IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,471

LAUREL D. SCHUTZ,

Petitioner,

vs.

RICHARD R. SCHUTZ,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

LAW OFFICES OF
ROBIN H. GREENE, P.A.
2655 LeJeune Road
Suite 1109
Coral Gables, Florida 33134
(305) 444-0213

-and-

LAW OFFICES OF
FRUMKES AND GREENE, P.A.
100 North Biscayne Boulevard
Suite 1607, New World Tower
Miami, Florida 33132-2380
(305) 371-5600

Attorneys for Petitioner

TABLE OF CITATIONS

Page

Coca-Cola Co., Food Division v. State, Department of Citrus
406 So.2d 1079, 1087 (Fla. 1981) 22

F.V. Investments, N.V. v. Simca Corp.
415 So.2d 755 (Fla. 3rd DCA 1982) 21

Gardner v. Gardner
494 So.2d 500 (Fla. 4th DCA 1986) 12,17,25

Moore v. City Dry Cleaners & Laundry
41 So.2d 856 (Fla. 1949) 21

National Airlines, Inc. v. Air Line Pilots Association International
154 So.2d 843 (Fla. 3rd DCA 1963) 21

West Virginia State Board of Education v. Barnette
319 U.S. 624, 642, 63 S.Ct. 1178, 1187,
87 L.Ed. 1628 (1943), ... 21,22

INTRODUCTION

The Petitioner, ***LAUREL SCHUTZ,*** was the Wife in the trial court and the Appellant in the District Court of Appeal. The Petitioner shall be referred to as "the Wife."

The Respondent, ***RICHARD SCHUTZ,*** was the Husband in the trial court and the Appellee in the District Court of Appeal. The Respondent shall be referred to as "the Husband."

References to the Record on Appeal are indicated by the abbreviation "R." and references to the trial transcript are indicated by the abbreviation, "TR." All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The Husband, ***DICK SCHUTZ***, and the Wife, ***LAUREL SCHUTZ***, were married in 1972. (R.1-2). They had two daughters: Dee Britt, now fifteen years old, and Brigette, now thirteen years old. (R.1-2). In 1977 the Wife petitioned for a dissolution of the marriage and the Husband filed a counter-petition. (R.8-11). The dissolution was granted on November 13, 1978 and the Husband was awarded the custody of the parties' two children. The court found, at that time, that although both parties would be able to provide appropriate custodial care for the children, the Husband had a more stable and established lifestyle and, with custody awarded to the Husband, the Wife would be able to establish a career for herself. (R.53). The court expressly ruled that the award of custody to the Husband would be re-evaluated after two years. (R.54,56).

The Husband never assumed the custody of the children, preferring, instead, to make the Wife "wait" for his decision to do so. This course of action caused the Wife and the children considerable stress and emotional anguish. (R.90-91)[1] Two months after the entry of the Final Judgment, the Wife sought modification with respect to the custody issue in view of the Husband's refusal to assume custody.

In October, 1979, nearly one year after the entry of the

---

[1]The Wife testified that the Husband would call daily and say he was coming to get the children, who would wait with their bags packed. He never came. (TR.650).

Final Judgment, the court modified the custody award so as to grant custody of the children to the Wife. In so doing, the Court specifically found: 1) the Husband had not taken custody of the children and had told the Wife that he would take the children "when he was ready" and would not pay anything for their support in the interim; 2) the Husband was consistently late in picking the children up for visitation and returning them and had cursed the Wife in the presence of the children during his visitation periods; 3) the Husband was a bitter man who sought to punish the Wife by creating disturbances and difficulties with visitation and any other dealings he might have with the Wife. (R.120).

The Husband appealed this order. During the period of the appeal, the Wife was required to file numerous motions in the trial court regarding the Husband's harassment of her; his returning of the children late from visitation; his taunting of her by keeping the children in his car outside her home; and his failure to provide proper care for the children during his summer visitation. (R.155-156;158-159; 168-170;171-172). In early 1981, the District Court of Appeal, Third District, affirmed the trial court's modification order.

Just after the district court's affirmance of the modification order, the Wife and the children moved to Georgia. The Wife did not tell the Husband that she was moving but did provide him with an address and telephone number several days after the move. (TR. 557-558) The Husband ceased payment of child support upon learning of the move to Georgia. (R.414)

While the children were in Georgia, they spoke to the Husband on the telephone and wrote him letters, but there was no actual visitation between the Husband and the children. (R.414)[2]

The Wife and children returned to Miami after only seven months in Georgia. The Wife, however, did not inform the Husband that they had returned. She did not telephone him or write to him. (R.414).

After the Wife returned to Miami, the Husband ran into her and the children or the Wife's new husband, Roland Joynes, sporadically - January, 1982, late 1983, April, 1985. The Husband also learned where the Wife was working in February, 1985. Then, two days before Memorial Day in 1985, the Husband called the Wife and asked if he could visit with the children.(TR.594). She did not give him an answer immediately and, several days later, the Husband showed up at her house. (TR.594-95) The Husband and the Wife and the children talked on the front lawn. (TR.596).

---

[2]The Husband testified that he traveled to Georgia three times to visit the children. According to the Husband the Wife was aware, on all three occasions, that he was coming, but when he arrived, neither the Wife nor the children were home. (R.563; 564-65;511). The Wife testified that she knew of only one occasion when the Husband was scheduled to visit the children in Georgia. The Husband had advised that he would pick up the children at 9:00 a.m. and, when he had not appeared by 3:00 p.m., she took the children shopping. (TR.761).

Thereafter, the Husband moved to hold the Wife in contempt for violating his visitation rights and sought to have the custody of the children awarded to him. (R.227-233). In his motion for modification seeking custody, the Husband, who had not seen the Wife or children in four years, alleged, as he had numerous times in the 1978-1981 proceedings, that the Wife "used narcotics" in the presence of the children, was involved in "illicit" drug sales and was "an unstable individual." (R.228). The Husband withdrew this motion prior to trial.

The Husband also moved to determine his liability for the child support payments he had not made since 1981. (R.230-31). The Wife moved to modify visitation and for an order awarding the past due child support arrearages. (R.185-204).

A final hearing upon the motions took place on June 10 and June 11, 1986. From the outset the proceedings involved but one issue - was the Wife "to blame" for the fact that the Husband had not visited with the children in four years?

The first person to testify was the parties' then-thirteen year old child, Dee Britt, who was questioned by her court-appointed Guardian ad Litem. Dee Britt told the court that she was nervous and frightened to be in the courtroom with her father; she had seen her father hit her step-father, Roland Joynes, when she was younger, (TR.330). Dee Britt did not want to visit with her father. (TR.368). She told the court that she was afraid of him (TR.366); that when she last saw him [during court ordered visitation in these proceedings] he told her that "your mother does drugs" and that he "could still beat up Roland"

(TR.324); and that he had broken promises in matters that were important to her. (TR.346). More importantly, she told the court that her mother had not spoken against her father to her:

> *Q: [A]fter your mother and Richard or Dick got separated or divorced, did your mother ever talk to you about your father?*
>
> *A: No.*
>
> *Q: Never, ever?*
>
> *A. No.*
>
> *Q. Didn't you just tell the Judge that she told you he didn't support you?*
>
> *A. In the last year she's been telling like not bad things, she's just telling us things about him like when she was married to him and stuff like that.*
>
> *The Court: What kind of things?*
>
> *Q: She's been telling us about the court stuff and like the things we have to do.*
>
> *The Court: She has read to you pleadings in this case?*
>
> *A: She tells us like about - like the meetings like this and the depositions [Dee Britt's deposition was taken by counsel for the Husband] and stuff like that.*
>
> *The Court: You said she told you things that occurred when the two of them were married. What kinds of things? Was it a happy marriage, did she tell you that?*
>
> *A. No.*
>
> *The Court: She tell you it was an unhappy marriage?*
>
> *A. Well -*
>
> *The Court: What way? What were some of the things she told you that made it unhappy?*

A: That they didn't get along.

The Court: Okay, did she tell you why they didn't get along or what they didn't get along about?

A. No.

The Court: You said that your mommy told you certain things about your daddy, they weren't bad things, but like about this case?

A. Yes. (TR.339-341).

Dr. Michael Epstein, the court-appointed psychologist, told the court the following about the parents and the children. The Husband, nearly ten years after the parties' divorce, still resented the Wife both over her having wanted a divorce and over the amount of money she received from the court as a result of the dissolution of marriage. (TR.378). The Husband's psychological evaluation revealed him to have a "tendency to action-oriented, restless, rebellious, generally angry, with some tendency to act out his anger in a direct fashion at times," an evaluation consistent with the type of person who might abuse his wife. (TR.379). The Wife was fearful of the Husband, and the children perceived their mother as fearful of their father. (TR.384-385).

The children, whom Dr. Epstein viewed as truthful, told him that their mother had never told them "any bad things" about their father. (TR.407). The children have strong negative feelings about their father developed from their living environment with their mother and their own recollections of their

father (TR.384;391). The Wife contributed to these feelings by not encouraging visitation between the children and the Husband and by discouraging the involvement of the children and the Husband on an unconscious level and, to some extent, on a conscious level as, for example, through her relocation to Georgia. (TR.382).

Finally, Dr. Epstein opined That the term "parental alienation" as defined by Dr. Richard Gardner, a child psychiatrist, applied to this situation and these children only in "some milder form." (TR.396;404).[3]

The remaining portions of the final hearing primarily were devoted to the testimony of the parties. The Wife attempted to tell the court the basis for her fear of the Husband but the court restricted her, finding that the difficulties that she had encountered with the Husband were not related "to the legal situation of what happened from February 9th [when the Wife moved to Georgia] to date." (TR.654)[4] The Wife, nevertheless managed to tell the court the following about the state of her relationship with the Husband after their divorce:

---

[3]The Husband, in the district court, alleged that Dr. Epstein testified about a concept called "parental alienation syndrome." In actuality, counsel for the Husband read to Dr. Epstein from a book authored by Dr. Richard Gardner and asked if Dr. Epstein "agreed" with Gardner's theory. Dr. Epstein agreed with portions of the theory (TR.396), disagreed with other portions (TR.399), found only some "milder form" of the symptoms described by Gardner present in this case (TR.396) and specifically told the court that his agreement with Gardner's theory was in concept only and that he was not saying that it applied to this particular case. (TR. 404).

[4]The trial judge refused to allow evidence of the Husband's physical violence during the parties' marriage. (TR.451-452).

[The Husband] was constantly late picking them [the children] up and bringing them home. He would threaten, every time he left my driveway that he wouldn't bring them back he would hold them in the driveway and taunt me to come out, outside the fence and come get them if I wanted to.

* * *

It was a constant battle to get this man to follow the rules the Judge had set. I couldn't get him to do that. (TR.656).

* * *

[W]ith the visitation rights of the father, he would bring the support checks any time he wanted. He would come early in the morning, afternoon on days when he wasn't allowed on the property. He would walk up to my door, I lived on an acre that was all fenced. He never let me know he was coming first and he would call just - he could threaten when he came, "I'm checking up on you." And I said, "Dick, please mail the check to me." And, "I'll do it anyway I want. I'll deliver it whenever I want." (TR.657).

The Wife admitted that she had not called the Husband when she returned from Georgia. She stated:

My life had been so uprooted. I had no time to establish at all - - I hadn't had any time. Contacting Mr. Schutz would be like exactly what's happening here right now. It would just be a continuation of what I had been through the previous four years.

I was very tired. I really needed some time to enjoy my new marriage and my new mom and my children and new home. Mr. Schutz and I was just a constant struggle. (TR.670).

The Husband testified that he had not visited with his children in four years because he did not know where they were living. He testified that he had attempted to locate them by checking school board records (TR.477), but he did not contact any of the individuals who he knew would have known the Wife's location, such as the Wife's mother or the Wife's best friend with whom he was in regular contact. (TR.457-58). The trial judge found the Wife's belief that the Husband could have located the children to "smack of chutzpah" although Dr. Epstein earlier had testified:

> *Q: You indicated in your report that [the Husband's] efforts to locate the children didn't appear to be very sincere?*
>
> *A: It was difficult for me to obtain the true facts when I heard each party. Of course I felt and I have written in my report that it would seem over the period of time that the children lived in Georgia more particularly, however, the longer period of time they have lived in Miami, one would expect he would have been able to locate both of his daughters better than he had, that is, he had not done so for several years, quite a few years. Apparently only did so on Memorial Day of 1985, I guess.*
>
> *Q: If you were to learn, Dr. Epstein, that Mr. Schutz knew where his children were in January of 1982 because he met them in a shopping mall and again in the summer of 1983 and again in December of 1984, but did nothing until May of 1985 in an effort to see the children, would your opinion change?*
>
> *A: It would put into question his sincerity or at least the efforts he is willing to invest in making a good relationship with his daughters. (TR.408).*

At the conclusion of the two day final hearing, the trial judge entered an order finding that the children's hostility towards the Husband was the result of the Wife's actions. Based on this finding, the trial court absolved the Husband of his child support arrearages, ruling that there were no "legally existing child support arrearages." (R.417). The trial court also held that the children's entitlement to future child support would be conditioned upon future visitation (R.417) and decreed:

> *It shall be the obligation of the [Wife] to do everything in her power to create in the minds of [the children] a loving, caring feeling toward the [Husband]. It shall be the [Wife's] obligation to convince the children that it is the [Wife's] desire that they see their father and love their father. Breach of this Paragraph either in words, actions, demeanor, implication or otherwise, will call for the severest penalities this Court can impose, including Contempt, Imprisonment, Loss of residential custody or any combination thereof. (R.417-418).*

SUMMARY OF ARGUMENT

Both the trial court and the district court erred in this case because:

The trial court's order and the district court's opinion are premised upon the assessment of "guilt" on the part of the Wife for the fact that the minor children of the parties did not visit with the Husband for many years. The reality of this case, however, is that both parties were to blame for the deterioration of the relationship between the Husband and the children and, as such, "blame" should not have been placed upon only one of the parties.

The trial court's order unquestionably infringes upon the Wife's constitutional rights to freedom of speech and expression, and the finding of "parental alienation" with respect to the parties' children does not justify such infringement because the restrictions placed upon the Wife's rights do not serve either to balance the parties' respective rights or to remedy the "parental alienation".

The trial court's order is not supported by ***Gardner v. Gardner***, 494 So.2d 500 (Fla. 4th DCA 1986) because the order impermissibly exceeds the standards imposed upon parents by the ***Gardner*** decision by requiring the Wife to "convince" the children of a judicially decreed set of facts.

The trial court's order fails to provide for the best interest of the children because the child support arrearages, "excused" by the trial court belong to the children and not to

either party. The trial court's assessment of "guilt" on the part of the Wife with respect to the Husband's visitation is not a sufficient or appropriate basis upon which to deny to the children their right to support.

ARGUMENT

AN ORDER COMPELLING THE RESIDENTIAL PARENT UPON PAIN OF IMPRISONMENT OR LOSS OF CUSTODY TO FOSTER VISITATION BY EXPRESSING FEELINGS AND BELIEFS WHICH SHE MAY NOT HOLD AND ABSOLVING THE NON-RESIDENTIAL PARENT FROM HIS FAILURE TO PROVIDE SUPPORT CONSTITUTES AN ABUSE OF DISCRETION, VIOLATES THE RESIDENTIAL PARENT'S RIGHT TO FREEDOM OF SPEECH AND FAILS TO PROVIDE FOR THE BEST INTEREST OF THE CHILDREN.

This is a case about two parents, both of whom acted reprehensibly at times, yet only one of whom was villified and punished by the courts.

Of these two parents it is undisputed that:

1. Before and during their 1978 dissolution of marriage, the Wife was beaten by the Husband, abused by the Husband, thrown from a moving car by the Husband, taunted by him, threatened by him and intimidated by him. (TR. 651). She suffered the loss of the custody of her children in the 1978 proceedings only to be forced to endure the anguish of uncertainty when the Husband continually refused to assume the custody of the children. (R.90-91; TR.650). The Wife further endured four years of litigation instituted by the Husband which included unfounded allegations of drug abuse and illegal narcotics sales (R.124-147); surveillance by private investigators retained by the Husband (165-166); physical attacks upon her friend (and later husband), Roland Joynes, by the Husband (R.118-123); and legal fees amounting to $40,000 payment for which she was compelled to sell her home. Less than a year after the original custody order to the Husband was entered, it was modified to grant custody to the Wife. The trial court specifically found:

[T]he [Husband] has never taken custody under the Final Judgment in this cause and did not do so before the former circuit judge hearing the Motion for Modification and Contempt Notice entered a stay order. The Court finds that the [Husband], prior to the stay order, told the [Wife] that he would take the children when he was ready and he would not pay anything for their support during the interim.

[T]he [Husband] has consistently been late in picking up the children for visitation and returning them and has cursed the [Wife] when he picked up or returned the children in front of said children.

The Court had an opportunity to observe the demeanor of [the Wife] and [the Husband] and the Court believes from the demeanor and testimony of the parties that the [Husband] is a bitter man and is seeking to punish the [Wife] by creating disturbances and difficulties on matters involving the visitation with the minor children and in any dealings with the [Wife]. (R.118-123)

2. The Wife sought to begin her life anew. She moved to Georgia in 1981 without notifying the Husband until several days later. During their seven month stay in Georgia, the children spoke to the Husband on the telephone, and sent him cards purchased by the Wife, wrote him letters, but the Husband's attempts to visit the children were frustrated. (R.417). The Wife ultimately returned to Miami without telling the Husband. As the trial court found, "[she] never placed a call to the Husband though she always had his phone number; never dropped him a note, although she always had his post office box which was the same throughout this period." (R.417).

3. From February, 1981 - when the Wife and children moved to Georgia - through these appellate proceedings, the Husband has failed to provide the children with any support whatsoever.

4. When visitation between the Husband and the children was reestablished by the trial court, the Husband, during his first visit with the minor children since 1981, told the little girls that their mother "did drugs", that he "could still beat-up" their step-father, and he threatened them with H.R.S. custody saying, "If I can't have you, your mother won't either". (TR.407)[5]

5. The two children identify completely with their mother who, consciously or unconsciously, conveyed her fear and loathing of the Husband to them. The children told the trial court that they

---

[5]The children's Guardian ad Litem wrote to the Husband's counsel to express concern over this incident:

> *I interviewed the children again after the visitation, and found them to be in a high anxiety state, and openly distraught about the visit. They advised me that Mr. Shutz took them to The Falls Shopping Center, where they walked around, ate lunch, went to a movie, and then were returned to their mother's home. During the course of this visitation, Mr. Shutz did very little in the way of making himself known to his children; rather, they tell me, he dwelled on their mother's ostensible drug problem, and something to the effect that he at one time had done physical harm, or could do physical harm, to Mr. Roland Joynes, who apparently is the Former Wife's current spouse. These, of course, are the representations their father made; but nonetheless, they demonstrated visibly that they were ill at ease with the visitation, and have absolutely no desire or inclination to go on any further visits of that type.* (R.309-314).

"hate" their father and that they didn't want to see him at all. (R.272;TR.368).

The trial court, when confronted with these facts, elected to place upon the Wife complete and total blame for the state of this former family. The trial court absolved the Husband not only of his role in bringing about these unfortunate circumstances but also of his $24,300 child support arrearages and his future child support obligations. In keeping with the trial court's total exoneration of the Husband, the trial court placed the entire burden of rectifying the family's situation upon the Wife. The court obligated the Wife to "do everything in her power to create in the minds of [the children] a loving, caring feeling toward the [Husband]". The trial court decreed that "breach of this paragraph either in words, actions, demeanor, implication or otherwise, will call for the severest penalties this Court can impose, including Contempt, Imprisonment, Loss of residential custody or any combination thereof". (R.414).

The District Court of Appeal, Third District, affirmed this order concluding, in essence:

1. The Wife was guilty of "parental alienation" as defined by Dr. Richard Gardner, a psychiatrist quoted both by the trial court and the district court;

2. Because of this "parental alienation" there is no constitutional infirmity in requiring a parent to express opinions and beliefs which she may not hold;

3. In accordance with ***Gardner v. Gardner***, 494 So.2d 500

(Fla. 4th DCA 1986), a residential parent has an obligation to do more than remain "neutral" in order to encourage and foster a relationship between a child and the non-residential parent.

All three of these premises are flawed.

A. Assessing "Blame" for "Parental Alienation" Under the Facts of this Case Was Error.

It was absolute error on the part of both the trial and the district court to find the Wife the sole cause of the children's animosity towards their father. "Parental alienation" as defined by the facts of this case did not occur in a vacuum. Whatever "parental alienation" occurred in this case was a reaction (running and hiding) to an action (brutality and harassment). Perhaps it was a wrong reaction, and, no doubt, it was a harmful reaction, but it was nevertheless a reaction and not a deliberate course of conduct committed with evil intent.

It is to be anticipated that the Husband will contend, as he did below, that the Wife was the sole cause of the circumstances existing between these parties and their children and that the courts did not err in so finding. It was the Wife, after all, who moved to Georgia without notifying the Husband, who was not at home when the Husband went to Georgia to visit, and who returned to Miami with the children and did not advise the Husband of their whereabouts. All of this is true. It is also true, however, that it was the Husband who beat the Wife, who threatened her, who cursed her and who harassed her in the presence of the children, and who physically attacked their step-

father in their presence and caused the children to be fearful of him.

The problem created by the Husband's misconduct and the Wife's reaction is that they raise questions of psychological dimensions, not legal issues. Would another woman, a stronger woman perhaps, have tolerated the Husband's abuse, sought judicial intervention and not run to Georgia? Would another woman, a stronger woman, have told the Husband she had returned to Miami, or did this woman deem that act the emotional equivalent of placing a loaded gun to her head?

The questions are endless but the problem is the same. Do we want our trial courts to descend to the nadir represented by this case - of sifting through evidence and testimony to select, from between two parties who have behaved abominably, who is "guiltier"? To what end? To excuse one party's failure to pay child support, as was the result here? That is certainly not in the best interest of children. To publicly condemn the party determined to be "guilty"? That will not repair the children's damaged relationships with their parents. The trial court's public villification of the Wife in this case, reprinted in local newspapers and legal journals, has not helped the children. Nor has the district court's equally public reprimand of the Wife.

This Court has before it the opportunity to tell the bench and bar alike that they may no longer engage in either allegations or adjudications of "guilt" in cases where both parents have acted reprehensibly. This Court should mandate that henceforth no one parent will be branded "guilty" where both parents

have erred and that our courts will deem both parents the transgressors and require both to alleviate the harm caused. A return to the proper focus of child custody and visitation proceedings - the best interest of the child - would, to paraphrase the trial judge, be the real "antidote".

B. The Existence of "Parental Alienation" Does Not Justify an Infringement Upon Constitutional Liberties.

The district court's second premise for affirming the trial court, the existence of "parental alienation", cannot justify infringing a parent's constitutional liberties. First, it is not permissible or in the best interest of children to violate the liberties of one parent in order to protect the liberties of the other. Second, the constitutional infringement here does not serve either to "remedy" the "parental alienation" found to have occurred or to protect the Husband's rights to a relationship with his children.

The trial court's order clearly violates the Wife's First Amendment rights. The first sentence of paragraph 8 of the final Order compels the Wife, under pain of imprisonment or loss of custody, to take certain non-specified actions towards the children and to instill certain feelings in them. It states: "It shall be the obligation of the [Wife] to do everything in her power to create in the minds of the [children] a loving, caring feeling toward the father." (R.414). This order is overbroad, vague, arbitrary, and inflexible, and it is impossible of enforcement.

It is black letter law that when an injunction issues, the acts or things enjoined should be specified in the decree with such reasonable definiteness and certainty that a party bound by the decree may readily know what he must refrain from doing without the matter being left to speculation and conjecture. ***Moore v. City Dry Cleaners & Laundry***, 41 So.2d 856 (Fla. 1949); ***F.V. Investments, N.V. v. Simca Corp.***, 415 So.2d 755 (Fla. 3rd DCA 1982). This is also true where a mandatory injunction is issued. Thus, in ***National Airlines, Inc. v. Air Line Pilots Association International***, 154 So.2d 843 (Fla. 3rd DCA 1963), it was held that an injunctive order which stated that National Airlines should "exercise reasonable diligence" in effectuating the injunction was erroneous because of the vague and indefinite standard of conduct imposed.

The standard of conduct required here is even more vague and indefinite than that condemned in ***National Airlines***. No matter what action the Wife were to take in the future, she would always be subject to the charge that she had not done everything that she could do and, therefore, was in contempt of the order and should be fined or jailed.

The second sentence of paragraph 8 states: "It shall be the [Wife's] obligation to convince the children that it is the [Wife's] desire that they see and love their father". (R.414). This provision constitutes a denial of the Wife's right to freedom of speech and expression.

In ***West Virginia State Board of Education v. Barnette***, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943), the United States Supreme Court held:

> *If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.*

Accordingly, this Court has held that "the State may never force one to adopt or express a particular opinion". ***Coca-Cola Co., Food Division v. State, Department of Citrus***, 406 So.2d 1079, 1087 (Fla. 1981).

The evil of the trial court's order, here, is that it does compel the Wife to adopt or express a particular opinion, one which the trial court assumed the Wife was justified in not holding.

Although it may seem, at first blush, that there can be nothing wrong with requiring a mother to convince her children that she desires them to visit with and love their father, it also would appear that there can be nothing wrong with requiring a child to salute the flag or recite the "Lord's Prayer". Yet, all are constitutional infringements however laudable their goals. ***Barnette***, ***supra***.

Contrary to constitutional principles, the district court held that requiring the Wife to speak convincingly well of the Husband to the children, rather than prohibiting her from speaking ill of him, does not infringe upon her constitutional rights because, "if it is wrong falsely to shout fire in a

crowded theater . . . it is just as wrong for the [Wife] to refuse affirmatively to encourage the relationship between these children and this parent [the Husband]." Such a conclusion, however, is actually a mixed metaphor. The refusal to speak well of a parent who the other parent does not believe is deserving of such compliments is not tantamount to "refusing to encourage" a relationship. A relationship between a non-residential parent and his or her child is "affirmatively encouraged" by the residential parent through action - having the child ready for visitation; preventing the child from making other plans during visitation times; punishing the child if he or she refuses visitation; and so forth. Uttering words of praise for the non-residential parent is not a necessary element in any of these acts, for it is through positive acts, not empty words, that the residential parent fosters and encourages a relationship between the children and the non-residential parent.

Although it is clear that the trial court's order constitutes an infringement upon the Wife's constitutional rights it is also true, as the district court noted, that "all basic rights of free speech are subject to reasonable regulation." But, the court's infringement upon the Wife's rights in this case does not serve either purpose of balancing rights between the parties or achieving the goal of reconciling these parties and their children. There is no rationale for the constitutional infringement.

In the district court, the Husband argued that his relationship with the children is constitutionally protected. We

agree. The Husband nevertheless distorted the constitutional issue by further arguing that the Wife was seeking constitutional protection "to villify, defame, denigrate and berate the former Husband". That was not and is not the Wife's position. No parent has a right ever to disparage the other parent in the presence of the children. The order here, however, neither serves to protect rights or to prevent either party from disparaging the other.

In his answer brief, the Husband asked, "How may the court best protect the former Husband's constitutionally protected relationship with his two minor children?" The answer to that question is, quite simply, not by this order.

This order fails to protect the Husband's relationship with his children because, first, the order places no responsibility whatsoever upon the Husband to foster and nurture his relationship with his children. If the children are to grow to love him, the only person charged with developing that affection is the Wife. It should not be just the Wife's "affirmative obligation" to foster and nurture. Second, it is undisputed that, as noted by the dissent to the district court's opinion, there is "a great deal of animosity between the parties and these feelings persisted after their dissolution of marriage." Each of the parties here had the personal freedom, however distasteful in its operation, to harbor ill will toward the other. Neither, however, had the right to convey such feelings to the children. Mistakes were made. Consciously or unconsciously, the children in this case were made to learn how each of their parents felt

about the other. The trial court's order does nothing to rectify these mistakes. Rather, the order compels the Wife, and only the Wife, to "convince" the children of feelings and beliefs which she does not hold and which the children know she does not hold. Thus, the trial court's "antidote" increases the children's internal conflict instead of providing a way to heal. Such increased conflict certainly cannot serve to "protect" the Husband's relationship with the children.

Plainly, then, this is not a case in which competing constitutional rights were balanced in a rational or meaningful way. The infringement here upon the Wife's constitutional rights to freedom of speech and expression does not serve to protect the Husband's right to a relationship with his children.

C. *The Trial Court's Final Order Is Not Supported by Gardner v. Gardner*

The district court's third premise - that constitutional infringement was permissible here because ***Gardner v. Gardner***, 494 So.2d 500 (Fla. 4th DCA 1986) imposes upon a residential parent an "affirmative obligation" exceeding neutrality - is flawed because no authority can define a parent's "affirmative obligation" to include "convincing" his or her child of a judicially decreed set of facts.

An "affirmative obligation" to encourage and nurture the parent-child relationship as set forth in ***Gardner*** can only mean that each parent must exercise a genuine good faith effort to do so. The test is the existence of good faith; a standard which

the trial courts are regularly called upon to assess. Good faith, in this context, means a course of conduct that a parent, in the exercise of his or her best judgment and within the privacy of the family unit, deems the most appropriate and effective. Thus, the "affirmative obligation" of ***Gardner*** provides to the parent the decision making capacity of how to go about fulfilling the "affirmative obligation", bounded by a requirement of good faith.

The trial court's order here exceeds the ***Gardner*** standard. The Wife is both required to make every good faith effort to encourage and foster a relationship between the Husband and the children and, most perniciously, to "convince" the children not just that they should and must have such a relationship but that it is her desire that they do so.

The trial court's order compels the Wife to exceed the legal duty imposed by ***Gardner***. Here, the Wife can actually be successful in her efforts to promote a good relationship between the Husband and the children yet still be subject to imprisonment or loss of custody if, despite all of her efforts, she nevertheless fails to "convince" the children of her desires. This anomalous result does not fall within the purview of ***Gardner***.

D. The Trial Court's Order Failed to Provide for the Best Interest of the Children.

It is clear from the foregoing that the trial court's final order is not supported by any authority within the framework of constitutional or domestic relations law. The district court's

affirmance of the order was equally erroneous. There is, however, a more glaring problem with the order than the mere lack of legal support: the final order fails in every conceivable way to provide for the best interest of the children.

The trial court discharged the Husband's obligation to pay the sum of $24,300 in past due child support, finding "no legally existing arrearages" because of the court's adjudication of the Wife's "guilt" for the "parental alienation" found to have occured.

The trial court's discharge of the Husband's child support arrearages was wrong in light of the facts of this case. The Wife was not the sole person responsible for the "parental alienation" that occurred in this case. The Husband was the perpetrator of grossly reprehensible conduct toward the Wife. The fact that the Wife reacted to that conduct in a manner which ultimately contributed to a breach in the children's relationship with the Husband cannot serve to shift the entirety of the "blame" to her. A parent who behaved the way the Husband here behaved should not be judicially excused from child support arrearages because of the unfortunate happenstance of the other parent's reaction to that behavior.

The trial court's discharge of the Husband's child support arrearages was wrong under the law. Section 61.13, Florida Statutes, was amended effective October 1, 1986 to provide:

> ***When a custodial parent refuses to honor a noncustodial parent's visitation rights, the noncustodial parent shall not fail to pay any ordered child support or alimony.***

Section 61.13, Florida Statutes, as amended, provides certain remedies to the trial courts in cases of improperly denied visitation, none of which include the cancellation of the child support not paid during the period of denied visitation. Thus, the case authorities upon which the trial court relied in its decision to "excuse" the Husband's child support arrearages of $24,300 are no longer viable and, at the very least, this case should be remanded for reconsideration in light of this statutory amendment.

The trial court's discharge of the Husband's child support arrearages also was wrong from the perspective of the best interest of the children. Child support belongs to the child, not the parents. The trial court sought to "punish" the Wife by eliminating the $24,300 child support arrearages but succeeded only in punishing the children.

In ***Making Parents Behave: The Conditioning of Child Support and Visitation Rights***, 84 Columbia L. Rev. 1059 (1984) (hereafter "Making Parents Behave"), the author used theories of contract law and equity to analyze the harm done to children by conditioning the payment of child support on rights of visitation:

A contractual analysis fails because:

> ***Justifying conditioning parental obligations as merely an application of the contractual doctrine of constructive conditions of exchange completely fails to respond to the interests of the child in a visitation or support dispute. The child is a joint holder of the support and visitation rights with the respective parent. Thus, the child suffers with the injured parent when one of these is with-***

> *held. Conditioning these obligations upon each other as a remedy when a violation occurs only serves to deprive the child of a second right on the basis of contumacious conduct in which he has played no part.* "Making Parents Behave," 1069.

An analysis under equity principles fails because:

> *The practical effect of denying the parents a remedy [enforcement of arrearages] is to prevent the child from obtaining the rights to which he is entitled even though his hands are clean. By automatically refusing to grant a remedy in this situation the court punishes the child without considering the child's interests. Because of this, the equitable doctrine of clean hands cannot legitmately be relied upon as a basis for conditioning obligations.* "Making Parents Behave," 1071.

The termination of child support or, as here, the discharge of child support arrearages as a "remedy" for the denial of visitation, has significant psychological repercussions for the child. The "remedy" makes the child the innocent victim of his parent's misconduct:

> *Courts have recognized the psychological toll on the child that can result from a solution that makes him, and his rights, the "weapons in the sparring of the parents." Because the child often tends to feel responsible for the failure of the marriage in the first place, this tampering with parental obligations is likely to produce more guilt. In addition, the remedy of terminating support payments in response to the custodial parent's failure to honor the non-custodial parent's visitation rights often causes the child to suffer from financial insecurity.*

* * *

> ***Finally, the use of termination of support as a remedy for visitation denial and vice versa can lead to an unfortunate mental association. One court has referred to the remedy as a "money for visits solution." The notion that visits with the noncustodial parent are merely a way to ensure that the support payments keep coming will eventually occur to the violative parent and to the child. After a few bouts with termination or the denial of visitation, the child will come to understand that his relationship with the noncustodial parent is financially rather than emotionally based.*** "Making Parents Behave," 1078.

Here, the children were deprived of their right to support because of the trial court's assessment of "guilt" in which they played no part. Worse, the trial court declined to require the payment of current child support and conditioned all future support obligations upon the Husband's exercise of visitation rights - the decried "money for visits" approach. In its haste to punish the party it deemed "guilty," the trial court disregarded the best interest of the children in every way possible.

The child support issue is not the only way in which the best interest of these children was ignored by the trial court's final order.

The children have suffered psychological harm as a result of the dispute between their parents. The trial court recognized this fact when it required, in paragraph 5 of its order that, "the children shall continue to be counseled by Dr. Epstein at the [Wife's] cost to attempt to undo the mental damage done to the children." Having so decreed, however, the trial court went on to require the children's counselor to report to the court any

and all "violations" by the Wife of its mandate that she "create" in the minds of the children "a loving, caring feeling toward the father." Dr. Epstein is to report such "violations" whether they be "real or only suspected."

One can hardly imagine a more egregious intrusion into the privacy of the children and the ability of their counselor to provide psychotherapy than an order that "commissions" their counselor into the service of the court as a "private investigator" and "spy." The children may not presently be aware of the conditions under which they will be receiving "therapy," but one need not strain to envision the shock, disappointment and potentially devastating consequences that will follow if in the course of sharing their most private thoughts and feelings with their therapist they learn that something they said was conveyed to the court as "evidence" of their mother's "suspected violation" of the trial court's order and may, ultimately, result in her being jailed.

E. How the Children's Best Interest May be Served

It is compelling to note that only the children's Guardian ad Litem was able to see beyond the question of fault and blame and guilt in these proceedings to the needs and the best interest of the children. The Guardian ad Litem urged the trial court:

> *If I have any recommendation at all . . . that regardless of fault, if there is any way, any possibility of a re-structuring, that should be done, it should be done through therapy and should be done meaningfully with an honest approach to it.*

* * *

> ***If I were to be asked relative to this whole business about the arrearages and that I don't know if that's my position other than the fact I can show you case law it belongs allegedly to the children. So there are - I was only going to say that if it was ever legally determined what should be done about that, perhaps the money should go into some type of a trust fund for the benefit of - this is for future college education, something of that effect, but that would be it.*** (TR. 418, emphasis supplied).

The Guardian ad Litem was correct because the children's best interest would be served by:

1. Enjoining <u>both</u> parents from disparaging the other;

2. Ordering <u>both</u> parents to exercise their utmost good faith in fostering and developing a meaningful relationship between the children and each parent.

3. Requiring <u>both</u> parents, independently of each other, to commence therapy with the children and their court-appointed counselor on a regular basis;

4. Requiring the Husband to pay the child support arrearages, in full, to a trust to be administered by the children's Guardian ad Litem, which trust funds shall be used for the children's future educational purposes and to pay for the required family therapy and counselling.

An order such as this would serve the best interest of the children and would provide for and protect each parties' relationship with the children. This is what the future should hold for these children and all children caught between their parent's battles - not further wars between their parents conducted in

courtrooms but, rather, concrete plans for re-structuring and unification. Anything less should be unacceptable.

CONCLUSION

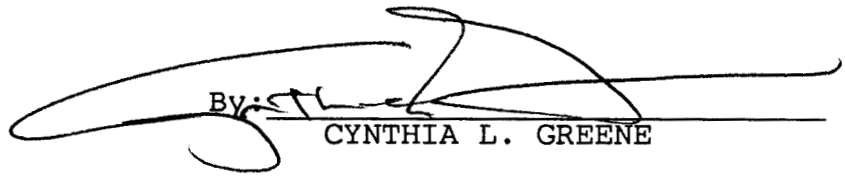
Based upon the foregoing argument and authority, the Petitioner respectfully submits that the opinion of the District Court of Appeal, Third District, affirming the order of the trial court, be quashed and these proceedings be remanded accordingly.

Respectfully submitted,

LAW OFFICES OF
ROBIN H. GREENE, P.A.
2655 LeJeune Road
Suite 1109
Coral Gables, Florida 33134
(305) 444-0213

-and-

LAW OFFICES OF
FRUMKES AND GREENE, P.A.
100 North Biscayne Boulevard
Suite 1607, New World Tower
Miami, Florida 33132-2380
(305) 371-5600



By: _____
CYNTHIA L. GREENE

CERTIFICATE OF SERVICE

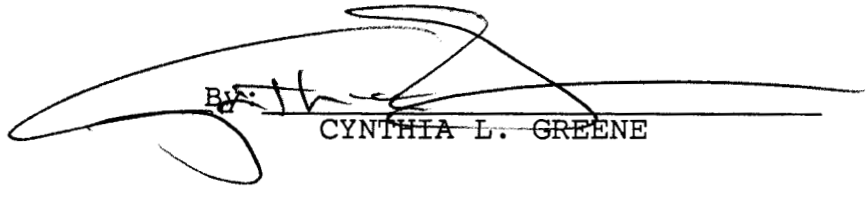
WE HEREBY CERTIFY that a true copy of the Petitioner's Brief on the Merits was mailed to Andrew M. Leinoff, Esquire, Atrium Building, Suite 206, 1500 San Remo Avenue, Coral Gables, Florida 33146-3047, and to Mark A. Gatica, Esquire, Co-counsel for Respondent, Harbor Place - 2nd Floor, 901 N.E. Second Avenue, Miami, Florida 33132, this 10th day of October, 1988.

Respectfully submitted,

LAW OFFICES OF
ROBIN H. GREENE, P.A.
2655 LeJeune Road
Suite 1109
Coral Gables, Florida 33134
(305) 444-0213

-and-

LAW OFFICES OF
FRUMKES AND GREENE, P.A.
100 North Biscayne Boulevard
Suite 1607, New World Tower
Miami, Florida 33132-2380
(305) 371-5600



By: CYNTHIA L. GREENE