IN THE SUPREME COURT
OF THE STATE OF FLORIDA

In The Matter Of The Adoption
Of: John Doe, Infant Baby Boy:

CASE NO. 72,593

BOB DOE and JANE DOE,
Petitioners,

v.

RICHARD ROE and MARY ROE,
Respondents.
_____/

ON REVIEW OF CERTIFIED QUESTION FROM
FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENTS ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The ultimate issue in this case is whether the state may order the adoption of an infant when both natural parents object, making those objections known before the petition for adoption is filed, and without any finding of unfitness of the natural parents.

Richard's conduct during the pregnancy was not perfect, but the Petitioners' Statement of the Facts is misleading with respect to the positive things Richard did; the nature of Richard's and Mary's relationship; and Mary's own vacillations on adoption. There is no support for Petitioners' claims that Richard "'walked away' emotionally and financially" [IBR. 48] from either Mary or his child, or that "there is an element of sustained cruelty" [IBR. 51] in their relationship. Petitioners' statements that "the facts were hotly contested" [IBR. 52; 56] are not accurate. The facts are substantially unchallenged. What has been hotly contested is the legal conclusion flowing from the facts.

Even though Richard had lost his job at the end of 1985 and did not find another until May, 1986 [R. 616; FJ. 3], during which time he borrowed money from his father [R. 633], it is unchallenged that Richard nonetheless:

> (1) spent $4000 on Mary for a ski vacation, including new clothes for her [R. 9; 612];
>
> (2) had a continuing relationship with Mary throughout the pregnancy, which included a ride to "dream" about their future the week before she left, following an evening out for her birthday [R. 49; 58; 315];

(3) cared deeply for Mary's older son, buying him toys, taking him on outings with and without Mary, paying his insurance premiums (as noted in PX 14, App. 6) [R. 44-47];

(4) gave Mary a maternity gown and robe for Mother's Day in May, 1986 [R. 58], and money for a new outfit for her birthday just days before she left [R. 57];

(5) continually took Mary and her son out to eat, or to his apartment where he cooked for them, or to his parents home [R. 44; 47; 647], to the point that Mary did not even consider food an expense in July, according to her Arizona counselor [R. 224];

(6) provided his own furniture to furnish Mary's apartment, in addition to the furniture his parents provided at his request [R. 14-15; 646; 767; 177];

(7) paid Mary's rent in February, the only time she told him she needed financial help [R. 13;96;642];

(8) never failed to pick up milk, baby food, diapers and such when Mary asked [R. 45];

(9) "urge[d] the natural mother to come [back] to Phoenix to have the child, live with him and give him time to sort his life out...." [Trial court's finding, FJ. ¶26]

All of this was done for Mary, her older son, and the baby after Richard knew she was pregnant and before the baby was born, and is uncontradicted in the record.[1]

During the first few months of 1986, Richard and Mary discussed all their alternatives, including marriage which they had discussed even before Mary was pregnant [R. 42]. Richard candidly admits that early in the pregnancy he favored abortion,

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[1] The trial court's findings in ¶8 implying that Richard's contributions were limited to supplying "some family furniture" and paying one month's rent are unsupported in the record and are clearly erroneous.

which Mary opposed and tried to talk Richard out of by meeting with pro-life representatives. The second meeting was a visit to a counseling center which Richard voluntarily attended [R. 12; 51].

Richard admits in late February or early March he agreed to the adoption alternative [R. 20; 637], believing Mary, as the mother, had complete control over the decision concerning her pregnancy and that he had no right to object [R. 618-619;645]. There is no evidence that Richard suggested adoption.

At the end of March, Mary wrote a "good-bye" letter to Richard's mother [App. 1] in which she emphasized that the adoption decision was hers alone [PX 15; R. 1052].

Richard responded in the letter included at App. 4:

> I respect any decisions you make but lets put the axe away. I hope you'll think about our whole situation. I really would like to see my child. I've never had a child before and it hurts me to think that he or she would grow up thinking their father was a monster. No matter what you take away from me, the child will still be part of me. I'll still love the child no matter if I ever see it. Everytime you look at that child you'll see part of me there whether you like it or not. Thats a decision you and only you can make. I do hope for the very best for you and my child.

expressing his love for the child, and indicating his belief that Mary was going to keep the child [PX 13; R. 1048], which is what she was telling Richard in March and April [R. 51-52]. Petitioners point to nothing in the record from the time of this letter to today indicating any further desire by Richard for abortion or adoption, or any lessening of his expressed love for his then-unborn child, male or female, sick or well.

Mary did not end the relationship, and the two stayed in constant contact, seeing each other practically daily until Mary left Phoenix in August [R. 21;44;48;49]. Mary's Arizona counselor testified that this relationship was "very different" from Mary's experience with her older son's father [R. 180].[2]

There is no evidence that Richard knew Mary was receiving food stamps at the end of June [R. 15;642]. The only time Mary asked Richard for financial help was in February when she was between jobs, and needed money to pay her rent [R. 13;15;44]. The only "support" Mary would accept was marriage [R. 55; FJ ¶'s 10, 24, 27, 33]

In July, Mel Pearlman, a Florida lawyer whose firm acted as intermediary and attorney for the Petitioners [PX. 6] contacted Mary [R. 387]. If she would come to Florida, her one-way airfare and living expenses would be paid from August 1, 1986, until thirty days after the baby's birth [DX 4; R. 1066].

On August 3, Mary left Arizona without telling Richard [R. 47], and told her sister in Arizona not to tell Richard where she was [R. 298]. After she arrived in Orlando, she asked Richard to send some insurance papers through her sister. With the papers, he sent a letter in which he asked Mary to let him raise the

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[2] It is easy to overlook that Richard was facing being a father to <u>two</u> children, Mary's older son and this little boy. Even after Mary left him, Richard kept pictures of the older child and continued to pay his insurance premiums. Perhaps his immaturity kept Richard from realizing he had already made the commitment to marriage and children in his daily contact with Mary and her older son.

child [PX 14; R. 1050]. This poignant letter [App. 6] pleads in part:

> ... I remember you saying that you were going to keep the child. Let me ask you this, have you ever thought of letting be raise the child. You are probably laughing but I'm serious. I could raise her probably a lot bettter than you could. I know financially she would be better off. And I would give her just as much or more love. I am serious about this but you would probably let two strangers raise our child. At least think about it.... I do hope we have a healthy baby and I hope she looks just like me.

Mary showed the letter to Pearlman's office, which kept a copy [R. 345-346], but did not tell Petitioners [R. 432].

After that Mary and Richard talked more and more about the situation. Richard continued to struggle with the marriage decision, offering to come and get Mary and her son and bring them back to Phoenix [R. 644-645], but Mary would accept nothing less than marriage from Richard [R. 27;34;645].

After coming to Orlando Mary changed her mind about adoption, and three days before the baby was born, contacted Jean Doyle about securing shelter for herself and older son [R. 704]. She did not tell the intermediary because she feared she would be forced to leave the apartment, leaving her two year old son and herself without a place to live [R. 79;485]. In August, when she had refused to sign a blanket authorization for the release of medical information, the intermediary took back the expense allowance she needed to buy groceries [R. 571], and had refused to pay for medical care for her two year old [R. 412].

Mary had vacillated on adoption throughout her pregnancy [R. 55;323][3]. Her counselor in Arizona did not think she would place the baby for adoption [R. 230]. One of the attorneys acting as intermediary thought she was changing her mind about going through with the adoption in August [R. 572-573].

She expressed the guilt she was feeling about the money the adoptive parents were paying while she was having second thoughts about the adoption to her BETA counselor [DX 13; R. 1082; App. 8]. Pearlman had told her that the adoptive parents would be spending a lot of money on her; that if she changed her mind she would destroy these people, and that he would do everything possible to keep her from changing her mind once she signed the consent [R. 392;459-460].

Even so, Mary had packed her belongings in preparation to leaving the apartment when she told her mother that she had changed her mind and was going to keep the baby [R. 80]. Her mother, who had had the initial contact with Pearlman arranging for the adoption [R. 384-387;733], became very angry and told Mary that if she kept the baby, she would do it on her own with no support from her [R. 737-738].

With that, Mary changed her mind again, asked her doctor to induce labor, and Mary and Richard's son was born on September 12, 1986 [R. 738; DX 16].

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[3] After mid-March, she did not return to the Arizona agency until May [R. 174].

The last time Mary and Richard talked before the baby was born, she told him she was going to keep the baby [R. 52; 87; 643]; he told her not to sign any papers [R. 87; 643]. Adoption of Doe, 524 So.2d 1037, 1040, n.6 (Fla. 5th DCA 1988).

After the baby was born, before she signed the consent, Mary tried to call Richard, but could not reach him because his roommate had forgotten to pay the phone bill and the phone had been disconnected [R. 88;248;650]. She also tried to contact her counselor at BETA, but she was out of town [R. 88;719]. Finally, Mary asked the hospital to contact a rabbi, but none ever responded [R. 88]. After a night spent in tears with the baby, Mary signed a consent to adoption on Sunday, September 14 and left the hospital [PX. 9; R. 973-1005].

In an angry [R. 363] call to the intermediary on September 17, Richard vowed to stop the adoption and come and get his son [R. 361-365]. Richard left Arizona and came to Orlando with baby clothes to take his son home [R. 777]. When he arrived, Richard executed an acknowledgment of paternity and signed the birth certificate as father of infant John Doe [DX. 16; R. 1141]. He sent support which Petitioners refused [Resp. to Defenses, ¶7, R. 793].

Before the baby was born, Mary told Pearlman that Richard would not sign any papers [R. 440-441;442]; she gave him Richard's name [R. 440-441]; the HRS case worker had told Pearlman's office that the father's consent should be obtained, and the prospective adoptive parents had asked about getting the

father's consent [R. 450-451;679]. Nevertheless, Pearlman made no effort to contact Richard in Arizona [R. 425].

The intermediary did not tell the prospective adoptive parents about Richard's letter, nor about Richard's angry phone call because his feeling was that Richard was an angry father who had no legal rights [R. 432].

The adoptive parents were finally told of the problems on September 22, a week after the baby had been placed with them [R. 682]. Even though they had been told that the parents' rights would not be terminated until a final judgment [R. 677], they immediately made up their minds to fight, testifying that nothing would have convinced them to return the child to his parents [R. 682].

A petition for adoption was finally filed on October 22 [R. 784].

The Honorable Cecil Brown of the Ninth Circuit granted the adoption; the Fifth District reversed, but stayed its mandate to preserve the status quo. Consequently, Richard and Mary's son remains with Petitioners under the reversed adoption judgment.

SUMMARY OF ARGUMENT

Terminating the rights of natural parents, over their objections voiced before a petition for adoption was filed, is wrong, violating the most fundamental principles of our society.

Unwed fathers who have complied with the state's requirements must be treated the same as mothers or married fathers in adoption proceedings. Imposing additional requirements or considering different factors offends federal guarantees of due

process and equal protection. Before the state can terminate a parental relationship because of abandonment, the federal constitution requires that abandonment be proven by "clear and convincing" evidence. Abandonment must be complete and can only occur after the child's birth.

The judgment of adoption excusing the refusal of consent by the natural father is contrary to the clear statutory prescriptions and unsupported by the evidence. There is no statutory warrant for "implied consent" or "equitable estoppel" excusing the statutorily required sworn written consent of the natural father. The only permissible basis for excusing a parent s consent is abandonment of the child.

Even if the parent s pre-birth state of mind were relevant to abandonment, the evidence in this case is uncontradicted that the father expressed his love for his son as early as April and that those expressions continued through his August letter stating his desire to raise the child; his angry phone call to the intermediary immediately upon learning of the attempted adoption, and his transcontinental flight to Orlando to take his son home.

The trial court's ruling in the Final Judgment, ¶46 that the court had "the inherent power, under these facts, to grant the adoption of the child (over the putative father's objection) when adoption would be in the child's best interest" is contrary to the well-established law that a trial court may <u>not</u> consider the child's best interest when deciding whether the child is adoptable.

The evidence that execution of the consent was not an act of the mother's free will is overwhelming. In addition to the normal financial and emotional stresses of an unwed pregnancy, the mother faced the added pressures of having to provide for a two year old son; an intermediary who withheld living expenses, believing she was destitute, at the first sign of "lack of cooperation," and who testified not only that he successfully "controlled" the mother, but also admitted that continued support was contingent on her signing the consent; and her own mother who, when told of Mary's decision to keep the baby, abandoned her a continent away from the child's father whom she loved and with whom she had been in continual contact. After a day of desperate, unsuccessful attempts to contact someone on her side, she signed the consent.

Even if the consent had been freely given, it was revocable until a judgment terminating parental rights was entered. Parental rights are terminated only by a judgment, not by the consent. In agency adoptions, it has been held that a natural parent has the right to revoke a consent at any time before parental rights are terminated. Denying this right to natural parents in intermediary adoptions shatters the constitutional guaranty of equal protection of the law, as well as the specifically expressed statutory intent that natural parents receive the same "safeguards, guidance, counseling, and supervision in an intermediary adoption as they receive in an agency or department adoption."

ARGUMENT

INTRODUCTION

Two fallacious premises form the bases of Petitioners' arguments throughout their brief: first, that Richard "failed to grasp the opportunity" to establish his parental rights and relationship; second, that prospective adoptive parents have "parental rights."

In this case, the Petitioners deprived the father of the opportunity to exercise his parental rights and to develop a relationship with his son. Within days of the child's birth, Petitioners refused to return the little boy to his parents, and have refused the support sent by his father. They had not contacted him in spite of knowing before birth of his desire to raise his child and in spite of being told by HRS that he should be contacted.[4] They have invoked the power of the state to end his relationship with his son. They cannot be heard to complain that the father "failed to grasp the opportunity" to establish a relationship with his son when they purposefully set out to destroy that opportunity.

This case is unique among those relied upon by Petitioners In none of the cases was there a finding that near birth the father was urging the mother to come and live with him so he could support her and the children; always the fathers urge the mother to leave the live-in arrangement.[5] In none is there a

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[4] HRS does not obtain consents in intermediary adoptions.

[5] E.g., Baby Girl Eason, 257 Ga. 292, 358 S.E.2d 459 (1987); Doe v. Attorney W, 410 So.2d 1312 (Miss. 1982).

letter from the father a month before the birth expressing his desire to raise the child, or a letter five months before the birth telling of his love and desire to see his child. In none does the father fly across the nation with baby clothes to acknowledge paternity and take his child home days after birth. In none is the placement couple aware before filing the petition that both parents object to the adoption of the child. In none but one[6] does a fit father seek custody.[7] This case will not fit the pigeonholes into which Petitioners attempt to push it.

Petitioners' second error is ignoring that prospective adoptive parents have no "parental rights" because they have neither the natural relationship nor an adoption judgment, the sole sources of those rights. Petitioners' arguments that allowing the child's father to assert his natural rights interferes with their "rights" is specious.

Throughout their brief, Petitioners discuss the bonding which exists between them and Richard and Mary's son. This bonding occurred because Petitioners chose to reject the pleas of the little boy's parents for the return of their son, even knowing that the boy's father had never consented to the adoption

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[6] In Lewis (State) v. Lutheran Social Services, 68 Wis.2d 36, 227 N.W.2d 643 (1975), the father sought custody and was apparently found fit. He had, however, continually denied paternity before the child's birth, expressed no feelings for the child, and had no contact with the mother for three or four months before the birth of the baby.

[7] Cases not seeking custody: Quilloin, infra; Lehr, infra; Steve B.D., infra. Cases seeking custody, but found unfit: Eason; Doe v. Attorney W.

and his mother had withdrawn her consent. This occurred within days of the child being placed in their home. The observation of the court in Small v. Andrews, 530 P.2d 540, 544-45 (Ore.App. 1975), approvingly cited in Adoption of Baby Girl "C", 511 So.2d 345, 357 (Fla. 2d DCA 1987) is particularly applicable in this case:[8]

> The hardships produced by a separation of the child and [the would be adoptive parents] at this time are in substantial measure the result of the [would be adoptive parents'] resistance to the natural mother's efforts to regain custody. Those hoping to become adoptive parents cannot create their best argument for keeping the child's custody by thwarting a natural parent's known wishes.

I. PARENTAL RIGHTS CANNOT BE TERMINATED BY IMPLIED CONSENT OR EQUITABLE ESTOPPEL.

A. CONSTITUTIONAL CONSIDERATIONS

The intrusion of the state in the fundamental parent-child relationship invokes the protection of the constitutional guaranties of due process and equal protection. In the Interest of R.W, 495 So.2d 133, 134 (Fla. 1986); In the Interest of J.R.C.,

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[8] See also, The Matter of Baby Girl Eason, 358 S.E.2d. at 463:

> The adopting parents have developed a relationship to the child and are presumably providing the care and maintenance parents should provide children. That circumstance might permit a best interests test to be used under other facts. But the relationship here between adopting parents and child did not take place in the absence of state participation. The adoption laws were being pursued through the courts and this accounts for the placement of the child with the adopting parents. The unwed father has a constitutionally potected interest which cannot be denied him through state action. Only the state can alter its action to prevent the developmet of a parent-child relationship with adopting parents until the unwed father's rights are resolved.... If he is fit he must prevail.

480 So.2d 198 (Fla. 5th DCA 1985); Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972); Caban v. Mohammed, 441 U.S. 380 (1979); Armstrong v. Manzo, 480 U.S. 545 (1965).

Undoubtedly in response to Stanley, Florida and many other states amended adoption statutes in the early Seventies. Florida law now requires not only a hearing for unwed fathers, but requires actual consent when the unwed father acknowledges paternity. Fla. Stat. §63.062; Guerra v. Doe, 454 So.2d 1 (Fla. 3d DCA 1985), rev. den., 462 So.2d 116 (Fla. 1985). Florida law makes no distinction between married fathers and unmarried fathers who have acknowledged paternity.

By choosing to discuss the constitutional dimensions of this case first, Petitioners have put the cart before the horse. The beginning point in the discussion of Richard's paternal rights with his son must be the trial court's unchallenged finding that Richard is a father whose consent is required by Florida law [FJ ¶47]. This immediately distinguishes the case from Quilloin v. Walcott, 434 U.S. 246 (1977) and Lehr v. Robertson, 463 U.S. 248 (1983) in neither of which had the father complied with state law.[9]

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[9] Quilloin and Lehr are also distinguishable in that the fathers delayed eleven years and two years before undertaking any action, and did not seek custody. In this case Richard acted in two days after placement, contacting the intermediary, and has always sought custody.

These federal cases settle the question that states may constitutionally impose additional criteria on unwed fathers before giving them a veto equal to other parents. That is not the issue in this case, though, for the trial court found that Richard has met the state imposed criteria to attain equal rights.

Petitioners wish this court to go one step beyond, however, and apply the facially neutral statute in a discriminatory manner by imposing upon unwed fathers conditions and limitations which the statute does not impose on mothers or married fathers.

The Florida statute does not condition the rights of mothers or married fathers to keep their child at birth upon past consideration of abortion or adoption; or expression of only happy anticipation throughout the pregnancy; or payment of prenatal expenses.

The discriminatory impact of Petitioners' position is best illustrated by reversing the argument. If an unmarried mother failed to get prenatal care or failed to pay the bills; considered abortion, and arranged for adoption, but refused to sign the consent or surrender the child, could the prospective adoptive parents <u>compel</u> the adoption because she had abandoned or neglected the child pre-birth; or gave implied consent; or is equitably estopped from revoking an oral commitment to adoption? Certainly such cruelty would not be countenanced by the courts. Is there any basis, other than his sex, to treat differently a man who

acknowledges paternity immediately, giving the child a name and obligating himself to the child's support?[10]

Imposing such additional requirements on unwed fathers because of their sex (father v. mother) or because of their marital status is precisely the invidious discrimination condemned in Stanley v. Illinois, 405 U.S. 645 (1972), involving marital status, and Caban v. Mohammed, 441 U.S. 380 (1979), involving sex-based distinctions, as violative of the equal protection guarantees of the Fourteenth Amendment of the federal constitution.

The Florida adoption statute does not make these distinctions. Once an unwed father acknowledges paternity he is a person whose consent is required, as the trial court found. The statute makes no distinction among mothers, married fathers, or unmarried fathers with respect to the extent of their veto powers or the reasons for which the court may excuse consent. Denying "acknowledged" fathers the right to exercise their veto power and have custody of their children without any statutory warrant is a denial of due process, violative of the Fourteenth Amendment.

In Lehr, the court pointed out they were only concerned with whether the state had adequately protected the father's opportunity to from a relationship with his child. 463 U.S. at 262-263. Florida provides that protection with the acknowledgement of

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[10] Acknowledgement of paternity obligates a father to support of the child, including past medical expenses, Fla. Stat. §742.031 (1987), and entitles the child to inherit from his estate, Fla. Stat. §732.108 (2)(c) (1987).

paternity, and Richard seized it, accepting "some measure of responsibility for the child's future." Id. at 262.

Florida's statute, like the one in Lehr:

> guarantees to certain people the right to veto an adoption .... The mother of an illegitimate child is always within that favored class, but only certain putatuive fathers are included. Id. at 266.

Because the trial court here found Richard within the class favored by the statute, removing the distinction between mothers and unwed fathers, the state may not subject Richard to disparate treatment by considering conduct by him which would not be considered in connection with the mother's rights. Lehr, 463 U.S. at 265-266; Caban.

In applying Lehr, Petitioners rely upon foreign decisions, based on foreign statutes, which cannot easily be translated to Florida because of the great diversity of views among the states.[11]

In Petition of Steve B.D., 112 Id. 22, 730 P.2d 942 (1986), the court rejected the unwed father's claim because in fifty-one days when he believed the child was still with the mother he made no effort to see the child; initially refused to sign a paternity affidavit; entered the dispute in his own right only after the mother lost, and never sought custody of the child for himself,

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[11] See, Lehr, 463 U.S. at 256, n. 11. See generally, Annot., 74 ALR3d 421. The Annotation identifies jurisdictions which require waiting periods before valid consent may be given; require consents to be given before judicial officers, and identifies at least eleven jurisdicition absolutely permitting withdrawal of consents, particularly in intermediary adoptions.

only for the mother. Noting that he paid nothing by way of support the court stated:

> Still, financial support in any form or amount is one means by which an unwed father can establish a significant relationship with his child. [Emphasis added.]

In this case, Richard communicated his desire for custody of the child immediately after learning of the birth and placement; executed an affidavit of paternity within days; provided rent money, furniture, food, and clothes and other gifts for Mary and her older son before the baby's birth; expressed his desire to raise the baby himself before his birth, and sent support after the baby's birth.

The decision In re Baby Girl M., 37 Cal.3d 65, 688 P.2d 918 (1984), perhaps comes closest of all the foreign decisions to approximating Florida law since it interpreted a statute very much like Florida's requiring an unwed father's consent if he has placed himself within the statutory classification. The Supreme Court of California referred to the rights of mothers and "presumed fathers"[12] as "veto powers" in connection with an adoption and reversed a judgment terminating the father's rights.

In Baby Girl Eason, 257 Ga. 292, 358 S.E.2d 459 (1987), the court reversed the trial court's ruling that it could properly consider the best interests of the child, directing the lower court to decide the father's legitimation petition (Georgia's

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[12] "Presumed father" is the statutory term distinguishing fathers who have not met the statutory requirements from those who have.

method of protecting the father's interest) only upon consideration of fitness and abandonment. On remand, the father was found unfit, and found to have abandoned the child by, among other things, attempting to sell the baby; initiating no contact whatsoever after birth and taking no steps whatever to have his name listed as father on the birth certificate. The established facts here are obviously different.

Petitioners' constitutional arguments neglect two established principles. First, in Santosky v. Kramer, 455 U.S. 745 (1982), the court held that the federal constitution requires that there must be clear and convincing evidence before severing the parent-child relationship. Florida's courts have uniformly applied this standard in determining abandonment in adoption cases.[13]

Second, the Supreme Court of the United States firmly rejected any notion that the state can terminate parental rights over the objection of the parents solely because it would be "in the best interest of the child" in Quilloin, 549 U.S. at 255:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

B. STATUTORY CONSIDERATIONS

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[13] Hinkle v. Lindsey, 424 So.2d 983, 985 (Fla. 5th DCA 1983), citing authority from each district; Adoption of J.C.E., 487 So.2d 117 (Fla. 4th DCA 1986); Solomon v. McLucas, 382 So.2d 339 (Fla. 2d DCA 1980).

Adoption was unknown at common law and is purely a creature of statute. Consequently, in determining the issue of whether a child is adoptable, the court does not have a broad discretion but is confined by the statutory requirements. As the Fifth District said in Adoption of Braithwaite, 409 So.2d 1178, 1179 (Fla. 5th DCA 1982):

> The severance of a parent-child relationship is an extreme and harsh judicial act, and it should not be done unless the trial judge is convinced that the statutory basis for this remedy has been clearly established.

The legislature has expressly declared its intent in the statute, stating in Fla. Stat. §63.022(2) (1985):

> The basic safeguards intended to be provided by this act are that:
>
> (a) The child is legally free for adoption;
>
> (b) The required persons consent to the adoption or the parent-child relationship is terminated by judgment of the court;
>
> * * *

Under prior law, no consent was required for an adoption. The sole question was whether adoption was in the best interest of the child as long as the prospective adoptive parents were fit. See, Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943) Fla. Stat. §63.131 (1971). The only statutory effect of consent under prior law was waiver of service of the petition. Fla. Stat. §63.081 (1971). The new statute specifically changed this scheme.

In this case, where the natural father has acknowledged his paternity, his consent is required for the child to be adoptable.

Fla. Stat. §63.062 (1987);[14] Final Judgment, ¶47 [App. 12]. The consent must be in open court or by affidavit, Fla. Stat. §63.082(1)(c), and may be executed only after birth. Fla. Stat. §63.082(4).

The trial court ignored these statutory mandates, concluding that the father had given "implied" consent before the birth, and was estopped to assert his parental rights [FJ ¶41-46]. The sole authority for this position is Wylie v. Botos, 416 So.2d 1253 (Fla. 4th DCA 1984).

In Wylie the court invoked "implied consent" and "equitable estoppel" to permit adoption over the record objections of the natural father who had not given a written consent.

When the unwed father in Wylie learned of the pregnancy he agreed to defer to the mother's decision, and never expressed any change of mind until after the adoption petition was filed. Wylie paid $700.00 for medical care with the understanding it would be refunded upon the adoption of the child, and did not acknowledge paternity until two months after both placement and the filing of the petition. The trial court found the father was unable to explain the import of the acknowledgement of paternity and the real opposition to the adoption was from the grandmother. 416 So.2d at 1256-1257.

The trial court's order spoke in terms of abandonment by the natural father, but the district court, doubtful of the propriety

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[14] Because the applicable sections were unchanged in 1987, the reference year is not important between 1985 and 1987.

of that finding, concluded that abandonment need not have been reached. 416 So.2d at 1256, n.3. Instead, the Fourth District said:

> The trial court concluded, in essence, that the natural father ... had initially consented to the adoption of the child.... The only complication was that the father had not executed a written consent. However, under the facts herein whereby it was established that he was fully aware of the adoption and agreed thereto, we believe he is estopped to now claim that his written consent was necessary. Id. at 1257.

This ruling appears to sanction oral, pre-birth consents, contrary to the statute, though it can be harmonized with the statute as affirmance of an adoption based on consent in open court under Fla. Stat. §63.082(1)(c) (1987).

If Wylie authorizes departure from the statute, it is wrong. The other districts uniformly require adherence to the statute, and have been unwilling to legislate new exceptions such as "otherwise callous" conduct suggested by Petitioners [IBR. 36].[15] In Adoption of M.A.H., 411 So.2d 1380, 1382 (Fla. 4th DCA 1982), the court quite correctly observed:

> Prior to 1973, the Florida Statute did not require the parent to have "abandoned" the offspring and indeed it spoke to "the best interests of the child." ... However, our no doubt well intentioned legislature has orchestrated the new statute to specifically negate the child s best interests and make the adoption without consent, subject only to abandonment.

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[15] Adoption of Braithwaite, supra; Webb v. Blancett, 473 So.2d 1376 (Fla. 5th DCA 1985); Hinkle v. Lindsey, 424 So.2d 983 (Fla. 5th DCA 1983); Nelson v. Herndon, 371 So.2d 140 (Fla. 1st DCA 1979); Solomon v. McLucas, 382 So.2d 339, 343 (Fla. 2d DCA 1980) ("[T]he grounds upon which adoption may be granted in the absence of the written consent of the natural parent whose consent is required are only those specified in that section."); Adoption of Cottrill, 388 So.2d 302 (Fla. 3d DCA 1980).

Moreover, Wylie was inappropriately applied to this case by the trial court where Richard acknowledged paternity before the petition was filed; objected to the adoption before the petition was filed, and wrote expressing his love for his child and desire to raise his child even before the child was born. Additionally, he did not know the baby was going to be placed, for in his last conversation with Mary, he told her not to sign any papers and she said she was going to keep the baby. Doe, 524 So.2d at 1040, n. 6.

For some reason the trial court here was troubled with giving the natural father seeking custody an "absolute and arbitrary veto power over an adoption...." [FJ ¶46]. How could it be otherwise? That is the whole point of the statutory change in 1973. See, Lehr; Caban; Quilloin; Anthony John P., 101 Misc.2d 918, 422 N.Y.S.2d 570 (1979).[16]

The courts of this state have recognized that there is no inherent judicial power in dealing with adoptions because adoption exists only by virtue of statute. E.g., Webb v. Blancett, 473 So.2d 1376 (Fla. 5th DCA 1985). This should be sufficient answer to Petitioners' ingenious effort to create such power by having a portion of one hearing on the 1975 amendment to the act transcribed.[17]

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[16] For a collection of cases on securing consent of parents of illegitimate children and putative fathers, see Annot., 51 ALR2D 497; 45 ALR3D 216.

[17] The discussion of judicial power in the transcript was in (Footnote Continued)

It was the 1975 amendment which added the requirement of consent from unwed fathers who acknowledge paternity. Yet, with twelve years of judicial interpretation uniformly holding that required consent may be excused only upon a finding of abandonment, the legislature has not amended the statute to add any inherent judicial power to excuse consent for "equitable" reasons, even in the 1987 amendments.

Section 63.072 of the current statute does give the court discretion in deciding whether to waive consent even if a statutory basis for waiver is clearly present. It does not give any discretion to add new grounds.

None of the Florida cases relied upon by Petitioners support their position, except Wylie. In Adoption of Mullenix, 359 So.2d 65 (Fla. 1st DCA 1978), the father had done nothing to bring him within the statutory definitions of persons required to consent. Here, the trial court found that Richard is a person whose consent is required for the adoption.

The concurring opinion of Judge Jorgenson in Guerra v. Doe, 454 So.2d 1 (Fla. 3d DCA 1984), suggesting that the statutory grounds for excusing consent "cannot be considered an exhaustive list" has never commanded a majority in any court, and has been rejected in each district.[18]

(Footnote Continued)
response to a question about practice before the amendment when the unwed father's consent was not necessary.

[18] E.g., Nelson v. Herndon, 371 So.2d 140 (Fla. 1st DCA 1979); Solomon v. McLucas, 382 So.2d 339 (Fla. 2d DCA 1980);

(Footnote Continued)

Petitioners' contention [IBR. 38] that permitting natural fathers the right to custody of their children will have horrible effects upon potential adoptive parents and children by way of extortion, harassment and confinement of the child to a "'twilight zone' of perpetual foster care" is baseless. In connection with this case, the child will return to live with his parents. In intermediary adoptions the statute guards against extortion by prohibiting payments except as specified in the statute and by criminalizing "baby selling," Fla. Stat. §63.212 (1987). If the natural parents abandon the child by rejecting custody, the child is adoptable, not consigned to foster care.

If Petitioners' interpretation of Florida adoption law were accepted, it would turn the enlightened legislation giving fathers the right to participate in choices about their children and the right to raise and nurture their children into a cruel trick, holding out the requirement of a father's consent if he complies with the statute, but then snatching away that requirement in a judicial gloss that makes the requirement wholly illusory by elevating uncounseled, pre-birth activity over purposeful efforts to comply with the law, or worse, ignoring the requirement in the name of "inherent power."

The application of such a judicial interpretation would mean that an unwed father whose child had been placed with others

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(Footnote Continued)
Adoption of Cottrill, 388 So.2d 302 (Fla. 3d DCA 1980); Adoption of M.A.H., 411 So.2d 1380 (Fla. 4th DCA 1982); Adoption of Braithwaite, 409 So.2d 1178 (Fla. 5th DCA 1982).

without his consent would be deprived of even the opportunity of establishing a relationship with his child. The action of the state in depriving the father of even this opportunity would surely be unconstitutional. See, Lehr.

Finally, the Court has specifically recognized the right of any unwed father to have the care and custody of his child to the exclusion of strangers, even relatives, in Guardianship of D.A.McW., 460 So.2d 368, 370 (Fla. 1984). The court agreed that:

> a natural parent of a child born out of wedlock should be denied custody only where it is demonstrated that the parent is disabled from exercising custody or that such custody will, in fact, be detrimental to the welfare of the child.

and added:

> To hold otherwise would permit improper governmental interference with the rights of natural parents who are found fit to have custody of and raise their children.

It is difficult to understand how the unilateral action of a mother in seeking adoption could possibly deprive the father of his natural and well-recognized rights.

II. THE EVIDENCE IN THIS CASE WAS LEGALLY INSUFFICIENT TO SUPPORT THE FINDING THAT THE FATHER ABANDONED HIS SON.

Because the natural father has not consented in this case, the child is not adoptable unless consent may be statutorily excused by Fla. Stat. §63.072. The only relevant provision of that statute is §63.072(1) - abandonment.

The Fifth District, in Hinkle v. Lindsey, 424 So.2d 983, 985 (Fla. 5th DCA 1983), reiterated the definition of "abandonment":

> "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."

In adoption cases abandonment must be proven by clear and convincing evidence,[19] and must be complete:[20]

> Neglect by the natural parents or disinterest and failure to carry out parental obligations does not justify adoption of a child by strangers over the natural parents objection. Temporary failures and derelictions of parents, while possibly justifying deprivation of custody, will not support judgment of adoption. [Emphasis added.]

In Solomon, 382 So.2d at 346, the court ruled:

> In contemplation of the law, abandonment is absolute, complete, and intentional, and must be established by clear and convincing evidence.

Not even "a high degree of indifference and a lack of interest in the welfare of the child" is sufficient to constitute abandonment. Lovell v. Mason, 347 So.2d 144 (Fla. 1st DCA 1977). The Wylie court would not even affirm a finding of abandonment in that case.

The best evidence of the strict view taken of abandonment in Florida is that there are but two adoption cases in which abandonment has been held to excuse the lack of consent by the natural parent, while there are a number of cases holding that the evidence was insufficient to support abandonment.[21]

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[19] See page 19, supra, at n. 13.

[20] Adoption of Noble, 349 So.2d 1215, 1216-1217 (Fla. 4th DCA 1977). Accord, Lewis v. Currie, 340 So.2d 126 (Fla. 1st DCA 1976); Adoption of Gossett, 277 So.2d 832 (Fla. 1st DCA 1973).

[21] The following adoption cases found insufficient evidence of abandonment to excuse lack of consent: Lovell; Hinkle;

(Footnote Continued)

In Turner v. Adoption of Turner, 352 So.2d 957 (Fla. 1st DCA 1977), the appellate court found the evidence sufficient to constitute abandonment where the non-consenting father had murdered the child's mother and had made no effort at all to contact the child since his imprisonment for life.

In Smith v. Moore, 481 So.2d 36 (Fla. 1st DCA 1985) the court found the evidence sufficient to sustain abandonment by the mother where the child had been in foster care for seven years prior to her adoption.[22]

The facts in this case are far from those of Smith and Turner. Since the birth of his son, the father has done everything possible under the circumstances, and everything required by the statute. He came to Florida from Arizona and acknowledged his paternity; he has sent support, which has been refused [Resp. to Defenses, ¶7, R. 793]. The child's whereabouts had been kept from him to preserve the anonymity of the Does. In fact, the

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(Footnote Continued)
Adoption of Noble; Adoption of Gossett; Solomon; Adoption of J.C.E.; Lewis; Nelson; Stevens v. Johnson, 427 So.2d 277 (Fla. 3d DCA 1983); Adoption of King, 373 So.2d 384 (Fla. 4th DCA 1979); Allen v. Wilson, 328 So.2d 50 (Fla. 2d DCA 1976); Adoption of Serpe, 354 So.2d 1240 (Fla. 4th DCA 1981); Adoption of Cottrill, 388 So.2d 302 (Fla. 3d DCA 1980); Adoption of J.G.R., 432 So.2d 735 (Fla. 4th DCA 1980); Durden v. Henry, 343 So.2d 1361 (Fla. 1st DCA 1977); LaFollette v. Van Weelden, 309 So.2d 197 (Fla. 1st DCA 1975).

[22] In Adoption of Layton, 196 So.2d 784 (Fla. 3d DCA 1967), the court found abandonment where the father had no contact with the child for at least four years. There was conflicting evidence. However, the case was decided before the 1973 statute, under a different standard than that applicable here, and was specifically receded from in Adoption of Cottrill, 388 So.2d 302, 305 (Fla. 3d DCA 1980).

placement of this child with the Does on September 15, 1986, made it impossible for the father to even have had an opportunity to "abandon" the child.

Petitioners and the trial court placed heavy reliance on the father's state of mind early in the emotionally charged atmosphere of an unwed pregnancy, claiming such feelings are binding forever. There is no law working such an unjust result as to shackle a prospective parent with the loss of his child because at some point he is said not to have cared, or to have been in doubt, where the evidence is uncontradicted that at and before the birth the father showed that he did care and his doubts had been resolved.

No pre-birth activity can constitute abandonment under Florida law where immediately after the birth of the child the father complies with the statute, accepting his responsibility for the child.

The statutory and case law shows a very strong policy against findings of abandonment based solely on pre-birth conduct. Because of the very nature of childbirth and the emotional changes experienced throughout the course of pregnancy, the legislature has wisely limited valid choices concerning adoption to the time after birth. This recognizes the fact that parents' feelings can change through the course of the pregnancy and birth, as those involved with counseling unwed parents testified in this case [R. 232;325]. It would be truly anomalous if express, intended consents and waivers could occur only after

birth, but implied, unintended consents and waivers could occur before birth.

Even in Wylie, the court would not say that the father's pre-birth activities and comments constituted abandonment.

The courts have made it clear that the father of an unborn child has no right to interfere in the mother's decision concerning the child prior to birth. Jones v. Smith, 278 So.2d 339 (Fla. 4th DCA 1973), cert. den., 415 U.S. 958 (1974). The Supreme Court of the United States has reached that same conclusion, even with respect to the married father. Planned Parenthood v. Danforth, 482 U.S. 52 (1976). Quite understandably, given the broad publicity of such decisions as these regarding a woman's right to control childbirth, the father believed Mary when she told him he had nothing to say about pregnancy decisions [R. 618-619;645].

In Unwed Father v. Unwed Mother, 177 Ind. App. 237, 379 N.E.2d 467 (1978), the court faced the situation where the parents discussed abortion and adoption, the mother deciding not to have an abortion, even though the father gave her the money. Later during the pregnancy the father agreed to the adoption alternative, but changed his mind a couple of months before birth. The mother left. The trial court had found estoppel against the father, largely because Danforth gives the mother control of childbirth and the mother had been "misled" by his agreement to adoption. Reversing, the appellate court ruled:

> The consent is to be executed after the birth of the child [under Indiana law]. It is obvious, then, that Father could not have consented to the adoption of the child before the chld was born.... Mother herself

> would not have been held to a written (let alone verbal) intent, made six months prior to the birth of the child, to give up for adoption. We see no reason, legal or moral, to treat Father's statement as binding. 379 N.E.2d at 470.

Because Florida, also, prohibits pre-birth agreements for adoption, Richard's pre-birth conduct cannot constitute abandonment or "consent". See also, Adoption of Nelson, 202 Kan. 663, 451 P.2d 173 (1969).

Moreover, because our statute specifically provides that the mother's failure to pay prenatal expenses or to support the child before birth does not require her to surrender the child to prospective adoptive parents who have provided that support [Fla. Stat. §63.085(1)(a)], the State may not impose those requirements on the father just because he is a man. See, Caban.

Even if Richard's pre-birth activities were relevant on the issue of abandonment, they are legally insufficient. He did not pay the medical bills or give Mary a weekly allowance. This cannot be sufficient to constitute abandonment of his son, particularly when the evidence is uncontradicted that he had to borrow $1,200.00 himself in April. True, he "squandered" $4,000.00 on a vacation trip with Mary, but the fact remains that that money was spent on Mary. The other financial and emotional contributions that Richard made to Mary and her older son are set out at page 1-2 of this brief.

Even before the child was born, Richard expressed interest in the child's welfare and future. The letter of August 18 [App. 6] states:

> Let me ask you this, have you ever thought of letting me raise the child. You are probably laughing but I m

> serious. I could raise her probably a lot better than you could. I know financially she would be better off. And I would give her just as much or more love. I am serious about this but you would probably let two strangers raise our child.

This is not the language of a father who has shown a "settled purpose to permanently forego all parental rights."

The evidence is also uncontradicted that the father's last words to the mother before the child was born were "Don't sign the papers." [R. 87;643]. And her last words to him were "I'm keeping the baby." [R. 52;87;643]. He immediately called the intermediary and said he wanted his son after learning that the child had been placed.

Nowhere in the Final Judgment does the court refer to any post-birth facts supporting a finding of abandonment. The pre-birth findings of fact relied upon for abandonment are set out principally in Paragraph 8 of the judgment. It is true that Richard did not pay the Arizona medical bill, or the Florida medical bills at the time they were incurred.[23] The remaining findings in Paragraph 8 are not supported by the evidence, as noted on page 2 of our brief.

Any support contradicts a conclusion of complete abandonment. See, Petition of Steve B.D., 112 Id. 22, 730 P.2d 942 (1986). All the support from Richard, unchallenged except for its lack of perfection, renders the Petitioners' evidence of

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[23] Ironically, Richard has since paid the Arizona bill which is one of the bills which the prospective adoptive parents refused to pay when they learned of the father's refusal to consent [R. 454].

failure to pay the medical bills and early doubts legally insufficient, particularly measured against the constitutional requirement of "clear and convincing" evidence of abandonment.

The factual findings make clear that the only "support" Mary would accept was marriage [FJ ¶'s 10,24,26,27; R. 55]. Even when Mary's sister told her to ask Richard for money, Mary refused [R. 285]. The law does not condition the father's natural rights on marriage to the mother.

Finally, the initial determination of abandonment was not made by the court, but by the intermediary. According to the intermediary, they had a "valid consent and an abandoned father" [R. 430]; an angry father who "had no legal rights and has no legal rights" [R. 432] to his son.

Even though the father's name, city, and his employer were known after August 18, no additional inquiries were made of Mary, [R. 444-445] nor was there any effort to contact the father [R. 425]; even after the HRS case worker said the father's consent should be obtained [R. 450].

It is evident that the intermediary had no intention of notifying Richard of the adoption proceedings. In Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208, 209 (1943), the Court said of not notifying the father "who could have been located by diligent search and inquiry":

> Such procedure would be despotic in the extreme and contrary to the plainest principles of morality and justice.

The trial court adopted the intermediary's conclusion as a finding of fact [FJ ¶30], in spite of not one witness's testimony

that after March they ever heard the father tell them he did not care about his son,[24] and the only three who did talk to the father - his roommate, mother, and Kutner - all said he was against the adoption [R. 258;773;361].

No stretch of the record supports Petitioners' claim that Richard "'walk[ed] away' emotionally and financially" [IBR. 48] from the situation here. To the contrary, the uncontradicted testimony is that Richard and Mary continued their relationship throughout her pregnancy, even after she left Arizona.

As noted earlier, Richard's actions here are substantially different from those of the fathers in each case relied upon by Petitioners.

The court in Wylie would not affirm a finding of abandonment on the facts there.

In Doe v. Attorney W., 410 So.2d 1312 (1982), the father's rights were terminated under a Mississippi law permitting termination of parental rights if the parents are unfit. The court found the father, "a married man ... living in an open, adulterous relationship with the natural mother, a teen-aged girl," morally unfit. Additionally, the father had demanded that his name not be used and had ceased his relationship with the mother, asking her to leave the apartment. A month before the birth he

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[24] The trial court overruled the hearsay and relevancy objections made at trial to the testimony of third parties concerning Richard's state of mind based upon statements to them by Mary and permitted a standing objection [R. 121-124]. None of Mary's doctors or counselors, nor the intermediary, nor even Mary's sister or mother, talked with Richard about his feelings.

was contacted by the attorney handling the adoption and told the attorney he would consent. The father objected to adoption only after he was again contacted by the attorney. By contrast, and among all the other facts, it was Richard who contacted the attorney in this case to object to the adoption, the attorney never having attempted to contact Richard.

In Lewis (State) v. Lutheran Social Services, 68 Wis.2d 36, 227 N.W.2d 643 (1975) the father contacted the doctor to make sure his name could not be listed on the birth certificate and repeatedly denied paternity. The parents' relationship ended six months before the child's birth.

This decision did look solely to the father's pre-birth conduct in finding abandonment. However, it was decided before Santosky, constitutionally requiring clear and convincing evidence to terminate parental rights; before Caban, Quilloin, and Lehr, requiring equal treatment of mothers and fathers given veto power over adoptions. On its facts, Lewis is easily distinguishable from our case where Richard never denied paternity, went to extraordinary lengths to have his name listed on the birth certificate, and has had a continuous relationship with Mary.

The "conception to majority continuum" position of Baby Girl Eason is contrary to Petitioners' arguments focusing on specific pre-birth acts in isolation, to the exclusion of other pre-birth and post-birth conduct by Richard. The facts of Eason are discussed previously.

Richard's conduct was not perfect. Fortunately, the law does not require perfect conduct from parents before or after

birth for us to keep our children. We have not yet seen governmental forms inquiring whether parents at all times before birth gave full emotional and financial support to each other and at all times wanted the new baby as a prerequisite to taking our sons and daughters home.

Perfect conduct is not the issue. The issue is whether Richard's proven conduct justifies severing forever his ties with his son.

The decision in Roy v. Holmes, 111 So.2d 468 (Fla. 2d DCA 1959) gives substantial guidance as to what facts do not constitute clear and convincing evidence of abandonment in adoption situations. There, the parents placed their ten-month old child with an unrelated couple for two weeks, which turned into four years. During that time the parents agreed to support the child, but did not; the father was then ordered to support the child, but did not comply, though able. In reversing the adoption, the court said:

> Parents are by no means required to face strangers to their blood on equal terms in contention for the parental rights to their children.... [W]e think that the rule quoted from the Torres case, supra [Torres v. Van Eepoel, 98 So.2d 735 (Fla. 1957)], means that except in cases of clear, convincing and compelling reasons to the contrary the child's welfare is presumed to be best served by care and custody in the natural family relation by his natural parents, and that transitory failures and derelictions of the parents might justify temporary deprivation of custody by appropriate proceedings but seldom the permanent deprivation of parental rights with the finality of an adoption decree.
>
> * * * *
>
> Our study of the cases ... and the evidence in this case leads us to the conclusion that the respondents [natural parents] have been guilty of blameworthy

neglect, indifference and irresponsibility for their child's welfare, but have never permanently abandoned their parental rights to the extent that they have lost the protection of the law against their permanent deprivation by the adoption here sought over their objection. Their indifference to the child's financial support is certainly not to be commended, constitutes a gross imposition on the good offers of the petitioners and might well be the basis of a legal obligation for reimbursement. Nevertheless, "judicial impatience with the vagaries of parents" must not allow transitory derelictions to work a permanent forfeiture of the parental right and status. Id. at 471.

III. CONSIDERATION OF THE BEST INTEREST OF THE CHILD IN CONNECTION WITH CONSIDERATION OF THE CHILD'S ADOPTABILITY WAS ERROR.

In Guardianship of D.A.McW., 460 So.2d 368 (Fla. 1984) the Court held that in custody disputes between natural parents and others, the best interest of the child standard is inappropriate and the primary consideration must be the right of the natural parents to enjoy the custody, fellowship, and companionship of their offspring. Accord, Guardianship of Wilkes, 501 So.2d 704 (Fla. 2d DCA 1987); Johnson v. Richardson, 434 So.2d 972 (Fla. 5th DCA 1983).[25] The districts are all in accord.

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[25] Nelson v. Herndon, 371 So.2d 140 (Fla. 1st DCA 1979) (Adoption reversed where no showing of abandonment); Solomon v. McLucas, 382 So.2d 339 (Fla. 2d DCA 1980 (Adoption reversed. "[S]ince the passage of Section 63.072, Florida Statutes (1977), effective October 1, 1973, the grounds upon which adoption may be granted in the absence of the written consent of a natural parent whose consent is required are only those specified in that section. The best interests of the child is not one of them." Id. at 343); Stevens v. Johnson, 427 So.2d 277 (Fla. 3d DCA 1983) (Judgment denying adoption over objection of father of illegitimate child affirmed. "On these facts the best interest of the child doctrine will not operate to terminate the paramount custody rights of the natural parent."); Adoption of M.A.H., 411 So.2d 1380, 1382 (Fla. 4th DCA 1982); Hinkle v. Lindsey, 424 So.2d 983, 985 (Fla. 5th DCA 1983) ("The trial

(Footnote Continued)

Despite these precedents and in spite of the trial court's disclaimer, it is obvious that the trial court decided this case with a bias for maintaining the status quo instead of the bias for retaining the family relationship which the constitution, statute, and decisions require [FJ ¶46; 51].[26] The Fifth District appropriately held this to be error. 524 So. 2d at 1041.

The initial question, then, is not whether adoption is in the child's best interest, but whether the child is adoptable. Though this sounds callous, it is a better approach to the difficult problems of contested adoptions.

Petitioners ask the Court to repeal the existing adoption law and replace it with the one in effect before 1973 which looked fundamentally to the "best interest of the child" and did not require parental consent. Even if such a change were prudent, it would be beyond the power of the Court.

The "best interest of the child" approach is not a better alternative. See, Baby Girl "C", 511 So.2d at 357 -359. In an area of fundamental rights, it provides no standards. It means all things to all people. The tendency is to apply intuition deciding the child would be "better" with one set of parents, and

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(Footnote Continued)
court cannot decide the case on the child's best interest unless the evidence first supports a finding of abandonment by the non-consenting natural parent." Adoption reversed.)

[26] The trial court was obviously strongly influenced by the psychologist's testimony [FJ ¶51 (second paragraph)]. That testimony, though, was improperly received over a relevancy objection [R. 514-515]. Adoption of Baby Girl "C", 511 So.2d at 357.

then to express this intuitive feeling in terms of the legal standard. Lewis v. Lutheran Social Services, 59 Wis.2d 1, 207 N.W.2d 826 (1973).

The "best interest" rule makes "vested rights" arguments, such as Petitioners', inevitable. As recognized in this case, and surely in all these cases, moving the child even once is a traumatic experience. The lower courts here have consistently ruled to maintain the status quo, with the effect that the ultimate decision of this case will bring only one move, and not a ping-pong round. That goal may even have influenced the trial judge to grant the adoption, the best way to prevent multiple moves should the judgment be reversed.

Because the trauma of a change to the child is well-recognized and exists in every case, in every case it would be detrimental in some degree to move the child. Accordingly, in every case it would be "in the child's best interest" to remain with the prospective adoptive parents, no matter what. The outcome of any hearing on parental objections would be a foregone conclusion, giving the natural parents no meaningful opportunity to be heard as required by the consitution. Armstrong v. Manzo, 380 U.S. 545 (1965). The express intent of the legislature and the provisions requiring consent would all be vitiated. Delay would be the order of the day.

Anticipating such harsh, unjust results, the court in Quilloin, 434 U.S. at 255, proclaimed:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of

unfitness and for the sole reason that to do so was thought to be in the children's best interest."

In Baby Girl "C", 511 So.2d at 357, the Second District quoted with approval Small v. Andrews, 530 P.2d 540, 544-45 (Ore. App. 1975):

> Where as here, a natural mother not represented by legal counsel at the time consent is given attempts to withdraw that consent within a few weeks and thereafter takes reasonable steps available to regain the custody of her child, neither so-called "vested rights" nor superior economic or social position of the proposed adoptive parents will serve to deprive that withdrawal of legal effect.
>
> The hardships produced by a separation of the child and [the would-be adoptive parents] at this time are in substantial measure the result of the petitioners resistance to the natural mother s efforts to regain custody. Those hoping to become adoptive parents cannot create their best argument for keeping a child s custody by thwarting a natural parent s known wishes.

On September 22, Petitioners knew that the rights of the natural parents would not be terminated until a final judgment [R. 677]. Even before the birth they had specifically discussed with the intermediary obtaining a consent from the natural father [R. 679].

In intermediary adoptions placement alone creates no legal rights to the child for the adoptive parents. They are not his parents; they are not even his legal guardians. In agency adoptions, by contrast, the agency does become the legal guardian of the person of the child. Fla. Stat. §63.052 (1987).

The 1987 amendment of the adoption statute did not change the conditions for adoption. The addition of §63.022(2)(l) gave specific authority for such orders as that of the Fifth District in this case requiring the circuit court to consider visitation

for the natural parents. With that new authority, trial courts need no longer enter judgments of adoption in order to prevent multiple changes in custody. They can deny adoption, but provide for custody pending a final resolution. Before the change, the only clear authority for courts to take custody from natural parents was under Chapter 39.[27]

There is no question but that contested adoption proceedings are extremely difficult, and that the impact on everyone involved can be devastating. But, the comments by Judge Johnson writing for the court in LaFollette v. Van Weelden, 309 So.2d 197, 198 (Fla. 1st DCA 1975) are very appropriate:

> [W]e do not believe that the trial court, nor is this Court endowed by divine power to see into the minds of the parents, nor in the future of the child.

There was no finding or even suggestion by the trial court that Richard and Mary are unfit parents.[28] Indeed, that is not even an issue in this case, although Petitioners explored the

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[27] Fla. Stat. §63.142(3)(a) did, and does, provide that if the adoption petition is dismissed, the court "shall" determine the person to have custody. The section, though, does not provide clear authority for the court to deny custody to natural parents who have successfully challenged an adoption proceeding, absent further proceedings under Chapter 39. See, Guardianship of D.A.McW.

[28] We urge the Court to read the record references to the times Richard has "physically struck" Mary [IBR. 13]. One involved an incident in which Richard unintentionally [R. 779] "hit" Mary on the side of the face when he pulled his arm away from her grasp [R. 131-133; 778-779]. In the other incident, Richard pulled a towel off Mary's head [R. 289].

lives of Richard and Mary most thoroughly.[29] See, Adoption of Baby Girl "C", 511 So.2d at 346.

IV. THE CONSENT BY THE MOTHER WAS NOT FREE FROM EXTERNAL PRESSURE AND WAS REVOCABLE.

The decision that the mother's consent was not revocable is wrong for three reasons. First, it is based upon an improper concept of duress. Second, it is based on an improper and unconstitutional standard of proof. Third, it is not supported by the evidence.

The Court may consider the correctness of the Fifth District's decision concerning consents, for upon review of certified questions the Court is not limited to the question presented. The Court obtains jurisdiction of the entire case and is free to consider all issues properly preserved for review. E.g., Lawson v. State, 231 So.2d 205 (Fla. 1970).

The Fifth District affirmed the trial court's conclusion that there was no "legal duress" upon the mother. 524 So.2d at 1041. This conflicts with Adoption of Baby Girl "C", 511 So.2d at 352-356, rejecting the standard of "legal duress" applied to contractual disputes as the appropriate standard to be applied to consents in adoptions. The decision in Baby Girl "C" is the most

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[29] Indeed, the psychological history and profiles of Petitioners [R. 531-544] showed that they differd hardly at all from Richard and Mary in their personalities and relationship, including a separation in the first year of their marriage when they were the same age as Richard and Mary. This obviously does not make them bad people or unfit parents.

thorough discussion of the withdrawal of consents in contested adoption proceedings in Florida.

The Second District rejected the argument adopted by the trial court here that "duress justifying a revocation of an adoption consent could not result from ... only internal, subjective pressure on the mother...." Id. at 347-348. The prospective adoptive parents in that case, as here, contended that "a deal is a deal." Id. at 352. The Second District refused to adopt that approach to the surrender of a child, observing:

> Why should not a single parent in circumstances like those of the natural mother, who was surely ... subjected to great pressure ... be entitled to revoke her consent a short time later ...? * * * Why, if a person agreeing in writing to purchase encyclopedias from a door to door salesman is entitled to cancel that agreement three days later ... should not a natural mother be entitled to cancel one week later her consent to the permanent loss to her of the child to whom she gave birth?

The crucial question is, "[W]as the natural mother's consent under the circumstances of this case free from externally applied pressure?"

In our case, it clearly was not. Not only had the intermediary withheld needed living expenses from the mother previously, but after learning of Mary's decision to keep the baby, her own mother abandoned her. Moreover, upon learning of Mary's desire for the return of her son within days of obtaining the consent, the intermediary acted exactly as Mary had feared if she told him of her desire to keep the baby before birth: he stopped all financial payments, except those his firm guaranteed [R. 454-455], and told her and her two year old to be out of the

apartment within 24 hours [HRS Report, R. 842, p.3], in order to "mitigate the damages" [R. 454] to his clients!

Concerned for the welfare of her two year old son who was living with her, Mary signed the consent after vain efforts to contact the baby's father, her BETA counselor and a rabbi.

The guilt that she felt about her desire to keep this baby is well documented before the baby's birth in the notes of the BETA counselor. The guilt was undoubtedly intensified by the intermediary in the very first phone contact when he grilled Mary, extracting promises that, no matter what, she would go through with the adoption [R. 392-395], and emphasizing the amount of money the prospective adoptive parents would be spending on her[30] and how she would "destroy" their lives if she changed her mind before signing the consent [R. 460].

Before signing the consent, Mary had been up all night crying with her son [Hospital Records, DX 15, R. 1125]. One of the attorneys who took the consent to the hospital testified he did not ask the nurse how Mary was [R. 375]. He described Mary's wiping away of tears as "patting her face" with a rag [R. 350]. The other attorney admitted that the nurse told him before the consent was taken that Mary had been upset, crying the night before, and crying "from the birth" [R. 579-580].

The Fifth District affirmed, though the trial court required that the evidence of duress be "clear and convincing" [FJ ¶39].

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[30] They deposited $15,000 with the intermediary [R. 400].

That standard is improper and unconstitutional. The statute does not prescribe a standard of proof. This standard likely comes from the decision in Grabovetz v. Sachs, 262 So.2d 703, 704 (Fla. 3d DCA 1972) where the court said:

> In order to revoke a consent to an adoption it must be clearly shown that the consent was made under duress or undue influence.

This decision was approved in Adoption of Cox, 327 So.2d 776 (Fla. 1976).

In spite of the date of decision of Cox, both these cases were decided under the prior adoption statute that did not require the consent of the parents if the adoption was otherwise in the best interest of the child. Cox, at n.4. Consequently, the parent's consent was not required in either case, accounting for the Court's statement in Cox that the adoption's being in the best interest of the child prevailed over the mother's recantation of consent.

They were also decided when it was generally considered that duress and undue influence, like fraud, had to be proven by "clear and convincing" evidence. See, 11 Fla. Jur.2d Contracts §§45; 49. The Court has abandoned any notion that this is the appropriate burden of proof for fraud in either law or equity. Watson Realty Corp. v. Quinn, 452 So.2d 568 (Fla. 1984); Wieczoreck v. H&H Builders, Inc., 475 So.2d 227 (Fla. 1985). Having abandoned this standard for fraud, it can no longer be the standard of proof for duress and undue influence, particularly in adoption cases.

Moreover, only in 1982 was it held in Santosky v. Kramer, 455 U.S. 745 (1982) that the federal constitution requires clear and convincing evidence before severing the parent-child relationship. Requiring a natural parent to present clear and convincing evidence in order to keep her child impermissibly reverses the standard of proof, contrary to the constitutional requirements.

Parents asserting duress and undue influence in recanting a consent must present some evidence on point. But elevating that burden to the "clear and convincing" standard is unwarranted and unacceptable in light of the constitutional protections of the natural family relationship emphasized in Santosky.

Finally, under any standard, the evidence in this case demonstrates that the mother's signing of the consent was not "free from externally applied pressure." A continent away from the baby's father, now her husband; "controlled" [R. 408; 468] by the intermediary; feeling guilty, and finally abandoned by her own mother for choosing to keep her son, Mary signed.

V. DENYING NATURAL PARENTS THE RIGHT TO WITHDRAW A CONSENT TO ADOPTION BEFORE JUDGMENT IS AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION AND DUE PROCESS.

The provisions of §63.082(5) purport to make consents irrevocable, except upon a showing of fraud or duress. Under Chapter 63, the consent purports to waive not only parental rights, but also the right to notice of hearing. §63.122(4). The statute does not require that the parents be informed that they have a constitutional right to a hearing, and the form does not disclose that right [PX 7]. There is no judicial supervision

of the waiver of constitutional rights. Even though the statute provides for a challenge to the consent for fraud or duress, the parent is at the mercy of the private parties informing the court of the challenge to the consent because the statute provides that no notice need be given of the hearing to a parent having executed a consent.

Compared with the elaborate judicial inquiry necessary before accepting a plea of guilty to even the most minor criminal offense, the procedures for informing natural parents of their rights and insuring a knowing, voluntary waiver of those rights in intermediary adoptions is absolutely shoddy.

The right to a meaningful hearing, with an opportunity to affect the judgment, is underscored by §63.172 which provides that the legal relationship between the child and his natural parents is terminated only by a judgment of adoption, not by signing a consent. If parents may not exercise their parental rights before judgment because of uncounseled or inadvertent waiver of this most fundamental right, the hearing is meaningless.

The pronouncement in In re Cox, 327 So.2d at 777-778 that, "In the absence of fraud or duress a consent freely and voluntarily given is irrevocable" and the incorporation of that maxim in §63.082(5) is in direct conflict with §63.172. Parental rights either end with the consent or continue until judicially terminated by an adoption judgment. Because parental rights are not terminated until judgment, and because prospective adoptive parents must acknowledge that fact, §63.085(1)(c) & (2), the

right of the natural parent to rescind a consent must be unconditional until a judgment is entered.

The Fifth District has held that in agency adoptions "natural parents have the unfettered right to withdraw their consent until their parental rights are terminated." In the Interest of I.B.J., 497 So.2d 1265 (Fla. 5th DCA 1986), rev. den., 504 So.2d 766 (Fla. 1987).

Recognizing the ability of parents to exercise their parental rights until judicially terminated in agency adoptions, but denying them that right in intermediary adoptions, is a denial of equal protection and due process guaranteed by the Fourteenth Amendment of the U.S. Constitution.

In I.B.J. the Fifth District correctly noted, "Agency adoptions differ from intermediary or private adoptions." That is precisely the problem; the state treats similarly situated natural parents differently, depending solely on whether the adoption is through an agency or an intermediary, even though the result of both proceedings is termination of parental rights by the state.

That difference is also directly contrary to the express legislative intent in §63.022(2):

> The basic safeguards intended to be provided by this act are that:
>
> * * *
>
> (k) The natural parent or parents, the adoptive parent or parents, and the child shall receive the same or similar safeguards, guidance, counseling, and supervision in an intermediary adoption as they receive in an agency or department adoption.

The differences between agency and intermediary adoptions are substantial. Agency adoptions basically follow a two-step

process under Chapters 39 and 63, with substantial judicial supervision. First, in agency adoptions, the natural parents surrender custody of the child to the agency. Fla. Stat. §39.464 (1987).

After surrendering custody in agency adoptions, a petition for termination of parental rights is filed. After adjudication, the court commits the child to the agency for placement. The natural parents are still entitled to notice, unless the judge, not the agency, determines that notice may be waived. §39.462(1)(c) (1987).

In agency adoptions, the natural parents have a meaningful opportunity to be heard and to exercise their parental rights until judicially terminated. Because §63.082(5) purports to deny parents those rights, and because it applies only to intermediary adoptions as held in In the Interest of I.B.J., Fla. Stat. §63.082(5) is unconstitutional.

The legislature has even tried to prevent situations like this by forbidding placement of the child in the home without court order until HRS has determined that consents have been given on an informed and voluntary basis which can only be done sometime after the birth under the statute. Fla. Stat. §63.092 (1985).

However, as the case worker testified, there are "loopholes" [R. 492]. The problem is that the statute also requires the preliminary study to be completed within 30 days of notification of the intended placement. Fla. Stat. §63.092(2) (1985). As long as HRS is notified more than 30 days before the child's

birth, the study must be completed and the child may be placed, **even though it is impossible for HRS to include information on the consents which the statute mandates**.

Natural parents are even treated differently from prospective adoptive parents. Here, for instance, Petitioners testified that the ninety day statutory period was to give them the chance to revoke their "consent" to the adoption if they decided they didn't want to be parents after all [R. 686].

The disparate treatment provided natural parents with respect to withdrawal of consents in intermediary and agency adoptions bears no rational relationship to any legitimate state interest, particularly in light of the avowed legislative intent that treatment under either type of adoption is to be the same.

Permitting withdrawal of a consent does not inhibit adoptions. Georgia, for example, allows consents to be withdrawn within 10 days. Ga. Code §19-8-4(b). See generally, Annot., 74 A.L.R.3d 421. The Annotation identifies eleven jurisdictions as absolutely permitting withdrawal of consents, particularly in intermediary adoptions and prior to court action. There is no reason to believe that consents, if freely given, will be routinely withdrawn.

Other jurisdictions which do not absolutely permit withdrawal of consents balance the finality of consents with stringent requirements for obtaining the consents, either by imposing

statutory waiting periods[31] or requiring that the consent be given before a judicial officer.[32]

Because it neither regulates the timing of consents nor provides for judicial intervention, while at the same time purporting to make consents irrevocable renunciations of parental rights, Florida may well have the harshest adoption statute in the nation.

CONCLUSION

Because the father has not consented to this adoption; because no excuse for his lack of consent is available as a matter of law; because the mother has the constitutional right to revoke her consent for any reason at any time before judgment, and because the mother's consent was not freely given, the child is not adoptable.

The decision of the Fifth District reversing the judgment of adoption should be affirmed and the case remanded with instructions to the Fifth District to issue its mandate immediately,

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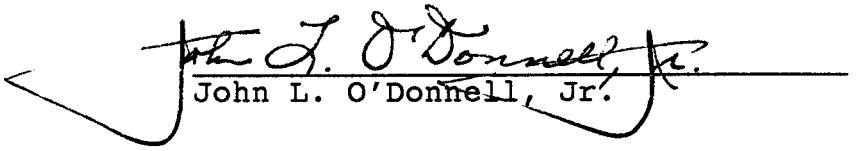
[31] The decision in Acedo v. State Department of Public Welfare, 513 P.2d 1350 (Ariz. Ap. 1973) points out that under Arizona law, for instance, consents given less than 72 hours after the child's birth are invalid. By contrast, the consent in this case was taken approximately 40 hours after the birth.

[32] See, e.g., Petition of Steve B.D., 112 Id. 22 730 P. 2d 942 (1986); Petition of Gonzales, 330 Mich. 35, 46 N.W.2d 453 (1951), noting the statutory requirement that a probate judge explain to an unwed mother the effect of the release of her child. See generally, Annot. 74 A.L.R.3d 421.

ordering the circuit court to dismiss the petition for adoption and immediately to restore custody of the child to his parents.

Respectfully submitted,



John L. O'Donnell, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondents has been furnished by mail to CHANDLER R. MULLER, ESQ., Muller, Kirkconnell & Lindsay, P.A., 1150 Louisiana Avenue, Suite 1, Winter Park, FL 32790; MS. JANICE YAHNKE, HRS, 941 West Morse Boulevard, Winter Park, FL 32789; ANTHONY B. MARCHESE, ESQ., Westshore Place, 4350 West Cypress, Suite 431, Tampa, FL 33607; CYNTHIA L. GREENE, Frumkes and Greene, P.A., 100 North Biscayne Blvd., Miami, FL 33132; NANCY RAINEY PALMER, 5200 S. Hwy 17-92, Casselberry, FL 32707; MARY ELAINE DUGGAR, 1300 Thomaswood Drive, Tallahassee, FL 32301 and CYNTHIA SWANSON, 515 N. Main St., Suite 200, Gainesville, FL 32601, this 5th day of August, 1988.

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