly demonstrated that under no circumstances will she recognize the Constitutionally protected interests of the minor children and the former Husband. The former Wife's continual refusal to recognize these interests conclusively demonstrates that the Order and Opinion under review are the only means to balance the competing interests represented by the former Wife's freedom of speech and the rights of the minor children and the former Husband. The

former Wife's adamant refusal to recognize these competing interests demonstrates that nothing less than the Opinion and Order under review can effectively protect these interests.

Moreover, this issue is only reached by a tortured interpretation of the Opinion and Order under review. The former Wife is required to do no more than to affirmatively encourage the relationship between the children and their parent. This Order would be unnecessary but for the former Wife's egregious conduct. She is solely responsible for creating the situation which now exists between the minor children and the former Husband. Accordingly, the Trial Court and the District Court of Appeal correctly placed the onus upon the former Wife to remedy this situation.

The Appellant's competing interests envisioned by this Court in the Coca-Cola case are clearly found in the District Court of Appeals' Opinion. Accordingly, it is clear that there is no conflict between that Opinion and the Coca-Cola Opinion. This Court should decline to exercise its discretionary jurisdiction.

CONCLUSION

Upon the foregoing argument and authority, the Respondent requests that this Court decline to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Respondents Brief on Jurisdiction was mailed to Marsha B. Elser, Esquire, 44 West Flagler Street, Suite 1575, Miami, Florida 33130 and Cynthia L. Greene, Esquire, 100 North Biscayne Blvd., Miami, Florida 33130 this 21st day of July, 1988.

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