IN THE SUPREME COURT
OF THE STATE OF FLORIDA

In the Matter of the Adoption
Of: John Doe, Infant Baby Boy:

BOB DOE and JANE DOE,

Petitioners,

v.

RICHARD ROE and MARY ROE,

Respondents.

_____/

CASE NO. 72,593

BRIEF ON BEHALF OF THE FAMILY LAW SECTION OF THE FLORIDA BAR AS AMICUS CURIAE

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INTRODUCTION

The Family Law Section of the Florida Bar submits this brief, as *amicus curiae*, in order to address the following issues: whether a natural father's pre-birth activities constitute abandonment for purposes of Chapter 63 proceedings; whether the best interests of the child should be considered as an inherent factor in adoption proceedings; and, whether the use of the Chapter 39 definition of abandonment is inappropriate when used to determine the right of a putative father to object to the adoption of a newborn child.

The Family Law Section takes no position with respect to any issues other than the foregoing which may be raised by the parties hereto and the Section submits this brief on its own behalf as distinguished from the Florida Bar as a whole.

I.

WHETHER A NATURAL FATHER'S PRE-BIRTH ACTIVITIES CONSTITUTE ABANDONMENT FOR PURPOSES OF CHAPTER 63

The major issue raised by the Fifth District Court of Appeal in its certified question is whether a putative father can be found to have abandoned a child before it is born. This is a question of utmost importance to prospective adoptive parents, birth parents and lawyers handling adoptions, as well as to the State. Of similar importance is the need for a more precise definition of the term "abandoned" in the context of adoption law.

The District Court correctly noted that an unwed father's consent, if it is required pursuant to §63.062(1)(b), Fla. Stat., may be excused, pursuant to §63.072(1), Fla. Stat., if the father has abandoned the child. Further, the District Court correctly formulated the key issue as stated on page 8 of its decision as being whether a putative natural father can abandon his child by neglecting his responsibilities to support the natural mother during pregnancy and to assist with her pre-birth medical expenses. The District Court answered this question "no," but the answer should be "yes."

There are only three possible categories of putative fathers; first, an unwed father who knows the mother is pregnant, supports her financially and emotionally, encourages her and participates in planning and decision making, and who lets her know from the earliest possible moment that he will

love, support and help care for and raise their baby; second, an unwed father who knows the mother is pregnant and who either terminates his relationship with her or who continues to see the mother, but refuses to support her emotionally or financially, urges her to have an abortion or who otherwise fails to take any interest in or responsibility for the baby, and who makes it clear through words or acts (including his failure to act) that he does not intend to love, support, and help care for and raise the child when it is born; and third, an unwed father who does not know that the mother is pregnant, and therefore does not support her during her pregnancy or even have an opportunity to do so or to declare his intentions or desires regarding the baby. The facts of the instant case put the father, Richard Roe, clearly in the second category: he knew the mother was pregnant, knew she needed financial support and had the ability to provide financial support, but he failed to do so, and failed to support a decision to keep and care for the baby. He even encouraged the mother to have an abortion.

The District Court is also correct in stating that the only statutory definition of "abandonment" in Florida is found in Chapter 39, Fla. Stat., which deals with juvenile dependency and delinquency. Some Florida adoption cases have alluded to this definition in casting about for a definition of abandonment in adoption cases. The Family Law Section recognizes that the main difficulty in deciding this case is that there exists no defini-

tion of abandonment in Chapter 63, and, while the Courts have labored to say what abandonment is *not*,[1] few courts have taken it upon themselves to say what abandonment is[2] -- other than to often quote the following statement from the Second District Court of Appeal:

> This Court has stated the rule to be that abandonment in the field of jurisprudence dealing with adoption consists of conduct which manifests a settled purpose to permanently forego all parental rights and the shirking of the responsibilities cast by law and nature so as to relinquish all parental claims to the child.[3]

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[1]See *Roy v. Holmes*, 111 So.2d 468 (Fla. 1959) (blameworthy neglect, indifference and irresponsibility for child's welfare); *Solomon v. McLucas*, 382 So.2d 339 (Fla. 2d DCA 1980) *cert. den.* 389 So.2d 1112 (Fla. 1980) (leaving the child with others and failing to provide support for the child, even though able to do so, and never seeing or visiting the child); *Durden v. Henry*, 343 So.2d 1361 (Fla. 1st DCA 1977); *Matter of Adoption of Noble*, 349 So.2d 1215 (Fla. 4th DCA 1977) (neglect or disinterest of natural mother who has voluntarily given custody of child to others and who admitted she was unable to cope with parental obligations herself); *Hinkle v. Lindsey*, 424 So.2d 983 (Fla. 5th DCA 1983) (failure of divorced father to pay child support as retaliation for mother's action in concealing child's whereabouts and interfering with father's visitation rights); *Matter of Adoption of Cottril*, 388 So.2d 302 (Fla. 3d DCA 1980) (incarceration, a chronic drinking problem and previous consent to an adjudication of dependency).

[2]See *Turner v. Adoption of Turner*, 352 So.2d 957 (Fla. 1st DCA 1977) (father had murdered child's mother and had no contact with child during his life prison sentence); *Smith v. Moore*, 481 So.2d 36 (Fla. 1st DCA 1985) (child had been in foster care for seven years).

[3]*Solomon v. McLucas*, 382 So.2d 339 (Fla. 2d DCA 1980) *cert. den.* 389 So.2d 1112 (Fla. 1980).

The Family Law Section strongly believes that a natural father should have an opportunity to declare and demonstrate his love and support for his unborn child. He certainly should not be automatically shut out of the decision of whether the child should be adopted. However, there must be some time limit set for that father to "put up or shut up." A mother of a newborn must immediately provide physical, emotional and financial support for the baby. A father who is not continuing his relationship with the mother or who is otherwise not supporting her or the baby is not faced with that immediate pressure. Even if a paternity and support action is brought, it will be months or maybe years before the father is accountable and required to support the baby. Even then, the father has none of the physical restrictions of having to care for a baby, no requirement of dealing with the medical, emotional or social needs of the child, no need to choose between job or career or school and parenthood (if indeed, a choice is even possible), and will often simply fail to pay court ordered child support on time, or in the full amount, or at all. Thus, an unwed biological father has virtually no negative consequences from his decision to not support the mother and the child. Such an irresponsible father cannot be allowed to refuse to consent to the adoption, thereby preventing the mother from choosing her only reasonable alternative, and also continue to refuse to support the baby.

A biological father cannot be allowed to "control" an adop-

tion of a newborn without some time restrictions. The Family Law Section urges the Florida Supreme Court to adopt the position of the Georgia Supreme Court in *In Re Baby Girl Eason*, 358 S.E.2d 459, 257 Ga. 292 (1987). There, the Georgia Court held that an unmarried biological father has a window of opportunity within which he may develop a relationship with his child. Such a window should begin at conception, but must end sometime soon after the baby's birth if the mother intends to place the baby for adoption.

Because of the nature of the adoption process, and the intention of the Legislature to "protect and promote the well-being of persons being adopted and their natural and adoptive parents and to provide to all children who can benefit by it a permanent family life,"[4] there must be some certain end to the uncertainty which may be engendered by the actions of an irresponsible father. He cannot be allowed to duck responsibilities during the pregnancy, and then, after he learns his child is a healthy baby boy, belatedly acknowledge paternity in order to trigger the requirement of his consent to the already arranged adoption . . . an adoption arranged by the mother during her pregnancy when the father had abandoned her. Such fathers should not be allowed to have their cake and eat it too.

The Georgia Court reasoned that, rather than beginning at

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[4]§63.022(1), Fla. Stat. (1987)

birth, an unwed father's rights and responsibilities begin at conception, and further that the unwed father must assume as much parental responsibility as is possible under the circumstances. In order not to lose his rights, an unwed father should be required to assume his responsibilities quickly and decisively. After all, that is what the unwed mother must do. She must support herself and pay medical and hospital expenses for herself and her baby. She may be required to make lifestyle changes, to restrict her physical activities, to participate in birthing classes. Above all, she must prepare herself to either be a single parent or to place her baby for adoption. She is entitled to *know*, not to have to *guess*, whether the natural father will support their child, and she is entitled to know that by the time the baby is born, or very soon afterward. If the natural father is uncommunicative, wishy-washy, or uncooperative, the natural mother is entitled to have a day beyond which this natural father has no further ability to hold up or block an adoption.

The Family Law Section believes that, unless this Court holds that an unwed father may be found to have abandoned his baby by his pre-birth activities, then the entire adoption process in Florida will be jeopardized. Intermediaries will have to advise birth mothers and prospective adoptive parents that, although the baby's father is not supporting her or her baby or doing anything to indicate he loves the baby or desires or intends to support the baby, he still may be able to stymie the

adoption. This will no doubt result in many adoptive parents deciding not to pay sometimes thousands of dollars in living and medical expenses for the birth mother because of the considerable risk that they will receive neither the baby nor their financial or emotional investment back. Thus, unsupported birth mothers will likely turn to state aid, or will fail to receive proper prenatal medical care, possibly endangering their lives or their baby's lives. There may be more truly abandoned babies - ones left on doorsteps or in gas stations - and more unwanted and abused children.

The Family Law Section urges this Court to directly address the question of whether a natural father's pre-birth activities can constitute abandonment and, if so, how can a natural father be safeguarded and his rights balanced against the natural mother's need to take immediate action for the safety and well-being of the baby.

II.

WHETHER THE BEST INTERESTS OF THE CHILD SHOULD BE CONSIDERED AS AN INHERENT FACTOR IN ADOPTION PROCEEDINGS

Section 63.022(2)(1), Fla. Stat. (1987), sets forth the Florida Legislature's intent in clear and unequivocal terms:

> In ***all*** matters coming before the court pursuant to this act, the court ***shall*** enter such orders as it deems necessary and suitable to promote and protect the best interests of the person to be adopted. (Emphasis added)

That language, which prefaces Florida's adoption statute, Chapter 63, when read *in pari materia* with the Senate Committee on Judiciary - Civil testimony,[5] reveals the Legislature's intent that the Court *must* consider the best interests of the person to be adopted as, if not the prime criterion, at least a major criterion in an adoption. The Court is also acting *in parens patriae*, or *in loco parentis*, in the adoption decision, and, as such, even in the absence of the clear legislative direction present in §63.022(1), Fla. Stat. (1987), it would properly have to look to the best interests of the child in the same way the biological parent is (often erroneously) assumed to do.

> The origin of the law's role in deciding custody disputes is usually traced to the concept of ***parens patriae*** and the duty of the court to protect the child who is unable to protect himself. [citations omit-

[5]See transcript of testimony provided in Appendix to Initial Brief of Petitioner.

> ted] It has also been suggested that custody law stems from the feudal concept of the child as a chattel, who represented important monetary interests. [citation omitted] *Alternatives to "Parental Right" In Child Custody Disputes Involving Third Parties*, 73 Yale L.J. 151 (1963) at 153, n.3.

The outcome of the adoption is going to have the most profound possible consequences on the child, and the child is usually the one least able to speak for him or herself. Not to consider the best interests of the child is to hearken back to when children were only property.

In an adoption of an infant, the child's biological parents become strangers to the child. The adoptive parents become the child's psychological parents. They become the only parents the child has ever had, and he or she becomes bonded to them. Under such circumstances, does "the best interest of the child" include removing such a child from his or her adoptive parents when such a child and his psychological (adoptive) parents have, from their first moments together, been a stable and loving family? If the child, who after all is the supposed focus of all the concern in this action, has any rights, the right to remain with the existing stable and loving parent-child relationship must be among them.

In *Beyond the Best Interests of the Child*, Goldstein, Freud and Solnit, *New Edition With Epilogue*, Free Press, New York 1979 (hereafter referred to as "*Beyond*"), a different standard is pro-

posed - the least detriment standard. Recognizing that in almost any case such as this, there is going to be, or has been, some detriment to the child, the authors of *Beyond* suggest that courts would be more likely to take the consequences of their decisions concerning children seriously if they would weigh their decisions according to which outcome is likely to do the least amount of harm to the child.

When the "least harm" standard is used, the question for the Court becomes "does the child need to have a parent assigned to him (her) by the court?" In other words, the initial question should be "Is this currently an unwanted child in need of a home and loving parents?" If the answer is in the negative, the court should not disturb the existing family relationship. (From *Beyond*, pages 75-78). This is in contrast to the current initial judicial focus of "to whom do I give this child?"

Former U.S. Supreme Court Justice Joseph Story, acting as a circuit judge in *U.S. v. Green* (3 Mason 482 Fed. Cas. No. 15256 [1824]), wrote:

> As to the question of the right of the father to have the custody of his infant child, in a general sense this is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interests to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant in the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain

> whether it will be for the real, permanent interests of the infant . . . . (as quoted in *Beyond*, page 82.

Justice Brewer of the Supreme Court of Kansas, in 1924, wrote:

> [When a] child has been left over years in the care and custody of others, who have discharged all the obligations of support and care which naturally rest upon the parent, then, whether the courts will enforce the father's right to the custody of the child, will depend mainly upon the question of whether such custody will promote the welfare and best interest of such child. (as quoted in *Beyond*, page 82).

Other jurisdictions have also treated the interests of the child as of paramount importance to the contestants. In *Application of Altmiller*, 76 Idaho 521, 525-527, 285 P.2d 1064, 1068 (1955), the Idaho Supreme Court said:

> . . . [T]hree rights . . . are to be considered: First, that of the parents; second, that of the person who has for years discharged all the obligations of the parents; third, and ***chiefly***, that of the child . . . It is far better for a child of innocent years to live among the people and with the attachments formed in childhood than to be torn away from familiar scenes, friendly faces and kindly voices, to be cast into a strange environment. (emphasis added)

What is the status of the "foster family?" The United States Supreme Court, in *Smith v. Organization of Foster Families*,

431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977), addressed this question as follows:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, [citation omitted] as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. [citation to *Beyond* and others] For this reason we cannot dismiss the foster family as a mere collection of unrelated individuals. [citations omitted] *Id., at 431 U.S. 844 97 S.Ct at 2094, 53 L.Ed.2d at 14 (1977).*

A foster family, of course, is generally thought to be temporary, whereas an adoptive family is permanent. If, therefore, the U.S. Supreme Court considers a foster family (of other than short-term) to be worthy of protection, surely the adoptive family is worthy of superior protection. In *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), the father of an ille-

gitimate child objected to an adoption petition filed by the stepfather of the child. The trial court found that the adoption was in the best interest of the child, and that legitimation of the child by the father was not. It then granted the stepfather's petition to adopt. The Georgia Supreme Court affirmed, and the U.S. Supreme Court unanimously affirmed, holding that the rights of the illegitimate father are not as extensive as those of a divorced father, as the illegitimate father has not previously shouldered the care and support of the child, where a divorced father would have. The Georgia code only required the mother's consent under the circumstances, and the U.S. Supreme Court held that *NOT* to be a violation of the illegitimate father's Constitutional rights. In its decision, the Georgia Supreme Court pointed out that the adoption was sought by the child's stepfather, who, as in the instant case, was part of the family unit in which the child was in fact living. *Quilloin*, 434 U.S. at 252-253, 98 S.Ct. at 553, 54 L.Ed.2d at 518.

Is "the best interests of the child" unconstitutionally vague? In *Matter of Adoption of J.S.R.*, 374 A.2d 860 (D.C.App. 1977), the District of Columbia Court of Appeals held that standard to be constitutional. In discussing the standard, the court said:

> The standard "best interest of the child" began to gain prominence in the jurisprudence of this country in the contexts of child-custody cases subsequent to the fountainhead opinion of Judge Brewer in ***Chapsky v. Wood***, 26 Kan. 650 (1881). Its first recognition in this jurisdic-

> tion appears to have been in ***Wells v. Wells***, 11 App.D.C. 392 (1897), and by today it has become well ingrained in our decisional law as the test to be applied in child-custody cases, whether between spouses [citation omitted], or between natural parent and non-parent [citation omitted]. Likewise we have applied "the best interest of the child" standard in child neglect cases [citations omitted]. We have recognized that this standard does not contain precise meaning. As we have pointed out, given the multitude of varied factual situations which must be embraced by such a standard, it must of necessity contain certain imprecision and elasticity [citations omitted] . . . . We think it plain that the standard "best interest of the child" requires the judge, recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives [citation omitted]. No more precision appears possible [citation omitted]. In this context, no more is constitutionally required [citation omitted]. *J.S.R., supra.*, 374 A.2d at 865 [emphasis added]

The District of Columbia reaffirmed the use of this standard in *Petition of D.I.S.*, 494 A.2d 1316 (D.C.App. 1985). In that case, the court, in noting that the "best interests" standard had been the basis for decision since the beginning of this century, held that in an adoption decision, a decree may be entered when the trial court is satisfied that the adoption will be in the best interests of the prospective adoptee and that the trial court's

decision will only be reversed for an abuse of discretion.

The Alaska Supreme Court, in *Matter of J.J.J.*, 718 P.2d 948 (Alaska 1986), noted that "Various courts and commentators have pointed out that a preoccupation with biological parents' rights often ignores the child's essential rights to a permanent parental home."[6] Commenting that "the notion that a child should have a right to remain with adults with whom he has formed strong emotional bonds is not new", the Court quoted in *In re Jerremiah O'Neal*, 3 Am.L.Rev. 578 (Mass. 1868-69):

> If . . . the child has made new relations in life, so deep and strong as to change its whole nature and character, the father has no right to reclaim it . . . . The child is not the father's property. It is a human being and has rights of its own . . . . If the father has left the child at an age too early for it to remember him, . . . and other persons have expended money and become attached to the child, and the child has formed such associations as cannot be severed without injury to it, then the father has no legal right to sunder those ties. *Id. at 580.*

In conclusion, the "best interests of the child" standard is required by Florida Statutes to be exercised by the Court as a "prime directive" when making decisions and entering orders concerning adoptions. That standard is not new. It is not unique to Florida, and it is not unconstitutionally vague. Further, it

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[6]Id. at 951, n.11.

would be a violation of the *child's* rights, and a shirking of the Court's *parens patriae* responsibility not to use that standard. The Family Law Section respectfully submits that the best interest of the child should be a major consideration and an inherent factor in adoption proceedings.

III.

WHETHER THE USE OF THE CHAPTER 39 DEFINITION OF ABANDONMENT IS INAPPROPRIATE WHEN USED TO DETERMINE THE RIGHT OF A PUTATIVE FATHER TO OBJECT TO THE ADOPTION OF A NEWBORN CHILD

Chapter 63 of the Florida Statutes provides a mechanism which allows the court to excuse the consent of a parent who has abandoned a child. §63.072, Fla. Stat. (1987). The trial court in the present case used a "failure to evince a settled purpose to assume all parental duties" [7] standard in determining that the putative father, Richard Roe, abandoned the child, John Doe, and entered the adoption order without his consent. In their appellate briefs both the appellant and the appellee impliedly accepted this standard by arguing whether or not Richard Roe had in fact abandoned the child through his pre-birth activities and statements. However, the Family Law Section believes that the true issue is whether or not the failure to evince a settled purpose standard is the appropriate standard to decide the right of a putative father to veto the adoption of a newborn child.

Failure to evince a settled purpose to assume parental duties is a definition of abandonment stated in Chapter 39 of the Florida Statutes. §39.01(1), Fla. Stat. (1987). Chapter 39 is the Florida Statute which defines dependency and provides mechanisms for the protection of dependent children. Under Chapter 39

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[7]Section 39.01(1), Fla. Stat. (1987)

this definition of abandonment is used to define when children have been abandoned by their parents and can be taken into the foster care system; and it is used to define abandonment for the purpose of permanent commitment. Permanent commitment is the state's method of freeing children to be placed for adoption.

The state's goal in foster care services is the rehabilitation of deficient parents and reunification of the family unit. If this goal is unable to be achieved then H.R.S.'s foster care service is charged with the responsibility of reviewing the biological parent's lack of progress and initiating permanent commitment proceedings. §409.168(1)-(3), Fla. Stat. (1987). These goals are accomplished through a performance agreement. A performance agreement is a court approved plan of rehabilitation setting out the services the agency has agreed to provide and the objectives the biological parents are required to meet. §409.168(3), Fla. Stat. (1987). Offer of a performance agreement is a prerequisite to obtaining an order of permanent commitment. *Smith v. Moore*, 481 So.2d 36 (Fla. 1st DCA 1985).

The failure to evince a settled purpose standard is used in permanent commitment petitions to obtain permanent commitment orders through abandonment when parents have not lost all contact with their children, but have substantially failed to comply with the provisions of the performance agreement. Use of this standard in Chapter 39 cases allows the state to free children for adoption whose parents will never be able to assume respon-

sibility for their care, but have not entirely deserted their children.

Until 1973 Chapter 63, the Florida Adoption Act, did not have an abandonment provision in the waiver of consent of a natural parent to child's adoption. *Adoption of M.A.H.*, 411 So.2d 1380 (Fla. 4th DCA 1982). A best interest standard was used until the legislature removed the best interest standard from the statute and substituted abandonment as a ground for excusing consent of the parent. From that point on courts were required to decide what constituted abandonment on a case by case basis. *Adoption of M.A.H.* In some cases the courts have stated that the failure to manifest a settled purpose to permanently forego all parental rights will constitute abandonment. *Hinkle v. Lindsey*, 424 So.2d 983 (Fla. 5th DCA 1983); *Solomon v. McLucas*, 382 So.2d 339 (Fla. 1980). In *Hinkle* the minor child in question was born during the marriage of the natural father and the natural mother. The court narrowly construed the standard and stated that although shirking of parental duties and obligations may be evidence of the intention to permanently forego all parental rights, it does not as a matter of law prove abandonment.

In *Solomon v. McLucas*, 382 So.2d 339 (Fla. 2d DCA 1980) the court used the failure to evince a settled purpose standard to terminate the rights of a mother and allow the relatives she placed the child with to adopt the child. The court went on to

define the two typical classes of cases in which this standard can be used to avoid the consent of the natural parent: cases of stepparent adoption and cases where parents have given custody of their children to another to raise. In both the ***Hinkle*** and ***Solomon*** cases there was a pre-existing relationship between the child and the parent whose rights were being severed and therefore, the failure to evince a settled purpose standard was strictly construed. Although, the ground of abandonment was added to Chapter 63 to avoid the necessity of obtaining a parent's consent and the failure to evince a settled purpose ground has been borrowed by some courts in the determination of abandonment there are no cases in which this standard was used to determine pre-birth abandonment. Following the reasoning of the *Solomon* court, this is an inappropriate mechanism for determining the rights of putative fathers to newborns.

Parental rights have a long history of constitutional protection. *Prince v. Massachusetts*, 197 U.S. 11 25 S.Ct. 358, 49 L.Ed. 643 (1905). *Pierce v. Society of Sisters*, 268 U.S. 510 45 S.Ct. 571, 69 L.Ed. 1070 (1925). *Stanley v. Illinois*, 405 U.S. 645 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). The evolution of the rights of natural fathers began with *Stanley v. Illinois, Id.* Stanley, the natural father of illegitimate children who resided with him from their birth, won the right to continue custody of his children without state intervention after the death of the mother. These blanket rights of natural fathers were eroded by

Quillion v. Walcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) and *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1978). In *Quillion, Id.*, a natural father sought to block the adoption of his child by the mother's husband. Noting that the natural father had not shouldered any of the responsibilities of being a father, the court held that equal protection principles did not require the same protection for an illegitimate father as for a divorced father.

In *Caban, supra.*, the Supreme Court partially invalidated a statute which permits an unwed mother, but not an unwed father to prevent adoption of a child. In that case, the court held that sex-based discrimination violated equal protection. The state can withhold a veto privilege from the father of an illegitimate child where the father has not participated in the support or care of the child.

The father's participation in the rearing of his child was also an important requirement for due process protection in *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1982). Parental rights do not spring from the biological connection between parent and child. Parental rights must be coupled with the assumption of parental responsibilities. Supreme Court cases in the area of father's rights describe a hierarchy of parental due process rights based on the participation of the father in the child's care or support. *Caban, supra.*, and *Lehr, supra.*, both approved statutory schemes that

required affirmative acts from fathers who wished to exercise their parental veto over adoption, by legitimation in *Caban*, and by filing with a putative father registry in *Lehr*.

Recent Florida decisions dealing with this issue have followed the lead established by the United States Supreme Court by requiring some type of affirmative action by the putative father before his consent is required. *Wylie v. Botos*, 416 So.2d 1253 (Fla. 4th DCA 1982); *Guerra v. Doe*, 454 So.2d 1 (Fla. 3d DCA 1984). In *Wylie v. Botos, supra.*, the court stated that a natural father is required to take some sort of affirmative action to establish his right to have his consent required. A properly and timely filed acknowledgment of paternity was identified as an appropriate act to trigger the right to consent. The father's filing of an acknowledgment of paternity in *Guerra, supra.*, put him in the class of persons whose consent was required before the child could be adopted. Richard Roe falls into the class of fathers on the lower end of the hierarchy of protected parental rights, such as in *Wylie, supra.*, and *Guerra, supra.*, which require an affirmative act by him for his lack of consent to act as a veto to the adoption of his illegitimate child.

At the broad policy level the constitutional hierarchy of protected parental rights must be considered when any reconciliation of Chapters 39 and 63 are attempted. Fathers who have an established relationship with their children are entitled to

more protection when their rights are being severed than those who only have had an unrealized or ungrasped opportunity to establish a relationship with their children. The conduct of Richard Roe in this case is not unusual in the field of independent adoptions. Many putative fathers react to the news of their impending fatherhood with disbelief, anger, threats and vacillation. Many fathers attempt to retain a veto power over the proposed adoption plans either to continue to attempt to dominate the biological mother; or out of feelings of anger at the end of the relationship; or unsureness that allowing their child to be adopted makes them unworthy persons. The uncertainty of the putative father's position strains the adoption process. It places pressure on the biological mother. A biological mother may fear signing consent to an adoption, if the child may go to a father that she feels is unfit to rear that child. Adoptive parents are left with the uncertainty that the adoption placement may fall through after they have become attached to the child. Most importantly, it places the future of adoptive children in jeopardy of disruption of their placements and potential emotional damage. Given the potential for harm suffered by the parties to a disrupted adoption, a legislative or judicial policy requiring an affirmative act by a putative father to establish his right to consent to an adoption is a wise as well as a constitutionally sound policy.

A legislative definition of the meaning of the term abandon-

ment when used in the different contexts of Chapters 39 and 63 is certainly warranted and necessary to eliminate much of the confusion concerning abandonment in the field of adoption. However, any such definition or definitions should reflect a sensitivity to the difference of the role of the state in each of these areas. The ultimate goal of each statute is the protection and welfare of children. However, as previously described, the state assumes a more extensive role in the care of children when acting under Chapter 39. §39.001(2), Fla. Stat. (1987). The state becomes the guardian of children permanently committed to its care. §39.001(2)(c), Fla. Stat. (1987).

The role of the state under Chapter 63 is limited to providing basic safeguards in the adoption process. §63.022(2), Fla. Stat. (1987). Placement of the child in the adoptive home and termination of the parental rights are performed by the intermediary. The role of the state is a regulatory function of assuring the suitability of the placement. §63.092, Fla. Stat. (1987). The greater intrusion of the state into the parent-child relationship when acting under Chapter 39 supports the need for a stricter definition of abandonment in this context. On the other hand, actions by the state under Chapter 63 are confined to regulatory functions and the principal actors in this context are private ones. Under Chapter 39 the state is intruding into a pre-existing parent-child relationship and substituting its care for the care of the parent. Under Chapter 63 the state is only

assuring that the arrangements made by private parties are safe. Applying a stringent definition of abandonment is unnecessary.

Future adoptions will be less traumatic and courts will not have to face heart-wrenching situations such as this one, where a two-year old child could be removed from the adoptive home he knows to be placed with his unfamiliar natural parents, if putative fathers are required to act in some well-defined affirmative manner to establish their interest in a child, before their consent is required for the adoption of that child.

CONCLUSION

The Family Law Section of the Florida Bar, as amicus curiae, respectfully submits that the issues raised by this case are issues of extreme importance to the citizenry of the state of Florida. The Section urges this Court to directly address the questions presented herein so as to provide future guidance to all attorneys handling adoptions, adoptive parents, birth parents and the courts of this State.

Respectfully submitted,

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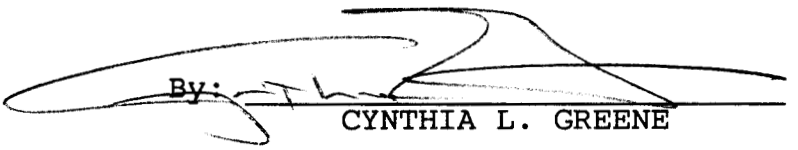
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been furnished by United States Mail to JOHN L. O'DONNELL, JR., ESQUIRE, at 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801-1975 and upon CHANDLER R. MULLER, ESQUIRE, at 1150 Louisiana Avenue, Suite One, Winter Park, Florida 32790 this 17th day of August, 1988.



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