OA- 12-8-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,471

LAUREL D. SCHUTZ,

Petitioner,

vs.

RICHARD R. SCHUTZ,

Respondent.

FILED
SID J. WHITE
NOV 14 1988
CLERK, SUPREME COURT
By
Deputy Clerk

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

This proceeding follows the Petitioner's request for Discretionary Review of the Opinion of the Third District Court of Appeal, dated February 9, 1988, and the Trial Court Order dated June 17, 1986. In this Brief, the Petitioner, LAUREL D. SCHUTZ, will be referred to by name, or as "the Former Wife". The Respondent, RICHARD R. SCHUTZ, will be referred to by name, or as "the Former Husband". The symbols for references used in the Petitioner's Brief on the Merits will be adopted for reference in this brief, and are restated for convenience as follows:

"R." for "Original Record on Appeal"

"TR." for "Transcript of the testimony taken before the Trial Court on June 10 and 11th 1986."

In addition, the following symbols are adopted for use in this Brief:

"HX." for "Husband's exhibit;"

"WX." for "Wife's exhibit."

"A." for "Appendix to Respondent's Brief on the Merits."

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STATEMENT OF THE CASE

This matter is on Discretionary Review by this court from the Opinion of the Third District Court of Appeal affirming the Trial Court's Final Order on all pending motions. [R 413-419]. The Trial Court, *inter alia*, determined that there were no legally existing child support arrearages; ordered child support to continue from the date of the Order; permanently restrained removal of the children from the court's jurisdiction; ordered counselling for the children to undo the mental damage done to them; ordered the attorney *ad litem* to monitor the situation and apprise the Court of the Former Wife's compliance with the Court's Order; requested the court appointed counselor to continue to monitor the situation and report to the court; specified reasonable visitation for the Former Husband with the two minor children; and ordered the Former Wife to do everything in her power to undo the mental damage done to the children by her with respect to their hateful and spiteful attitude toward the Former Husband, under pain of contempt for breach of this obligation. [R 417-418].

The Former Wife appealed those portions of the Order in which the Court determined that there were no legally existing child support arrearages, and that specify the obligation of the Former Wife to do everything in her power to create in the minds of the children a loving caring feeling toward their father.

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STATEMENT OF THE FACTS

Consideration of this case requires a thorough understanding of the underlying facts as presented to the Trial Court. The Statement of the Facts contained in the Petitioner's Brief bears so little resemblance to the facts as fully presented and ultimately determined by the Trial Court, that due consideration of the Trial Court's Order warrants a complete Restatement of the Facts as heard and determined by the Trial Court.

The parties were married in 1972. [R-1]. Two children were born of the marriage: DeeBritt, who was born on December 12, 1973, and Brigette, who was born on June 29, 1975. [WX-1].

The Trial Court dissolved the parties' marriage on November 13, 1978. [R-53]. The parties agree that the Former Husband was the primary caretaker of the parties' children before the divorce. [WX-1, P2]. In fact, in the Final Judgment of Dissolution of Marriage, the Trial Court awarded sole custody of the minor children to the Former Husband. [R-53]. Since the Former Wife also retained possession of the marital residence, the parties agreed to gradually transfer custody of the children from the Former Wife to the Former Husband. [T-551]. When the parties did not immediately transfer the children to the Former Husband's apartment, the Former Wife moved for modification of custody. [R-90,91]. In October, 1979, the Trial Court entered an Order on Motion for Modification, thereby modifying the Final Judgment and awarding custody of the parties' children to the Former Wife. [R-118-123].

In the Modification Order, the court granted the Former Husband visitation, and ordered him to pay child support to the Former Wife. [R-118-123]. It is undisputed that following the Court's Order transferring custody in October, 1979, through February 6, 1981, the Former Husband saw the children every other weekend pursuant to the visitation schedule. It is also undisputed that during this period the Former Husband punctually paid child support pursuant to the Court's Order [TR-553].

On February 6, 1981, the children saw their father for the last time. Three days later, the Former Wife surreptitiously moved herself and the minor children from Miami to Milledgeville, Georgia [TR-556, 671]. The Former Wife left without notifying Mr. Schutz of her plan to move. In fact, the children did not even know that they were moving until the date that they actually left Miami. [TR-347, 671]. This move occurred a mere three days after DeeBritt and Brigette had enjoyed a weekend visitation with their father. [TR-347].

The Former Wife subsequently described her move to Milledgeville, Georgia in a letter sent to Mr. Schutz dated February 17, 1981. [TR-557] [HX-G]. Mr. Schutz thereupon availed himself of the telephone number provided in that letter and called the Former Wife to notify her that he intended to exercise his visitation in Milledgeville. [TR-561]. The Former Wife assented to Mr. Schutz's intention to visit with the children. [TR-562].

On March 13, 1981, the Former Husband and his mother, Levonne Schutz, left Miami and drove all night to Milledgeville, Georgia.

[TR-471, 562-563]. After driving all night, Mr. Schutz and his mother arrived in Milledgeville at approximately 9:00 a.m. on the following Saturday morning. [TR-563]. Unfortunately, Mr. Schutz and his mother arrived to find an empty house. [TR-472, 563]. Mr. Schutz and his mother remained in Milledgeville until 6:00 that afternoon. They drove by the house several times, but there was never anyone home. [TR-563].

Mr. Schutz and his mother left Milledgeville at approximately 6:00 that evening, and arrived in Miami on Sunday. On the following Tuesday, March 17, 1981, Mr. Schutz called the Former Wife in order to ascertain what had happened over the preceding weekend. [TR-564, HX-I]. The Former Wife indicated that she and the girls had gone shopping that day.

Over the following months Mr. Schutz continued his attempts to maintain close relationships with the two minor children. However, his frequent calls to Milledgeville were frustrated by the Former Wife disconnecting and terminating his attempted conversations with the children. [TR-566, HX-J]. Despite the Former Wife's efforts, Mr. Schutz and the two girls managed to maintain a warm, caring, tender, and loving relationship. On May 18, 1981, DeeBritt sent a letter to her father in which she indicated that she loved him very, very much. DeeBritt read the text of this letter into the record. [TR-350].

Despite the Former Wife's belligerence, Mr. Schutz continued attempting to see the children. He was entitled to one month of summer visitation with the girls, and intended to exercise that

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privilege. On July 3, 1981, Mr. Schutz sent a letter by certified mail to the Former Wife in Milledgeville. [TR-570-572] [HX-K]. Mr. Schutz also called the Former Wife several times during the last week of June. [TR-572-573] [HX-J]. Finally, on July 30, 1981, Mr. Schutz telephoned the Former Wife and indicated that he would be leaving for Milledgeville the following day.

On July 31, 1981, Mr. Schutz and his sister, Terese Taylor, left Miami and drove to Milledgeville. [TR-508, 574]. Mr. Schutz and his sister left Hollywood at about 9:00 a.m. Thursday, and arrived in Milledgeville around 10:00 p.m. They immediately checked into a Holiday Inn. [TR-510] [HX-D]. They stopped at the house several times that night, but no one was home. [TR-511]. On the following day, August 1, 1981, Mr. Schutz and his sister again visited the Former Wife's home. Throughout the day they intermittently ventured to the house and rang the bell, but each time no one answered. [TR-511]. Finally, they returned to Miami.

Still, Mr. Schutz - although desperate - did not willingly surrender the love and affection of his daughters. Following his second unsuccessful trip to Milledgeville, Mr. Schutz went to a Western Union office and sent a telegram to the Former Wife. After receiving a receipt acknowledging delivery of the telegram to the Former Wife, Mr. Schutz sent airline tickets to the children for a flight from Atlanta to Miami. The children did not arrive. [TR-579] [HX-O]. Notwithstanding all of the above, the Former Wife testified that she traveled with the children almost the entire summer of 1981. She testified to traveling to Disneyworld, San

Francisco, the Grand Canyon, and Mexico. She testified to leaving Milledgeville on June 30th and returning for a short stay in July, and then leaving again in August. She testified that she never received any communications from Mr. Schutz indicating that he wished to have summer visitation with the children. [TR-662, 663].

On August 30, 1981, Mr. Schutz again called Milledgeville. He was informed by the Former Wife's new husband, Roland Joynes, that they and the children were moving to San Francisco. [TR-581]. Nonetheless, unbeknownst to Mr. Schutz, in September, 1981, the Former Wife and the two girls returned to Miami. [TR-662].

The Former Wife hid the children from Mr. Schutz until early 1982. At that time, Mr. Schutz happened to be buying his auto tags at a shopping plaza. [TR-583]. Mr. Schutz bumped into the Former Wife and the two children. He asked the Former Wife for her address, but she refused to give it to him. [TR-584]. She did give him a phone number, but advised him to wait five days before calling her, as she and the children would be out of town. [TR-584-585]. Five days later Mr. Schutz dialed that number,233-1516, only to find that the number had been disconnected. [TR-585, 673].

Mr. Schutz did not see the children again until Memorial Day, 1985. Unsure as to whether the children were living in town or merely visiting, Mr. Schutz checked with the Dade County School Board, but found that the children were not registered. [TR-586].

During this period of time Mr. Schutz's mother also helped Mr. Schutz try to find the children and the Former Wife. On several occasions she traveled to the Dade County Courthouse to check the

property recordings. She did not find the Former Wife as a record title holder of property in Dade County. [TR-477]. She also checked the public and private schools in the area, but could not find the children. [TR-478]. In December of 1983 Mr. Schutz learned that the children had attended the Alexander School on Old Cutler Road, but they were no longer there. [TR-589]. Mr. Schutz obtained an address for the children, but when he investigated the house, he found that it was vacant and for rent. [TR-589]. During this time the Former Wife and children did not contact the Former Husband.

Finally, in December, 1984, Mr. Schutz saw the Former Wife's name on a real estate listing in the newspaper. [TR-591]. In February, 1985, Mr. Schutz finally located the Former Wife's address. [T-593]. On the Saturday before Memorial Day, 1985, after weeks of painful contemplation, Mr. Schutz called the Former Wife and asked her if their differences could be resolved so that their daughters could have a father. The Former Wife said that she would call him back. [TR-594]. She did not call.

By Memorial Day Mr. Schutz had convinced himself that he should just go ahead and knock on the front door. When he did, Brigette answered the door. Subsequently, a meeting occurred on the front lawn between Mr. Schutz, the Former Wife, the two girls, and Mr. Joynes. [TR-595-596]. The meeting ended painfully.

The following day various motions were filed, including a Motion for Modification of Final Judgment. [R-227-229].

The visitation which subsequently occurred may hardly be

termed as meaningful. Approximately one-half hour into the first scheduled visitation, the children launched into a tirade of their father. They indicated that they hated him, they wanted to know where he had been for the last several years, and why he had not supported them. [TR-597].

Mr. Schutz attempted on two other occasions to visit with the minor children. These visitations were no better than the first. [TR-598-599].

On August 13, 1985, the children related to Judge Simons their feelings regarding visitation with their father and the basis for those feelings. Brigette indicated to the court that she does not consider Mr. Schutz their father or anything else because he had not been around for seven years. She did not feel that they should have visitation with him because he was real mean to them. [R-261]. She believed that when things were going bad for Mr. Schutz he wanted a divorce, and then abandoned her and DeeBritt. [R-264]. On Page 15 of the Transcript Brigette summarized her feelings to the court:

> "Brigette: But he didn't have to come back if we are already happy. He didn't have to come back and bother us. I don't care if he is my real dad. I hate his guts and I always will. I always have bad thoughts. He has been the worst, not a friend, nothing. He hasn't done anything he hasn't even supported us for her braces or anything.
>
> He hasn't seen us about five to seven years and I am already 11. Last time he saw me when I was about three and he doesn't really want us or else he would have come back a long time ago." [R-272].

The court implored the girls to give visitation a chance. They remained intransigent in their refusal:

> "The Court: Give it a chance. That's what has to be. That's it. You will see him, visit with him, and nobody says you have to have a good time.
>
> If you want to sit there, sit there. Then you will come back and tell me about it. Then we will go from there. If you don't do it, you will not have a chance to come back and tell me, let's get back there where it was before, if that's what you want to do.
>
> Brigette: Then I have to sit around and wait for him to call me. He is always late.
>
> The Court: You tell me about that. You keep track of the time.
>
> Brigette: I hate it when he comes to pick me up.
>
> The Court: Go to it. If you have a bad time, come back and tell me.
>
> Brigette: Why do we have to go with him if we hate him?"

[R-274-275].

In January, 1986, the court appointed psychologist, Dr. Michael Epstein, interviewed the two girls. Dr. Epstein reported that DeeBritt wanted absolutely nothing to do with her father, even to the point of excluding visitation. She expressed anger at his abandonment of her. She included Roland Joynes as s complete father image replacement. Dr. Epstein believed that this occurred not only because of Mr. Schutz's absence and Mr. Joynes' presence over the years, but also because of the Former Wife's very strong positive feelings toward Mr. Joynes and strong negative feelings

toward Mr. Schutz. [WX-1 - P3,4].

Dr. Epstein reported similar findings following his interview with Brigette. She related to Dr. Epstein that visitation with her father gives her nightmares. She hates him, and feels that it is unfair for him to come back and destroy their lives. [WX-1 - P5].

At the Final Hearing on June 10, 1986, DeeBritt echoed and expanded upon the previously expressed feelings regarding visitation. She believes that her father never went to see them while they were in Georgia. [TR-330]. She believes that her father hasn't supported them in any way, and that he hasn't given them gifts, cards or money. She believes that he never phoned them or tried to see them. Most importantly, she testified that the source of all her information regarding Mr. Schutz is her mother. [TR-338]. DeeBritt indicated that her mother has continued to provide all her information regarding their father. DeeBritt testified that her mother has read the pleadings to the two girls. [TR-358]. The Former Wife confirmed this fact. [TR-678]. DeeBritt also indicated that Mr. Schutz brought her a birthday gift, which she never opened. [TR-367].

Dr. Epstein also testified at the Final Hearing. Much of Dr. Epstein's testimony concerned a recent article by Dr. Richard A. Gardner entitled Recent Trends in Divorce and Custody Litigation.[1] [TR-393] [A-1]. Dr. Epstein identified Richard Gardner as a

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[1] Gardner, Richard A., Recent Trends in Divorce and Custody Litigation, ACADEMY FORUM, 29(2); 3-7, 1985, a publication of the American Academy of Psychoanalysis.

psychiatrist and leading expert in the area of divorce litigation and expert testimony from mental health approaches. Specifically, Dr. Epstein testified about a concept called "Parental Alienation Syndrome".

This syndrome is identified as a disturbance in which children are obsessed with deprecation and criticism of a parent - denigration that is unjustified and/or exaggerated. It includes not only conscious but subconscious and unconscious factors within the parent that contribute to the child's alienation. Furthermore, it includes factors that arise within the child - independent of the parental contributions - that contribute to the development of the syndrome. Typically the child is obsessed with "hatred" of a parent. The word hatred is placed in quotes because there are still many tender and loving feelings toward the allegedly despised parent that are not permitted expression. These children speak of the hated parent with every vilification and profanity in their vocabulary, without embarrassment or guilt. The vilification of the parent often has the quality of litany. [TR-394, 395].

Dr. Epstein testified that he found evidence of this syndrome in these children. [TR-395]. Dr. Epstein testified that an act such as the Former Wife leaving Florida with the children without allowing the children to say good-bye to their father, would ultimately be a conscious effort to alienate the affection of the children to the father. [TR-398, 399]. Dr. Epstein considered actions such as the Former Wife telling the children that "if your father wanted to see you he could find you," to be a combination

of both conscious and unconscious efforts toward alienation of affection. He also considered a parent reading pleadings in this matter to the children to be a conscious effort at alienation of affection. [TR-399].

Dr. Epstein further testified that he did not believe the Former Husband posed any threat whatsoever to the children, and that he had no reason to believe he would not be a good visiting parent. [TR-400].

Dr. Epstein concluded:

> "A. I think it would be most helpful too if it were possible for Mrs. Joynes to change her attitude, her expressed attitude toward the girls in a more positive fashion, that with the time the girls' attitudes would change as well. That was essentially my intent, by the way, if I left it out.
>
> In addition to Mr. Schutz making slow attempts at reconcilation with the girls even if he didn't cause the initial break, that in addition one would hope, again hard to enforce that legally, I guess, that their mother would encourage or begin to slowly not discourage their desires if there was any, for them to visit with their biological father." [Tr-401].

At the conclusion of the hearing the Trial Court entered its order determining that based upon all the facts presented, there were no legally existing arrearages, ordering child support and visitation, and directing the Former Wife to do everything in her power to encourage the minor children to visit with their father. From this Order, the Former Wife appealed, and the Third District Court of appeal affirmed.

SUMMARY OF ARGUMENT

The Trial Court properly ordered the Former Wife to take these steps necessary to undo the damage that she alone caused to the relationship between the Former Husband and the parties' minor children. The record overwhelmingly establishes that the Former Husband was a good and loving parent and that the minor children enjoyed a tender and caring relationship with their father. The Former Wife single handedly destroyed that relationship by secreting the minor children from the Former Husband for several years, over which time the children began to despise their father on the basis that "he did not visit them".

The Trial Court's Order is a proper extension of this State's domestic relations jurisprudence, which is founded upon sound moral and psychological bases, and which recognizes the importance of the relationship between the children of fractured homes and both of their parents. The Trial Court's Order merely requires the Former Wife to take those steps which are necessary to repair the relationships which she purposefully destroyed.

Furthermore, the Trial Court properly found that there were no legally existing support arrearages. Florida law has long held that a Court may refuse to enforce support arrearages under compelling circumstances. It is difficult to imagine circumstances more compelling than the circumstances of this case: The Former Wife intentionally and successfully hid the minor children from the Former Husband for a period of several years. They now despise him. Moreover, it is difficult to imagine this Former Wife coming

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forward to request the support arrearages prior to the Former Husband locating her and the children. If the Former Husband never found the children, it is highly unlikely that the Former Wife would have ever requested another nickel of child support.

ARGUMENT

I. THE TRIAL COURTS ORDER, COMPELLING THE FORMER WIFE TO ATTEMPT TO UNDO THE DAMAGE TO THE RELATIONSHIP BETWEEN THE PARTIES' MINOR DAUGHTERS AND THE FORMER HUSBAND, WHICH WAS CAUSED BY THE FORMER WIFE'S REPREHENSIBLE CONDUCT, IS OVERWHELMINGLY SUPPORTED BY LEGAL AUTHORITY AND PROFESSIONAL OPINION.

A. The Former Husband's relationship with the minor children is constitutionally protected.

The record in this case overwhelmingly supports the Trial Court's Order. It is clear that under Florida law a custodial parent has an affirmative duty to encourage and nurture the parent-child relationship between the minor children and the non-custodial parent. This Order, which compels the Former Wife to take those steps which are necessary to rectify the damage that she caused, and to nurture the relationship that she destroyed, is clearly supported by the facts of this case and the great weight of authority.

The relationship between parent and child is constitutionally protected. In the case of Stanley v. Illinois, 405 US 645, 31 L.Ed 2d 551, 92 S.Ct 1208 (1972), the Supreme Court noted that:

> "The private interest here, that of a man and the children he has sired and raised, undeniably warrants difference and absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children, 'comes to this court with a momentum for respect lacking when this appeal is made to liberties which derive merely from shifting economic arrangements.' (Citations omitted)."

405 US 651.

The constitutional protection afforded Mr. Schutz with

respect to his relationship with the two minor children has been recognized by the Supreme Court as essential, among the basic civil rights of man, and a right far more precious than property rights. Stanley, supra. The integrity of the family unit has found protection in the Due Process clause of the Fourteenth Amendment, the Equal Protection clause of the Fourteenth Amendment, and the Ninth Amendment Stanley, supra.

The State of Florida recognizes the proposition that the relationship between a parent and child is constitutionally protected. This is made clear by the opinion in the case of In re Adoption of Braithwaite, 409 So.2d 78 (Fla. 5th DCA 1982). That court recognized the aforementioned principal in footnote two of the opinion, citing Stanley v. Illinois, supra; Quilloin v. Wallcot, 434 US 246, 98 S.Ct. 594, 54 L.Ed. 2d 511 (1978); Wisconsin v. Yoder, 406 US 205, 92 S.Ct. 1526, 32 L.Ed. 2d 15 (1972). Recognizing this proposition, the Braithwaite court noted:

> "The custodial parent of a child also owes an obligation to the non-custodial parent to encourage and nurture the parent child relationship. It is often only too easy for the custodial parent to undermine and starve the non-custodial parent's contacts and relationships with the child, particularly when the parties are separated by long distance."

Braithwaite, supra, at 1180, footnote 4.

The Braithwaite court noted that the record reflected the custodial parent undermining and starving the non-custodial parent's contacts and relationships with the child. Specifically, the court found a conscious effort on the part of the custodial

parent to extinguish the relationship between the child and her natural father. The facts in the record giving rise to this inference included the mother returning the father's Christmas presents, not allowing a requested summer visitation, and failing to keep the father informed of the child's current address. Clearly, the egregious conduct identified in Braithwaite bears a striking resemblance to the Former Wife's conduct in this case.

B. The Trial Court properly placed the onus of rectifying the damage on the party at fault.

It is fundamental that the Trial Court's findings of fact reach the Appellate Court with a presumption of correctness. When reviewing a Trial Court's Order, the Appellate Court may not second guess the judge who saw the parties and heard the evidence and exercised his discretion. The Court is permitted only to measure that exercise of discretion by the evidence contained in the record to determine whether the result is sustainable under any theory of law. Reid v. Reid, 396 So.2d 818 (Fla. 4th DCA 1981). The Appellate Court may not substitute its judgment for that of the Trial Court. Pearce v. Pearce, 341 So.2d 282 (Fla. 1st DCA 1977).

The Trial Court observed the demeanor of the witnesses, listened to the nuances of the testimony, and examined the exhibits and the pleadings. Clearly, The Trial Court reasonably concluded that the Former Wife's testimony regarding her justification for her actions was fabricated and entitled to no credibility whatsoever. The Former Wife lied to the Court in that aspect of

her testimony, just as she had lied about nearly everything else. It is only now, in her third appearance before a court, that she even admits to partial fault for the unfortunate state of affairs that she has caused. In any event, even if true, her testimony was legally insufficient to justify her conduct.

Numerous examples of the Former Wife's intentional misrepresentations to the Court demonstrate the basis for the Court refusing to attach any credibility to her testimony. For example, with respect to Mr. Schutz's first attempt to visit with the children in Milledgeville, Georgia, the Former Wife testified that she and the children waited at the house from 9:00 in the morning until 3:00 that afternoon. [TR-660]. This statement was without any realistic foundation. Mr. Schutz and his mother both testify to driving all night from Miami to Milledgeville, and arriving in Milledgeville to find an empty house. The testimony is corroborated by documentary evidence provided to the Former Wife's attorney immediately before their departure and by the telephone statements indicating calls to Milledgeville immediately before the departure, and after their return from the futile trip. The Former Wife's testimony was, not surprisingly, unsubstantiated.

The Former Wife represented to the Trial Court that Mr. Schutz attempted no further visitations. In fact, she represented that no further visitations would have been possible, since she and the children allegedly travelled throughout the entire summer, prior to their return to Miami in September. [TR-663]. These statements were also gross departures from reality. Again, the Former Husband

verified his attempt to arrange visitation with the children by presenting telephone receipts, numerous calls to Milledgeville, Georgia, and three letters sent by certified mail. Moreover, the second futile sojourn from Miami to Milledgeville was verified by charge receipts showing that Mr. Schutz and his sister checked into a Holiday Inn in Milledgeville and shopped in between their repeated visits to the house. The Trial Court properly discounted the Former Wife's testimony on all issues, including the justification for her reprehensible actions.

Among the various misrepresentations that the Former Wife presented to the Trial Court, she asserts an alleged basis for justification of her actions. Yet, there is no authority for the proposition that a custodial parent may destroy a warm, tender, and loving relationship between the non-custodial parent and the parties' minor children; deprive the non-custodial parent of his court ordered visitation rights for a period of four years; and, in the words of the Trial Court, "slowly drip poison into the minds of these children," so that they now hate, loathe, and despise the man whom all persons agree was formerly a good father to the children. This is a punishment harsher and more extreme than any recognized in the criminal laws of this country. It is a punishment that no court or governmental entity in this country may impose absent the most extraordinary and compelling circumstances, none of which existed in February, 1981. The law allows and provides procedures for humane, civilized responses to the alleged conduct of the Former Husband, and none of those

responses include severing the constitutionally protected parent-child relationship.

Both the Trial Court and the District Court of Appeal, Third District, found, on an ample record, that the Former Wife was the sole cause of the minor children's hatred toward their father. In fact, the Trial Court summarized its findings as follows:

> "From the testimony received in Court, having observed the demeanor of the witnesses, having listened to the nuances of the testimony, having examined the exhibits and the pleadings, the Court has no doubt - not a reasonable one, not even an unreasonable one, or even a scintilla, shadow, or peradventure of a doubt - that the cause of the blind, brainwashed, bigoted, belligerence of the children toward the father grew from the soil nurtured, watered and tilled by the mother. The court is convinced that the mother breached every duty she owed as the custodial parent to the non-custodial parent of instilling love, respect, and feeling in the children for their father. Worse, she slowly dripped poison into the minds of these children, maybe even beyond the power of this court to find the antidote. But the Court will try." [R-415-416].

The Former Wife attempts to weigh the Former Husband's alleged conduct against the Former Wife's conduct, and urges this court to conclude that both parties were at fault and that, accordingly, no blame should be assessed. This approach is wrong. It was the Former Wife who solely and intentionally severed the relationship between the minor children and the Former Husband. All parties agree that the Former Husband was a good and loving father prior to February 1981. All parties now agree that the Former Husband attempted to maintain a loving relationship with his minor daughters following the Former Wife's flight to Milledgeville, Georgia.

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The Former Wife moved to Georgia in an attempt to sever the relationship between the children and the Former Husband. It didn't work. He called frequently, attempted to visit, and the children sent him warm and tender correspondences. The Former Wife moved again. This time she left no forwarding address, and no telephone number. While Mr. Schutz made every possible attempt to locate the children and the Former Wife, the Former Wife allowed the children to believe that he had abandoned them. She let them believe that he did not wish to see them, and that if he wanted to, he could do so. Ultimately, when Mr. Schutz finally found the children, they justifiably hated him. After all, hadn't he abandoned then four years earlier?

It is undisputed that Richard and Laurel Schutz did not get along. If they did, they may have never been divorced in the first place. It is also true that in a great majority of dissolution cases, the parties have not and may never resolve the psychological and emotional breaches which required them to resort to the Court's intervention in the first place. However, under no circumstances should the reprehensible conduct of the Former Wife in this case be tolerated, condoned, or merely swept under the rug and declared a draw in terms of culpability. It was the Former Wife that poisoned the minds of the children, and on that basis, the Trial Court and the Third District Court of Appeal properly placed upon her the onus of attempting to undo the damage that she caused. This court should reach a similar conclusion.

C. The Trial Court's Order does not violate the Former Wife's First Amendment rights of freedom of speech.

It is abundantly clear that, in the words of the District Court of Appeal, Third District, the Former Wife'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" resulted in this litigation and required the entry of the order at issue herein. It is also clear that the Trial Court's Order is amply supported by extensive legal authority.

The Former Wife's obligation to the Former Husband as the primary residential parent of the parties' minor daughters, is specified in Gardner v. Gardner, 494 So.2d 500, 502 (Fla. 4th DCA 1986), appeal dismissed, 504 So.2d 767 (Fla. 1987). In that case the court reiterated the rule that the custodial parent may not merely remain neutral with regard to visitation, but has an affirmative obligation to the non-custodial parent "to encourage and nurture the parent child relationship." Gardner, supra, at 502. After citing that rule, the Gardner court held:

> "The Wife in the instant case cannot bring herself into compliance with the final judgment merely by taking no action with regard to visitation, but rather has an obligation to encourage the parties' minor daughter to visit the husband and to take steps to make sure that the daughter will do so."

Gardner, supra.

The Former Wife urges this Court that she can comply with Gardner by merely dressing the children and making them available

for visitation. Gardner requires more. Gardner requires the residential parent to affirmatively encourage visitation. Gardner imposes a duty on the residential parent to reinforce the child's desire to visit with the non-residential parent. The Order under review clearly comports with the requirements of Gardner v. Gardner, supra.

The premise underlying Gardner and the Order under review is logical and so self apparent that it demands affirmance of the Trial Court's Order. This premise is that the children will spend the majority of their time with the residential parent. The residential parent will be the primary influence shaping the development and attitudes of the parties' minor children. The residential parent will, in most cases, largely determine the attitude of the children with respect to the non-residential parent, and will have a disproportionate influence upon the success of the non-residential parent's attempts to enjoy visitation with the children. It is this logic which is at the heart of Gardner v. Gardner, and which overwhelmingly requires affirmance the order under review.

Nowhere is this more true than in this case. It is undisputed that the children enjoyed a very close and loving relationship with their father prior to February, 1981. It is similarly undisputed that they now hate and despise him. During this time their attitudes were shaped by one person: Laurel Schutz. This court now has an opportunity to declare in no uncertain terms that visitation with a non-residential parent is a cherished right and

a compelling interest, and that the residential parent may not traverse this right without incurring the harshest of sanctions.

The Former Wife's implication of her First Amendment freedom of speech is without merit. The Trial Court's Order is founded on well settled constitutional principles. Moreover, it is equally well settled that speech is subject to reasonable regulation. State v. Scott, 678 S.W.2d 50, 52 (Tenn. 1984); Dickson v. Dickson, 12 Wash.App. 183, 186-189, 529 P2d 476, 478-79 (1974) cert. denied, 423 US 832, 96 S.Ct. 53, 46 L.Ed.2d 49 (1975); See United States v. Diapulse Corp. of America, 457 F.2d 25, 28 (2d Cir. 1972).

The constitutional liberties which are allegedly in conflict herein compel the result reached by the Trial Court. The Former Wife was compelled to do no more than to attempt to mend the breach between the minor daughters and the Former Husband that was caused solely by her own actions. If any party should be required to bear a hardship as a result of this litigation, than it should clearly be the Former Wife. The Former Husband and the minor children have already suffered the destruction of a close and tender, constitutionally protected relationship. While that relationship may never be repaired, it is certainly not unreasonable for the Court, pursuant to Gardner v. Gardner, supra to require the Former Wife to speak well of the Former Husband to the parties' minor daughters.

Moreover, it is also clear that a Court may compel certain forms of expression between a parent and their children. This proposition is exemplified by the opinion in the case of the matter

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of In Re S.D., Jr., 549 P.2d 1190, 1201 (Alaska 1976). In that dependency case, the court conditioned custody upon the parents successfully encouraging the children to attend school. The Supreme Court of Alaska determined that parents may properly be ordered to take specified actions, despite their conflicting constitutional rights. This case is particularly instructive, because basic notions of constitutional liberty were involved. Nonetheless, that court found that protection of minor children may require impositions upon the constitutional freedoms of the parents, and that, specifically, parents may be required to express encouragement for activities they do not necessarily find valuable.

Finally, it is also clear that expert professional opinion favors the approach adopted by the Trial Court in this cause. Dr. Richard A. Gardner discussed the problem which is at the root of this case. Dr. Gardner noted:

> "The parent who expresses neutrality regarding visitation is essentially communicating criticism of the non-custodial parent. The healthy parent appreciates how vital is the children's on going involvement with the non-custodial parent and does not accept inconsequential and frivolous reasons for not visiting. The "neutrality" essentially communicates to the child that the non-custodial parent cannot provide enough affection, attention, and other desirable input to make missed visitation a loss of any consequence."

Dr. Gardner's observations illustrate the soundness of the Trial Court's Order. It is only by requiring the non-residential parent to do more than merely dress the children and make them available that successful visitation with the non-residential parent can occur. This is especially true when there is animosity

between the parents. All fundamental notions require an affirmance of the Trial Court's Order.

D. Trial Court properly excused the child support arrearages under the facts of this case.

Judicial opinion in Florida strongly supports the view that where a father is granted visitation rights with correlative obligations to make support payments for his children, he ordinarily should not be required to make payments so long as the mother, having the primary custody of the children, fails or refuses to afford him the visitation privileges so granted. This is designed to compel mutual compliance. Denton v. Denton, 147 So.2d 545, 548 (Fla. 2d DCA 1962).

Unpaid child support arrearages constitute a vested right in the child which will be strictly enforced absent extraordinary or strongly compelling circumstances, such as waiver, laches, estoppel, or reprehensible conduct on the part of the custodial parent. O'Brien v. O'Brien, 424 So.2d 970, 971 (Fla. 3rd DCA 1983). The Trial Court properly determined that the facts of this case constituted extraordinary and strongly compelling reasons not to enforce such arrearages. [R-416]. It is difficult to imagine more reprehensible conduct than the conduct of the Former Wife in this case.

A precise statement of the law is found in Warrick v. Hender, 198 So.2d 348 (Fla. 4th DCA 1967). In that case the Court summarized the law as follows:

> "The principles involved may be succinctly summed up by stating that, in cases where the divorced father is brought before the court and it is found that he has not

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> paid to the divorced mother the sums of child support which the divorce decree specified, the Trial judge is not variably obligated to recognize the amount of the paper delinquency as an immutable debt and to exercise all the judicial powers available to compel his payment. Rather, he should consider the facts and significant change of circumstances which have arisin since the decree, the relationships of the parties and their conduct in dealings with each other, whether the complaining party has done equity and has complied with the duties imposed by the decree upon her, and make disposition in accordance with equitable principles but also fully providing all of the safeguards and supplying all of the needs reasonably available to effectuate the best interests of the children themselves."

It is undisputed that the Court should not refuse to require the payment of child support arrearages for the support of the minor children when the children will thus be required to suffer. Hardy v. Hardy, 118 So.2d 106 (Fla. 1st DCA 1960). The record clearly reveals that these children will not suffer by the termination of the support arrearages. There is not one scintilla of evidence in the record which would indicate otherwise. Dr. Epstein noted in his report that DeeBritt wore a highly stylized haircut, wore stylish clothes, and had nice expensive jewelry, including a Rolex watch. [WX-1, P3]. It is undisputed that the girls have always been enrolled in fine private schools. These children have not suffered as a result of the Former Husband withholding support, and they will not suffer as a result of the Trial Court's cancellation of arrearages. The Trial Court properly cancelled the support arrearages, and the Order should be upheld.

CONCLUSION

Based upon the foregoing argument and authority, the Respondent respectfully submits that the opinion of the District Court of Appeal, Third District, affirming the Order of the Trial Court, be affirmed and that this Appeal be dismissed accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Respondents Brief on the Merits was mailed to Robin H. Greene, P.A., 2655 LeJeune Road, Suite 1109, Coral Gables, Florida 33134 and Frumkes and Greene, P.A., 100 North Biscayne Boulevard, Suite 1607, New World Tower, Miami, Florida 33132-2380 this 14th day of November, 1988.

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