IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,471

LAUREL D. SCHUTZ,

Petitioner,

vs.

RICHARD R. SCHUTZ,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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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 CHILD 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.

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

It is of no small interest to observe how the complexion of a case can change as it moves through the judicial system. This case however is an unfortunate example of how both logic and meaning can be lost through such a shifting of emphasis.

At the trial court level, this case was principally about child support - the Husband's failure to pay $24,300 in past due child support and his defense that he should not be held accountable for the arrearages because he had been unable to visit with his children during the years in which the arrearages accrued.

When this case reached the district court level, the concept of the "parental alienation syndrome" became the hallmark of the case although, in actuality, the record reveals that the subject of "parental alienation syndrome" was mentioned in but four of the 369 pages of trial testimony (TR. 394-96; 397-99) and the conclusion reached by the expert witness who was asked about the "syndrome" in those four pages was that it did not apply to this case.

Now this case is before this Court and now, according to the

Husband, the focus is the Wife's "single-handed" infliction of an ailment the so-called "parental alienation syndrome" - upon her children.

Because of this change in perspective, it is no longer enough to say that in reality, "parental alienation syndrome" has nothing to do with this case. It is no longer enough because the legal machinations that created the shift in emphasis may not allow the simple record truth to prevail. The simple record truth is as follows:

Dr. Michael Epstein, the court-appointed psychologist, did not testify about the "parental alienation syndrome" as the Husband has stated in his brief. (Respondent's Brief at 11-12) Rather, counsel for the Husband read to Dr. Epstein from an article on "parental alienation syndrome" authored by Dr. Richard Gardner, and asked Dr. Epstein if he "agreed" with Dr. Gardner's theories. Dr. Epstein agreed with portions of the theory (TR. 396), disagreed with other portions (TR. 399), and he found only some "milder form" of the symptoms described by Gardner to be present in this case (TR. 396). Moreover, Dr. Epstein specifically told the court that his agreement with Gardner's "parental alienation syndrome" theory was in concept only and that he was not saying that it applied to this case. (TR. 404).

Dr. Epstein told the trial court that his evaluation of the minor children revealed that their mother had not spoken badly about the Husband to the children and that the children did not perceive their mother as having ever told them "bad things" about their father. (TR. 407).

Despite this record evidence, the Wife has been branded as guilty of intentionally inflicting upon her children the now judicially approved psychological ailment of "parental alienation syndrome," and this Court is being asked by the Husband to affirm the district court's legal application of the existence of this "syndrome" to the facts of this case.

What is dangerous about this is not so much that the Wife has been found guilty of something which the testimony established she did not do. That is not "dangerous" in any larger sense of the word because the Wife, after all, is only one person. The adjudication of "guilt" as it pertains to her - the trial and district court's public villification of her - hurts only her and her children. What is truly dangerous however, is that on this record - this record of a total of four pages of one expert's agreement and disagreement with another's theory - Florida law, as promulaged by the District Court of Appeal, Third District, has judicially recognized the psychological concept of a "parental alienation syndrome" upon the words of an attorney reading limited portions of one man's theory into a trial court record. Other theories and concepts - the "battered women's defense," HLA testing in paternity cases, various definitions of "insanity," have all required years of testing and verification before being accepted by the legal community and, yet, the "parental alienation syndrome" is now part of the law of the State of Florida based upon four pages of trial testimony

The Husband asks this Court to affirm the district court's judicial recognition of the "parental alienation syndrome" theory

because he must. He cannot prevail in this non-payment of child support case unless the Wife is found to be "at fault" for the Husband's non-payment of child support. According to the theory upon which the Husband demands that this Court affirm this case, if the Wife is "guilty" of the one thing (inflicting "parental alienation syndrome" upon the children) then he is not guilty of the other thing (non-payment of child support). Upon this theory the Husband prevailed both in the trial court and the district court, but neither court stopped to consider the effect of the achievement of the Husband's ends in this case. The Wife asks this Court to be the first to so consider.

To begin, the question, of course, is whether the Wife was "guilty." The immediate answer to the question, as previously established, is that she was not. The record establishes that she did not speak ill of the Husband to the children, she did not disparage him, denigrate him or demean him. She avoided him because she feared him. The record establishes that the children were not "suffering" from "parental alienation syndrome," and the court-appointed psychologist did not find the concept of the "parental alienation syndrome" to be applicable to this case.

Accepting the Husband's position for the sake of argument,

All of this, however, merely leads to the question - what end was achieved by the emphasis upon blame in this case? The answer is quite simple - the end achieved was the excuse of the Husband's failure to pay child support upon a finding of the Wife's infliction of "parental alienation syndrome" upon the children and the complete failure to provide for the best

interest of the children.

If this case stood for the foregoing proposition alone, it would be bad enough. Unfortunately, as a result of the district court's opinion, this case stands for far more. The law enunciated by this case at the district court level is: (a) that a concept called "parental alienation syndrome" is now judicially recognized without any evidentiary support in the record; and, (b) that upon a finding that "parental alienation syndrome" has been so causd on inflicted upon children by one party, the other party will be "excused" from his or her intentional acts.

All of this is the meaning of ***Schutz v. Schutz***, leaving one wondering how this case came to mean so much upon so little and leaving this Court faced with the question whether, on this record, the "parental alienation syndrome" was properly used as a basis for assessing blame and adjudicating guilt and ignoring the best interest of the children.

Even assuming the efficacy of the "parental alienation syndrome," there was no evidentiary nexus established between the Wife's hiding from the Husband and the childrens' feelings about him. The Husband, however, contends that both courts below properly assumed the required nexus upon the following syllogism (Brief of Respondent at 25):

1. The Husband and the children had a "close and tender" relationship prior to 1981;

2. The children now "hate and despise" him;

3. Between 1981 and the time of trial the childrens' "attitudes were shaped by one person: Laurel Schutz."

The problem with this is that the premises are flawed.

The Husband would have this Court believe that he and the children were "close and tender" prior to February, 1981. But, to accept this statement, this Court must be prepared to believe that a man can beat his wife, abuse her, taunt her, threaten her and intimidate her, oftentimes in the presence of his children, and not affect their "close and tender" feelings for him; that this same man can leave his children waiting with suitcases packed, day after day and week after week, for a change in custodial residence "until he was ready" without affecting their "close and tender" feelings for him; that he can act in an immature, irresponsible and deplorable manner during visitation with his children, giving them beer when they are thirsty, driving recklessly and dangerously, threatening them with HRS custody and maligning and cursing their mother without affecting their "close and tender" feelings for him.

Only if this Court is willing to accept all of this can it conclude that the childrens' "attitudes were shaped by one person: Laurel Schutz." But, if this Court does not accept the proposition that only one parent can be responsible for the childrens' feelings about the other parent, then this Court must reverse the lower courts' determination that the onus for rectifying the relationship and the blame for its deterioration should be upon only one parent.

A second difficulty with the Husband's argument that the Wife's "guilt" can be assumed through the use of his syllogism is that Dr. Richard Gardner, the proponent of the "parental aliena-

tion syndrome," has described two types of the "syndrome." One is contributed to by the custodial parent, and the other is developed by the children themselves. As Dr. Gardner states:

> ***In such [latter] cases the alienation is primarily of the child's origin. It stems from the threat of being required by the court to live with the father - the parent with whom the child has had the weaker psychological bond. It is not significantly the result of maternal programming.*** Gardner, R., Judges Interviewing Children in Custody /Visitation Litigation, 1987 N.J.T.L. 26

Here, no evidence whatsoever was presented to the trial court concerning this aspect of the "parental alienation syndrome." This aspect, though, can be inferred from the children's own description of the father's behavior toward them. Nevertheless, the courts below simply accepted the Husband's argument that "parental alienation syndrome" can be "diagnosed" and blame for its "infliction" assessed based upon the sophistic syllogism, "They loved me once, they don't love me now, it must be solely her fault."

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

It is the Wife's contention that it is not permissible or in the best interest of chidren to violate the liberties of one parent in order to protect the liberties of the other, and 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 Husband has responded to this argument by stating, first, that he has a constitutionally protected interest in his relationship with his chilren and, second, that speech can be judicially regulated. We agree. (Initial Brief of Petitioner at 23, 24).

The Husband failed to address, however, the Wife's chief argument - that constitutional rights are not balanced by their violation.

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

Other than an unsupported attack upon the Wife's credibility, the Husband, as he did with respect to the constitutional issue herein, completed failed to address the Wife's argument that ***Gardner v. Gardner***, 494 So.2d 500 (Fla. 4th DCA 1986) requires nothing more than that the custodial parent encourage and nurture the relationship between the children and the non-custodial parent by the exercise of the utmost good faith effort.

Gardner, does not require, and cannot be read to require, that the custodial parent "convince" his or her children of any specified set of facts, speak any specified words or believe any specified things.

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

At the conclusion of these proceedings in the trial court, the court discharged the Husband's obligation to pay the sum of $24,300 in past due child support. The District Court of Appeal affirmed this discharge.

The Husband's suggestion that this discharge was proper is based upon three appellate decisions, the most recent of which is twenty-one years old. (Brief of Respondent at 28-29). The Husband, however, failed to discuss the fact that the Florida legislature abolished the concept of, to use the Husband's words, "correlative obligations" of visitation and child support in amending Section 61.13, Florida Statutes (1986) to read:

> ***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.***

Significantly, the Husband also failed to mention the clear public policy behind this statutory revision; that treating child support and visitation as "correlative obligations" deprives the child of his rights on the basis of conduct in which he played no part; that denying the child his right to support prevents the child from obtaining his rights even though his hands are clean; and that depriving a child of support contributes to the insecurity already suffered by a child of divorced parents. See, e.g., Making Parents Behave: The Conditioning of Child Support and Visitation Rights, 84 Columbia L.Rev. 1059 (1984).

Rather than addressing any of these points, the Husband instead argues that the children here will not "suffer" because of his non-payment of child support. He bases this statement upon the report of the court-appointed psychologist who noted, in passing, that the children had "stylized haircuts, wore stylish clothes and had expensive jewelry. (Husband's brief page 28).

This argument is specious. It is not now, nor has it ever been, the law of this state that child support arrearages need only be paid where the custodial parent proves that the children will suffer if the arrearages are not paid. The Husband's attempt to place upon these children or their mother a burden to prove "suffering" is not merely misguided but offensive.

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

The Wife believes that the methodology for serving the best interest of the children, as derived from the opinion of the Guardian ad Litem and set forth in her Initial Brief on the Merits bears repeating. The childrens' best interest would be served by:

1. Enjoining both parents from disparaging each other;

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

3. Requiring both 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 childrens' future educational purposes and to pay for the required family therapy and counselling.

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.

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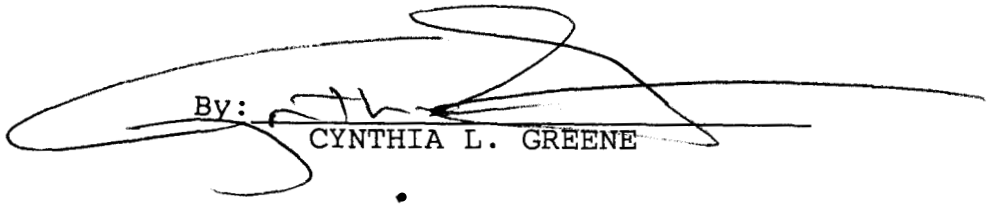

By: _____
CYNTHIA L. GREENE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the Petitioner's Reply 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 2nd day of December, 1988.

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