IN THE SUPREME COURT OF FLORIDA

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

CASE NUMBER 72,593

BOB DOE and JANE DOE,

Petitioners,

vs.

RICHARD ROE and MARY ROE,

Respondents.

_____/

PETITIONERS' BRIEF ON THE MERITS

CHANDLER R. MULLER, of
MULLER, KIRKCONNELL, LINDSEY
AND SNURE, P.A.
1150 Louisiana Avenue, Suite 1
Post Office Box 2728
Winter Park, Florida 32790
Telephone: (407) 645-3000

Attorneys for the Petitioners
BOB DOE and JANE DOE

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This appeal concerns the adoption of a young boy nearly two years of age. The trial court's order granting the child's adoption by Petitioners was invalidated by the Fifth District in an Opinion which certified a question of great public importance to this Court. This Court accepted discretionary review and has jurisdiction pursuant to Fla.R.App.P. 9.030(2)(v), and Art. V, §3(b)(4), Fla. Const. (1968).

Richard and Mary met in the summer of 1985 and sexual intimacy soon followed with Mary using birth control pills as the method of contraception (R. 4, 310). However, the parties did not live together. At the time they met, Mary was working in a bank and struggling to single-handedly support and raise a son who was less than a year old (R. 4, 17). She was approximately twenty-four years of age with an educational background which included a B.S. Degree in Political Science from the University of South Florida (R. 22). Richard was approximately the same age with an educational background which included some college (R. 22, 604-605). Neither Mary nor Richard had been previously married.

Four or five months into the relationship, i.e., late December or early January, Mary discovered she was pregnant as a consequence of failing to obtain and use any birth control pills under her renewed prescription (R. 7, 310). She informed Richard of the fact of pregnancy the day before they were scheduled to leave on a January ski holiday at Jackson Hole, Wyoming (R. 8, 611). Although Richard would later blame and berate her for the preg-

nancy, his initial reaction was to suggest that the matter not be discussed until after the ski trip (R. 10, 290, 308-309).

Richard picked up the tab for the Jackson Hole trip inasmuch as his job as a salesman of solar equipment had been very lucrative up to and including the month of December, 1985 (R. 9, 607). His trial testimony was that in the nine months of his employment in the solar industry, he had averaged One Thousand Three Hundred Dollars ($1,300.00) a week in commissions (R. 606). In December alone, his gross income from sales was Ten Thousand Dollars ($10,000.00) (R. 607). Knowing that his job would be adversely affected after December, 1985 by the termination of federal tax credits; and knowing of Mary's pregnancy, he, nevertheless, expended Four Thousand Dollars ($4,000.00) on this ski vacation (R. 9, 607-608, 610).

Upon return, Richard began urging Mary to obtain an abortion because he was not ready to commit to marriage, felt financial pressure, and was upset by the whole idea of the pregnancy (R 10, 631-632). Mary repeatedly told Richard that while she would not abort the child, she could not emotionally or economically raise two children as a single, unwed mother (R. 17, 18). She enlisted the help of third parties to counsel Richard on abortion on two occasions, but he resented and resisted these efforts (R. 11-13, 114, 284).

On February 27, 1986, Mary went to the Jewish Social Services in Phoenix to explore adoption (R. 18, 168). There, she spoke to a counselor named Joy Bagatell of the pressure she was

still receiving from Richard to abort the child (R. 168, 169). She was to continue meeting periodically with Joy Bagatell through July 14, 1986 (R. 223).

Because Mary remained adamant in her refusal to abort the child, Richard finally agreed to the adoption alternative at some point in March of 1986 (R. 20-21, 38, 171, 613, 630, 637). Also in March, Mary wrote a letter to Richard's mother explaining why she would not abort the child and why it was necessary to give the child up for adoption (R. 16). Richard and his mother discussed this letter (R. 661). For as long as five months, Richard continued to agree to Mary's plans for adoptive placement. However, at some point during July, he indicated he would not cooperate since it was Mary's intent that the adoptive family share her Jewish faith (R. 20-21, 37-38, 56, 630, 637).

In terms of Mary's finances during the pregnancy, the record shows that she lost her job at a bank on January 10, 1986 (R. 641). She was out of work approximately three weeks before finding other employment and Richard paid her February, 1986 rent upon her request (R. 640-642). By mid-April, Mary was four months pregnant and again out of work (R. 43). She began receiving Five Hundred Dollars ($500.00) per month in unemployment monies and supplemented that with what she could earn from babysitting and with food stamps (R. 641, 642). Her babysitting job ran out in July when she was about eight months pregnant (R. 287). Her basic monthly living expenses were running in excess of One Thousand Dollars ($1,000.00), not including prenatal expenses (R. 224).

Mary's economic position deteriorated as the pregnancy continued (R. 182, 186). This is so, notwithstanding that Richard and his family undoubtedly had loaned her some furniture items months earlier, and, more recently, Richard had paid February's rent and bought her some "special occasion" gifts. Richard continued to see Mary regularly. Sometimes he would simply show up at her apartment, after drinking, and wake her up for sex (R. 111-112). Despite Richard's pursuit of a "relationship" with Mary, and his frequent contact with her, no meaningful support of a repetitive or continual nature came forth to help satisfy basic needs of Mary and her unborn child, such as prenatal medical expenses, food, rent, etc., during the balance of the pregnancy (R. 14, 15, 29, 621). It was Richard's assumption the child being carried by Mary was a girl (R. 39). Any assistance efforts by others to provide groceries or other forms of aid would make Richard angry (R. 292). This lack of meaningful emotional or financial support was a grim reality for Mary, her son, and her unborn child, even after Richard began working again in May, i.e., her fifth month of pregnancy (R. 621). At trial, Richard admitted that he had made a conscious, deliberate decision <u>not</u> to provide support by the following testimony:

> Q. Had you chosen not to marry her and had you chosen not to raise this child that you claimed that you wanted to do on your own, she would have been stuck with a baby, wouldn't she?
>
> A. Yes, she would have.
>
> Q. Not just the baby, but two babies?
>
> A. Yes, sir.

Q. And you would be free as a bird like you were before, isn't that true?

A. If I made that decision, yes.

Q. But you didn't get on a plane and come down here at any point prior to the birth of the child and start supporting her, did you?

A. That's correct.

Q. Did you bother picking up a telephone and dialing 1-813-555-1212, which is Information for Tampa, Florida and ask for the listing of [redacted], Real Estate Broker? [[redacted] is Mary's mother]

A. I felt she wouldn't talk to me. No, I didn't.

Q. Again, what we are talking about is you went through a thinking process, came to a conclusion and then did not act, isn't that true?

A. That's correct.

Q. Just like you went through a thinking decision, came to a conclusion and did not act financially, isn't that true, as far as sending her support?

A. That is true.

Q. And also as far as sending medical expenses?

A. That is true.

(R. 623, 624) (emphasis added).

Richard made no attempt to utilize either his own financial resources (which included at least Nine Thousand Dollars ($9,000.00) in savings prior to the ski trip), or the available resources of his family to provide for the needs of his unborn child or the needs of the woman carrying his child (R. 607-608, 615-616, 640-641). His best friend, [redacted] (who was also his roommate from December of 1985 until November of 1986)

testified that there was no change in Richard's lifestyle brought on by his being in between the job of selling solar equipment and the insurance sales work he began in May, 1986 (R. 247).

In July of 1986, Mary was talking by phone with her mother in Florida and began communicating the scope of her financial predicament and frustration, as well as her desire to adopt the child out (R. 733). With Mary's permission, [redacted] contacted a local Tampa rabbi and before long, Bob and Jane Doe came to be notified of Mary's existence and situation (R. 670, 733). Seeking to preserve their anonymity, the Does asked attorney Mel Pearlman to pursue the Tampa connection on their behalf (R. 384, 670-671).

Bob and Jane Doe, the prospective adoptive parents, are a middle-class couple living in the Central Florida area. They have been married since 1975, are between the ages of thirty-five and forty, and have tried to conceive a child without success.

The first significant information attorney Pearlman received came from a phone conversation he had with a person who identified herself as a "friend" of the natural mother (R. 385). Because this "friend" knew so much about the natural mother's situation, Pearlman suspected a closer relationship than as represented (R. 386). When questioned on this, the "friend" then admitted she was Mary's mother (R. 386). [redacted] expressed that her daughter was pregnant, destitute, and had been abandoned by the putative father. Her daughter desired to place the child with a middle-class couple who shared her faith. She was also

interested in coming to Florida (R. 385, 391). Mrs. [redacted] then communicated Pearlman's number to Mary.

On Saturday, July 19, 1986, Mary called Pearlman at his home and they spoke for approximately ninety minutes (R. 387-388). She told him the putative father "wanted to have nothing to do with her, the pregnancy or the baby" (R. 390). He had not provided support during the pregnancy and she was financially destitute without the means to pay the upcoming rent (R. 389-391). When he asked for the putative father's address or phone number, her response was to inform him that the father would not cooperate in any fashion and cited, as an example, his earlier refusal to fill out medical information forms provided by a Phoenix social agency (R. 389, 55-56). Pearlman then questioned her even more extensively regarding any potential support from the unwed father and was firmly told that her financial situation was a direct result of the putative father's lack of caring and support (R. 391).

When Pearlman asked Mary if she wanted to have the baby in Arizona or Florida, she indicated it was her desire to make a new life for herself and her two-year old son in Tampa, Florida (R. 33, 391). He stressed the seriousness of an adoption decision and the potential ramifications of such a decision on both her life, her two-year old son's life, and the lives of the would-be adoptive parents (R. 391-392). Mary indicated she understood the factors and emotions involved and related that she had an adopted brother (R. 393). When asked point-blank if she still loved the putative

father and whether she would still marry him, she responded, "No." (R.395).

Upon concluding that conversation, Pearlman called Bob and Jane Doe to inform them of the details learned and his impression that Mary was an intelligent, stable person who had thought through the adoption decision very carefully (R. 396).

Pearlman subsequently mailed Mary forms, some of which were pertinent to Richard (R. 23, 24). However, Mary did not even approach Richard with these forms because of his earlier refusal to provide the most basic medical information on himself to the Arizona doctor she went to for pre-natal care (R. 23, 24).

Mary left Phoenix for Florida near the end of July (R. 57). The basic financial arrangements being that the prospective adoptive parents would provide her with one-way air fare, as well as an apartment, utilities, phone, car payment, car insurance, car transport to Florida, life insurance, and medical expenses associated with prenatal care and with the delivery. Such financial payments were to be provided from August 1, 1986 until thirty days after the child's birth (R. 60, 408-409). Additionally, she would receive living expenses of Three Hundred Dollars ($300.00) per month.

She and her two-year old son left Phoenix quietly, telling Richard, after the fact, by means of a letter channeled through her sister, [redacted] (R. 47-298). She told [redacted] not to reveal her whereabouts (R. 298).

Between the time she arrived in Florida and the time she

signed the consent form, Mary never indicated to attorney Pearlman or any members of his law office that there was any change in her circumstance vis-a-vis Richard (R. 583). However, within six days of her arrival in Florida, she initiated contact with Richard by phone and informed him that she was in Florida and why (R. 26, 32). The date of this phone call was August 8, 1986 and it lasted for thirty-two minutes (R. 655). She and Richard were in frequent and lengthy telephonic contact until just before the birth of John Doe on September 12, 1986 (R. 34-35, 87). Although Mary never gave Richard her Florida address, two weeks before delivery she did give him her phone number (R. 85, 653).

The subject of these phone conversations concerned their relationship. She refused to accept his offer to return and just live with him outside of a marriage relationship and repeatedly told him that the unborn child would be better off in a stable, two-parent home (R. 26, 27).

On August 12, 1986, she was interviewed by Janice Yanke of HRS (R. 475, 493). She was shown a blank consent form and a waiver-of-notice form and read the same (R. 481). She was further advised as to the irrevocable nature of the consent in the absence of fraud or duress (R. 483, 484). She was cautioned not to sign the consent following the birth of the child if she had doubts about giving the child up (R. 482). Mary indicated she understood (R. 482, 483).

During the initial interview, Mary told Janice Yanke that Richard never offered financial support; he wanted no responsibil-

ity for the pregnancy; and he did not deny paternity (R. 484, 485, 490). Additionally, Mary stated that she had not lived with Richard. (R. 484). Based on that information, HRS never sought Richard's interview or consent and issued a preliminary approval of the adoption based on their review of the fitness of Bob and Jane Doe (R. 487, 489).

By either late August or early September, Mary came by Pearlman's office and dropped off a letter written by Richard to Mary (and channeled to her through her sister, [redacted], and bearing a date of August 18, 1986 (R. 417). The letter discussed the relationship of the natural parents and also asked the mother to "at least think about" letting the natural father raise the child. Attorneys Pearlman, Steve Kutner, and Greg Stark evaluated the letter and concluded it contained nothing that would alter their initial assessment that Richard's consent was not mandated by the Florida Adoption Act (R. 423, 424). Therefore, they did not initiate contact with Richard or inform Bob and Jane Doe about the letter (R. 423, 424).

After the letter, Richard and Mary were again on the phone to each other (R. 34, 35). In the course of approximately two weeks, the following sequence of events took place:

9/04/86 Richard proposes marriage (R. 27). Mary accepts. Mary calls her mother wedding plans are made. Mary even buys a wedding dress (R. 43, 736).

Richard and Mary talk on the phone about the need to reimburse the adoptive couple--even to the point of itemizing what they believe Bob and Jane Doe have spent in order to arrive at a gross figure (R. 86).

Richard changes his mind and tells Mary he can't go through with a wedding. (R. 27, 626). Mary asks Richard to let her make the decision and he did not say no (R27-30, 97).

9/08/86 or 9/09/86 — In their next-to-last phone conversation, Richard told Mary not to "sign any papers" (R. 87).

9/09/86 — Mary decides to keep her child. She does not communicate this decision to the intermediary or to HRS (R. 79).

9/10/86 or 9/11/86 — In their last phone call prior to John Doe's birth, Mary tells Richard she has decided to keep the baby (R. 87, 97).

Mary decides to place her child up for adoption when her mother has indicated disapproval of Mary trying to raise two children alone (R.737-738).

9/12/86 Friday — JOHN DOE IS BORN.

9/14/86 Sunday — Mary took medicine in order to dry her breast milk and told the post-partum nurse she was certain she wanted the child placed for adoption (R. 506). At 8:30 A.M., Mary tells the nurse to take the child back to the nursery and that she did not want to see him anymore (R. 506).

9/14/86 — At 9:15 A.M., Mary signs the required consent in the presence of attorneys Steve Kutner and Greg Stark and Janice Mahler, R.N. (R. 356, 358, 507, 569, 967). She tells those present she understands the form and she understands its irrevocable nature (R. 354-358, 40-41, 95, 507). Mary is 25 years of age (R. 1141).

9/15/86 Monday — John Doe is placed in the adoptive home.

The timing of this child's birth and arrival in the adoptive home is a matter of the deepest spiritual and emotional

meaning for the Does, since it enabled Jane's terminally-ill father the chance to see and hold his namesake before his death two weeks later (R. 683, 684).

Also on Monday, September 15, Mary called a former girlfriend of Richard's to request that she inform Richard that a healthy boy had been born and that adoption papers had been signed (R. 39-40).

Upon learning of the birth of a male child on September 15, Richard told his mother, "Mother, can you believe I have a son? I'm going to go get it" (R. 774). He contacted Mary on September 15 with a marriage proposal. A joint decision was made between the two of them at that time to seek return of the child on the basis that Richard had not given written consent to the adoption (R. 39, 628-629, 719, 774).

On Wednesday, September 17, the intermediary received a brief, terse phone call from Richard. In the call, Richard stated that on his lawyer's advice he was coming to Florida to get his son (R. 361, 362). When asked to identify his lawyer, Richard refused and hung up (R. 362, 363).

Mary cancelled her September 18 appointment with Pearlman's office.

On September 19, 1986, Richard signed an Acknowledgment of Paternity, as well as John Doe's birth certificate (R. 601).

In response to being contacted by Richard and Mary's retained counsel, Pearlman called and met with Bob and Jane Doe on Monday, September 22, 1986, to explain that the biological father

and mother wanted John Doe to be relinquished to them (R. 431, 680).

Bob and Jane Doe declined to voluntarily relinquish John Doe at that time and went forward on October 22, 1986 with the filing of a Petition to Adopt John Doe (R. 784-786).

The biological parties were married November 15, 1986 in Arizona, notwithstanding Richard's earlier-stated preference that marriage be postponed until the return of the child (R. 726).

On at least two distinct occasions before trial and since setting up house together, Richard has physically struck Mary (R. 130-132, 288-289).

Upon the denial of a Summary Judgment motion filed by the biological parents, a three-day, non-jury trial commenced on May 19, 1986 in Orange County, Florida before Circuit Judge Cecil H. Brown.

On June 23, 1986, the trial court entered a Final Judgment granting the adoption of John Doe to Petitioners, Bob and Jane Doe (R. 1142-1153). Its legal and factual findings included its determination that the biological mother's written consent was valid and could not be withdrawn absent clear and convincing evidence of fraud or duress. The Court specifically found the biological mother to be an intelligent, articulate person who voluntarily signed the consent form with an understanding of its binding nature (R. 1147, 1148). The Court rejected Mary's claims that her consent was a product of legal duress and that she had a constitutional right to freely withdraw her consent at any time prior to the entry of a Final Judgment granting adoption.

As for the biological father, the Court granted the adoption petition over his objection, and in the absence of a written consent, concluding that he had impliedly consented by the force of his pre-birth conduct and is now estopped to claim his written consent is required. In so ruling, the Court took note of the fact that the sole reason that John Doe was placed up for adoption at birth was because Richard had been unwilling to show meaningful support during the pregnancy despite his full knowledge of the pregnancy; his full knowledge that Mary was in desperate financial straits and could not raise or support another child as a single parent; and despite his full knowledge that she had turned to the course of adoption for her unborn child (R. 1148, 1149). The trial court rejected Richard's argument that the consent-and-waiver provisions of Fla. Stat. §§63.062(1) and 63.072(1)(1985) gave him absolute and arbitrary veto power over the adoption simply by virtue of his having filed an Acknowledgment of Paternity subsequent to the child's placement in the adoptive home. The Court rejected Richard's claim that his pre-birth conduct toward the developing child and the natural mother was irrelevant.

As a separate basis for excusing the biological father's consent, the trial court further found that Richard had abandoned the developing child "by failing to provide the unwed mother with meaningful, repetitive, and customary support either during the pregnancy or at any point before the unwed mother executed the consent two days following the child's birth" (R. 1150).

And, having determined that infant John Doe was adoptable

with all necessary consents either executed or excused, the trial court further found it would serve his best interest to remain with the persons he has known as parents his entire life, and bonded with (R. 1151).

In July, 1987, the biological father and mother appealed the final order which had granted the adoption of John Doe and terminated their parental ties (R. 1154).

Timely briefs were filed in the Fifth District Court of Appeal by counsel for the respective parties. In an Opinion dated March 24, 1988, rehearing denied May 19, 1988, the Fifth District invalidated the trial court's order granting the adoption due to its conclusions that: (1) Richard Roe did not give his implied consent to the adoption (and, therefore, is not estopped from insisting his written consent is necessary); and, (2) that it is legally impossible for any biological father to abandon his unborn child by neglecting his responsibilities to support the natural mother and to assist her with pre-birth medical expenses and needs. Recognizing there to be no Florida law on the issue of whether pre-birth abandonment is a basis for excusing an unwed father's consent to an adoption, the following question was certified to this Court as a matter of great public importance:

> CAN THE FAILURE OF A PUTATIVE UNMARRIED FATHER TO ASSUME SUPPORT RESPONSIBILITIES AND MEDICAL EXPENSES FOR THE NATURAL MOTHER WHEN SHE REQUIRES SUCH ASSISTANCE AND HE IS AWARE OF HER NEEDS, BE A BASIS FOR A TRIAL COURT TO EXCUSE HIS CONSENT TO THE ADOPTION OF THE CHILD, ON THE GROUNDS OF ABANDONMENT OR ESTOPPEL, PURSUANT TO §63.072(1), FLA. STAT., (1985).

The Fifth District's Opinion affirmed the trial court's conclusion that the natural mother is bound by her consent. Additionally, the Opinion left undisturbed the factual findings of the trial court; as well as its finding that (based on the expert psychological testimony of Dr. George Lindenfeld) serious psychological damage would result to infant, John Doe, upon being removed from the only home and parents he has ever known. The Fifth District stayed its Mandate during the pendency of any further appeal to this Court in order to protect the child from damaging changes in custody.

The prospective adoptive parents (who continue to have custody of John Doe, now twenty-two months old) filed timely notice of their intention to invoke this Court's discretionary review on or about June 17, 1988.

This appeal follows from this Court's decision to accept review of the Fifth District Opinion in In Re: The Adoption of John Doe, 13 FLW 782 (Fla. 5th DCA March 24, 1988, rehearing denied, 13 FLW 1209.

SUMMARY OF ARGUMENT

The issues presented raise the fundamental questions of whether Florida law extends protection to anyone involved in the adoptive process other than a biological parent such as Richard Roe, and, if so, under what circumstances.

Point I examines the extent of an unmarried father's rights under both the Federal Constitution and Florida law. Petitioners assert that Richard Roe is a biological father who failed to grasp his opportunity to assume parental responsibilities toward his developing child; and thereby forfeited any constitutional or statutory right to veto John Doe's adoption. Further, his written consent is not mandated by the consent and waiver-of-consent provisions of §§63.062 and 63.072, Fla. Stat., under the facts; and that the trial court properly considered his attitude and conduct toward the pregnancy, toward his unborn child's needs, toward the needs of the natural mother, and his detailed knowledge of the adoption arrangements. The Fifth District erred in reversing the trial court which properly relied on Wylie v. Botos, 416 So.2d 1253 (Fla. 4th DCA 1982), to reach its conclusion that Richard Roe gave implied consent, by the force of his conduct, and is estopped from now claiming his written consent is necessary.

In Point II, the Petitioners assert that abandonment of an unborn child is possible; and that Richard Roe legally abandoned his developing child, under these facts, by virtue of his intentional withholding of meaningful emotional and economic support

from the first moment he learned of John Doe's conception, through the child's birth, and until such time as after John Doe had been placed in the adoptive home.

The argument in Point III is that the Fifth District erred in ruling that John Doe's best interest was irrelevant in this contested adoption; and therefore could not be considered in the determination on whether to sustain his adoption or invalidate it. Petitioners urge that a child's best interest is <u>always</u> relevant in <u>any</u> case concerning the relationship of parent to child--and particularly so where the innocent child has bonded in the adoptive family. It is not the legislature's intent in Chapter 63 to withdraw the protection afforded by the best interest doctrine from any child--much less a child in John Doe's position.

ARGUMENT

POINT I

THE FIFTH DISTRICT COURT OF APPEAL ERRED BY INVALIDATING THE ORDER GRANTING JOHN DOE'S ADOPTION BY PETITIONERS OVER THE OBJECTION OF THE PUTATIVE, BIOLOGICAL FATHER WHOSE WRITTEN CONSENT WAS PROPERLY EXCUSED ON THE BASIS OF IMPLIED CONSENT AND EQUITABLE ESTOPPEL.

I. Parental Rights and the Fourteenth Amendment.

The United States Supreme Court in Meyer v. Nebraska, 67 L.Ed.2d 1042 (1923) determined that the liberty interest guaranteed by the Fourteenth Amendment gives an individual the right to marry, establish a home, or bring up children. In Stanley v. Illinois, 31 L.Ed.2d 551, 559 (1972), the Supreme Court continued to emphasize parental rights when it stated:

> The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment [citation omitted] the Equal Protection Clause of the Fourteenth Amendment and the Ninth Amendment [citation omitted].

Adoptive parents, like biological parents, have been recognized to have a liberty interest in retaining custody of a child. Smith v. Organization of Foster Families, 53 L.Ed.2d 14 (1977).

Historically, the putative, unwed father was treated as a non-entity in the adoption process. However, in Stanley v. Illinois, Id., the Supreme Court, for the first time, gave constitutional protection to the right of an unwed father to be heard with respect to his fitness as a parent in a proceeding for the adoption of his children. The facts showed that Stanley's non-

marital relationship with the mother of his three children extended over an eighteen-year period. He lived with the mother and presumably had provided support for the children prior to the mother's death. The Court majority concluded that the Illinois statute (which presumed Stanley to be an unfit parent not entitled to notice of hearing solely on the basis of his lack of marital status), violated the Due Process Clause of the Fourteenth Amendment where he had "sired and raised" his children. Id. at 558. Since Stanley v. Illinois, Id., the United States Supreme Court has refined and narrowed the extent of a putative father's liberty interest in establishing a relationship with his out-of-wedlock child in the cases of Quilloin v. Walcott, 98 S.Ct. 549 (1978); Caban v. Mohammed, 60 L.Ed.2d 297 (1979); and Lehr v. Robertson, 77 L.Ed.2d 614 (1983).

In Quilloin v. Walcott, supra, the Court scrutinized the operation of a Georgia statute which gave the unwed mother of an illegitimate child the right to veto the child's adoption by others but denied that right to the unwed father who took no affirmative action to legitimize the child by marriage or petition. The Court concluded that equal protection principles did not require the biological father's authority to veto an adoption be measured by the same standard applicable to other parents, i.e., the unwed mother or a divorced father, since the State could permissibly recognize the difference and extent of commitment to a child's welfare between that of an unwed father who has not shouldered any significant responsibility for the child's welfare and rearing, and

that of a divorced father who would have borne some full responsibility for the child's welfare during the period of marriage. Significantly, adoption was granted over Quilloin's objection without any finding that he was an unfit parent.

The facts in Quilloin, Id., were that the illegitimate child was born in 1964. These unwed parents never married or established a home, and the responsibilities of nurturing the child were carried by the mother. However, Quilloin's name was voluntarily entered on the child's birth certificate. In 1967, the mother married Randall Walcott. During the next nine years, Quilloin provided no regular support to his son, intermittent visitation, and some toys and gifts--but took no steps which would have secured his right under Georgia law to veto the adoption. Interestingly, the Court accorded no importance to Quilloin's uncontradicted testimony that he was unaware of the legitimation procedure until after the adoption petition was filed jointly by the mother and by Walcott. Id. at 554.

In Caban v. Mohammed, supra, the Court was faced with an equal protection challenge by a father who had assumed a nurturing role similar to that of the mother. Specifically, the unwed father had lived with the children during their early years, and had maintained consistent contact with them before losing custody when the mother married another. Justice Powell's majority opinion treated Caban, Id., as distinguishable from Quilloin, supra, holding that New York's denial of veto power to the father (in contrast to the unwed mother and all other parents) was in viola-

tion of equal protection where there was a developed parental relationship.

Therefore, like Stanley, supra, and unlike Quilloin, supra, the putative father in Caban, supra, had "earned" the constitutional right to a decisive voice in the contested adoption proceeding because he had developed a significant parental relationship with the child.

The fourth putative father/adoption case to reach the Supreme Court was Lehr v. Robertson, supra. Jonathan Lehr and Lorraine Robertson had lived together for about two years before their daughter was born. He visited Lorraine in the hospital when the child was born, but provided no financial or emotional support during the next several years. Lehr never offered to marry Lorraine and never entered his name in New York's putative father's registry. Lorraine eventually married another man.

In January of 1979, Lehr filed a paternity petition in Westchester County Family Court without knowledge that Lorraine and her husband had filed an adoption petition one month earlier in Ulster County Family Court. Lorraine informed the Ulster County Court of the pending paternity action and also requested that venue for the paternity action be transferred to Ulster County. Because Lehr fell outside the seven categories of unwed fathers entitled to automatically receive notice of an adoption action, the change of venue request was his indication that a petition had been filed seeking the adoption of his daughter.

In March of 1979, the trial court signed the adoption

decree after ruling it was within its discretion to withhold formal notice to Lehr before finalization of the adoption. The New York Court of Appeals (in a post-Caban decision), affirmed both the constitutionality of the automatic-notice provisions that Lehr had failed to qualify under; and the lower court's exercise of discretion in withholding formal notice from Lehr, a known father, before finalization of the adoption.

On appeal to the Supreme Court, Lehr contended that he had a due process right to notice and a hearing before his parental rights could be terminated. Alternatively, he contended that the gender-based classification in the statute, which denied him the right to consent to the child's adoption and provided him with fewer procedural rights than the mother, violated the Equal Protection Clause of the Fourteenth Amendment.

Interestingly, Justice Stevens, in writing for the majority, adopted the following observations made by Justice Stewart in Caban, supra:

> Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, [citation omitted], it by no means follows that each unwed parent has any such right. Parental rights do not spring full blown from the biological connection between parent and child. They require relationships more enduring. 441 U.S. at 397, 60 L.Ed.2d 297, 99 S.Ct. 1760.

Lehr, Id., at 626, 627.

In holding that the known, natural father's due process and equal protection rights were not violated by failing to receive

notice and the opportunity to be heard before his child was adopted since he had failed to establish any significant custodial, personal, or financial relationship, the Lehr Court explained:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to this opinion of where the child's best interests lie.

Id. at 627. Additionally, the Court noted that while Lehr was objecting in the context of a step-parent adoption proceeding, it would reach the same result, in terms of limiting his right to object, in an adoption sought by "two total strangers." Id. at 627, n19. Lehr, Id., does not identify any distinct time frame in which a known, putative father must act in order to "grasp the opportunity" to make a significant custodial, personal, or financial tie to the child; and thereby secure an interest protected under the Fourteenth Amendment Due Process and Equal Protection Clauses. However, the decision clearly establishes that once the opportunity is missed or abandoned, the state is not constitutionally required to provide notice or obtain the father's consent to the child's adoption.

An unwed father simply does not have a constitutionally-sanctioned automatic veto power over an adoption flowing from the biological connection. Id.,; Quilloin, supra; Caban, supra.

Instead, the four Supreme Court opinions of Stanley, Quilloin, Caban, and Lehr indicate there exists a continuum of unwed father-child relationships with varying degrees of protection afforded by the Fourteenth Amendment depending on the extent to which the fathers have demonstrated or failed to demonstrate a commitment to the responsibilities of parenthood. See also, In Re Baby Girl Eason, 358 S.E. 2d 459, 461 (Ga. 1987); "The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson," 45 Ohio St. LJ 313 (1984).

Subsequent to Lehr, supra, no Florida case has considered what length of time must be available to a known putative father so that he might "grasp the opportunity" to be responsible toward his child. However, three decisions which have applied Lehr, supra, in the context of newborn adoptions are Petition of Steve B.D., 730 P.2d 942 (Idaho 1986), with facts remarkably similar to the instant case; In Re Baby Girl M, 688 P.2d 918 (Cal. 1984); and In Re Baby Girl Eason, supra.

In Petition of Steve B.D., supra, at 947, the Supreme Court of Idaho affirmed the determination of the trial court that the putative father had not established a constitutionally protected interest in his opportunity to develop a parent-child relationship. As in the case sub judice, the child was surrendered to the prospective adoptive parents by the unwed mother within a few days of birth and in the context of a private adoption. The salient facts were that the unwed parents had a short-term, volatile live-in relationship, with the putative father moving out

of the household twice during the early months of the pregnancy. When he left the second time, approximately four months into the pregnancy, that marked the last time the couple would live together until after the child was born.

Prior to giving birth, the unwed mother purchased some infant care items such as a crib. The father was aware of both the pregnancy and these purchases; and it was his trial testimony that he and the natural mother had planned to raise the child together and that it was always his intention to act as a parent to the child.

The child, a son, was born on March 5, 1984. The putative father made two hospital visits, showing physical tenderness for the child on one occasion by caressing and kissing him. He paid no expenses related to the child's birth, even though the mother was in severe financial straits.

Within two days of the birth, the unwed mother, DeBernadi, unilaterally consented to the child's adoption and surrendered custody to the adoptive parents. (She subsequently had a change of heart and unsuccessfully attempted to revoke her consent. In Petition of B.D., 723 P. 2d 829 (Idaho 1986)). The unwed mother concealed her action of adopting the child out from the putative father, Swan, until April 26, 1984. He subsequently acknowledged paternity, jointly executed an acknowledgment of common-law marriage with the natural mother, and was accorded a hearing to determine whether the private adoption of his newborn son violated his constitutional interest in the opportunity to

develop a parental relationship with the child.

The Supreme Court of Idaho concluded that the unwed father had let his opportunity to establish a relationship with the child, however fleeting, slip away until such time as the newborn had already been placed in the care and custody of the adoptive family. The Court made the following observations which are especially pertinent to the instant case:

> Lehr establishes no measure of time for constituting an adequate opportunity. However, because of the child's urgent need for permanence and stability, the unwed father must act quickly to take responsibilities and establish ties...
>
> * * * * *
>
> The fleeting opportunity may pass ungrasped through no fault of the unwed father or perhaps due to the interference of some private third party; nevertheless, once passed, the unwed father is left without an interest cognizable under the Fourteenth Amendment.
>
> * * * * *
>
> No violation of the Fourteenth Amendment lies unless 'state action,' not merely the actions of private persons, thwarts the unwed father's grasp.
>
> * * * * *
>
> As the Lehr Court noted: 'the most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences.' Lehr, supra, 463 U.S. at 263, 103 S.Ct. 2994. For whatever reason, Swan and DeBernadi did not marry prior to the child's birth...
>
> * * * * *
>
> The fact that DeBernadi actively concealed from Swan the adoption proceedings is no avail to Swan. As previously observed, a violation of

> the Fourteenth Amendment cannot be premised upon the independent actions of a private individual. The essential fact is that Swan failed to initiate either contact with the child or any legal action to establish his interests, whether or not Swan was to blame for those failures.
>
> * * * * *
>
> We imply no condemnation of Swan; nor do we doubt the sincerity of his present desire for custody. It may be that his own naivete [sic] concerning legal proceedings and requirements conspired against his timely action. Nevertheless, the critical fact remains that the opportunity to assert his interests slipped away without any involvement of the state.

Id. 730 P.2d 942, 945-947. Having reached the conclusion that Swan had no constitutionally-protected opportunity interest, the Idaho Supreme Court did not address the remaining issues of whether the lower courts had unduly emphasized the child's welfare over Swan's rights or otherwise misapplied state law.

In contrast, the putative father of In Re Baby Girl M, supra, was ruled to have sufficiently seized the opportunity to be responsible toward his child, and, therefore, was accorded a significant voice in the adoption proceeding concerning his daughter. The salient and distinguishable facts were that the unwed father and mother dated during part of 1980. When their relationship ended in November of that year, neither was aware that she had become pregnant. A daughter was born on July 18, 1981. The unwed mother had never even advised the natural father of the pregnancy, let alone the birth of the child until August 1, 1981.

Upon being advised, the putative father immediately called the appropriate state agency to determine his rights and by

August 5, 1981, had met with a social worker and requested that his daughter be placed with the family who was then providing day care for his sons. Also on August 5, the mother formally relinquished the child for adoption to the agency. She rejected the father's placement request because of her preference that the child be placed with strangers. Notwithstanding that the father requested custody for himself by August 17, 1981, the agency placed the child with the prospective adoptive parents on August 24. The California Supreme Court concluded the biological father had seized his opportunity to develop a parent-child relationship with the infant, and custody was returned to the biological father.

A third case which has examined Lehr, supra, in order to determine the "right" of an unwed father to legitimize and gain custody of a nine-month child placed (by an agency) in the adoptive home almost immediately after birth, is In Re Baby Girl Eason, supra. There, the undisputed facts were that the child was conceived shortly after the parties met and began dating. She was born on October 19, 1986. When the pregnancy was discovered, the parties discussed various alternatives such as abortion and adoption. "Some weeks" before the child's birth, the putative father moved to California due to his employment. Upon his moving, all further communication between the natural parents stopped. Three days after giving birth, the natural mother gave the infant up for adoption. When notified of the adoptive placement, the biological father filed a petition to legitimize his daughter in order to both gain custody and veto the adoption.

Prior to remanding to the trial court for factual findings on whether the biological father had abandoned his "opportunity interest," pursuant to Lehr, supra, the Georgia Supreme Court stated:

> We conclude...that unwed fathers gain from their biological connection with a child an opportunity interest to develop a relationship with their children which is constitutionally protected. This opportunity interest begins at conception and endures probably throughout the minority of the child. But it is not indestructible. It may be lost.
>
> * * * * *
>
> But our case goes beyond any of the factual circumstances of the four United States Supreme Court cases discussed. We have before us an unwed father, an infant some nine months old, adopting parents who have been in custody of the child virtually all of its short life, and a mother who has surrendered her rights in the child in favor of the adoption. Scharlach has no custody but he possesses an opportunity interest because he is the biological father.
>
> * * * * *
>
> However, evidence is in sharp conflict as to whether Scharlach has abandoned his opportunity interest through his conduct with regard to Eason and the child and otherwise. On remand, the trial court must first determine this issue. If it is determined that the opportunity interest has been abandoned, Scharlach's rights may be terminated.

Id., at 462, 463 (emphasis added).

Based on the principles announced in Lehr, supra, and applied to the infant adoption proceedings in Petition of Steve B.D., supra; In Re Baby Girl M, supra; and In Re Baby Girl Eason, supra, Richard Roe abandoned his opportunity to develop a parent-child

relationship with the infant, John Doe. The facts of the instant case (as properly found by the trial court in its capacity as a finder-of-fact and as accepted by the Fifth District), reveal that Richard Roe passed up many months' worth of multiple opportunities to establish a parental relationship which would require his consent to John Doe's adoption under the Due Process and Equal Protection Clauses of the United States Constitution. Consequently, his parental rights may be lawfully terminated.

II. Parental Rights Under the Florida Adoption Act.

In 1973, the Florida Legislature passed a bill commonly referred to as "The Florida Adoption Act," which is found at Chapter 63, Fla. Stat (1985).

Section 63.022, contains the Legislature's explicit statement of intent. Subsections (1) and (2)(k) provide:

> (1) It is the intent 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.
>
> (2) The basis safeguards intended to be provided by this act are that:
>
> > (k) the natural parents 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.

Plainly, the Florida Adoption Act involves the balancing

of potentially conflicting interests represented by the needs and best interests of the child; the respective rights of the natural and adoptive parents; and the need of society for finality and promptness in adoptive placement so that the benefits of a real home are available to the children of this state.

The fundamental objective of adoption laws is a humanitarian one of establishing the means of creating a nurturing home life for a child, independent of the biological connection. 2 Am. Jur. 2d Adoption §3.

Chapter 63, Fla. Stat., recognizes and accommodates two means of adoption. In the private or intermediary adoption, the infant is usually placed in the adoptive home within a few days of birth. In the agency adoption, the child is first surrendered to the custody of the agency. As was recognized in Interest of I.B.J., 497 So.2d 1265, 1266 (Fla. 5th DCA 1986), private adoptions differ from agency adoptions because the direct placement of the child into the adoptive home immediately triggers the rights of the adoptive parents. In the private adoption context, consent is irrevocable absent fraud or duress in order to protect the child, as well as the psychological security and private interests of the adoptive family from the whims and caprices of biological parents who later have a mere change of heart or circumstance. However, in an agency adoption, consent can be withdrawn in the discretion of the parent prior to the child being adjudicated dependent, since the child has remained in the custody of the agency.

A. Treatment of the Unwed Father.

Florida case law has had occasion to recognize that the unwed father is not in all respects similarly situated with the unwed mother or the married father. See, generally, Kendrick v. Everheart, 390 So.2d 53 (Fla. 1980); Collinsworth v. O'Connell, 508 So.2d 744 (Fla. 1st DCA 1987); DeCosta v. North Broward Hospital, 497 So.2d 1282 (Fla. 4th DCA 1986).

In terms of the Florida Adoption Act, this state's statutory method of giving a significant voice to some putative fathers, while denying it to other putative fathers, is found in §63.062(1)(1985) which provides:

> 63.062 Persons required to consent to adoption--
> (1) Unless consent is excused by the Court, a petition to adopt a minor may be granted only if written consent has been executed after the birth of a minor by:
>
> (a) The mother of a minor.
>
> (b) The father of a minor, if:
>
> 1. The minor was conceived or born while the father was married to the mother.
>
> 2. The minor is his child by adoption.
>
> 3. The minor has been established by court proceeding to be his child.
>
> 4. He has acknowledged in writing, signed in the presence of a competent witness, that he is the father of the minor and has filed such acknowledgment with the Vital Statistics Office of the Department of Health and Rehabilitative Services.
>
> 5. He has provided the child with support in a repetitive, customary manner. (emphasis added).

Section 63.072(1), further provides:

> 63.072 Persons whose consent to an adoption may be waived--the Court may excuse the consent of the following individuals to an adoption:
>
> (1) a parent who has deserted a child without affording means of identification or who has abandoned a child[.] (emphasis added).

Under §63.062(1), the consent of the natural mother of a child is required in all cases unless excused by the court. In contrast, the consent of the natural father is required only if he takes some sort of affirmative action which brings him under the statute. If he fails to take such action, his consent to the adoption is not required under §63.062 and the waiver-of-consent provisions of §63.072 never come into play. In Re Adoption of Mullenix, 359 So.2d 65 (Fla. 1st DCA 1978).

On the other hand, if the putative father takes affirmative, timely action, he would then fall within the category of fathers whose consent is required unless excused by the court. Guerra v. Doe, 454 So.2d 1 (Fla. 3d DCA 1984). In Guerra v. Doe, Id., the Third District held the unwed father had a due process right to participate in an adversary hearing on the issue of his consent. The facts showed that in December of 1982, the natural mother gave birth to Guerra's child and placed the child for adoption without Guerra's knowledge or consent. When she signed the requisite consent forms, she declared the natural father to be unknown. In reliance on the mother's consent, the child was placed with the adoptive parents who then filed an adoption petition in January of 1983. After the child's placement in the adoptive home,

Guerra learned of the child's birth and by February of 1983, he filed an affidavit of paternity with HRS. At the final adoption hearing held in March of 1983, the trial court granted the adoptive parents' motion to strike the affidavit of paternity on the basis of untimeliness. The Third District reversed, stating:

> We do not think the legislature intended to curtail the rights of a natural father who did not consent to the adoption of his natural child and who properly filed an acknowledgment of paternity, albeit one month after the institution of the adoption proceedings. Our interpretation of the legislative intent to afford a putative father an opportunity to be heard in a case such as this is supported by the Florida Supreme Court's construction of the adoption statute in Wiggins v. Rolls, 100 So.2d 414 (Fla. 1958). The Court in Wiggins stated:
>
> > Our adoption statute contemplates that in the absence of consent a natural parent should be afforded a full and complete opportunity to object to an adoption in an adversary proceeding in which the rights of the parent should be afforded due recognition.

Guerra v. Doe, supra at 2.

With the Guerra majority opinion having determined the natural father's filing of an acknowledgment-of-paternity after the child's adoptive placement entitled him to a day in court (in keeping with his statutory and procedural due process rights), Judge Jorgenson stressed in his concurring opinion that on remand the focus must now shift to the primary issue of the child's best interest. In a related footnote, he provided the following guidance to the trial court:

> [I]t remains to be determined by the trial court whether, among other things, Guerra deserted or abandoned his purported child.

> The provisions of §63.072, Fla. Stat. (1981), offer some guidance but cannot be considered an exhaustive list when the paramount interest is the welfare of the child (emphasis added).

The Guerra majority opinion is a correct analysis of the consent-and-waiver provisions of §§63.062 and 63.072 because of its recognition that the mere filing of an affidavit of paternity does not ipso facto grant every biological father veto power over the adoption. Further, the concurring opinion of Judge Jorgenson is a correct analysis of the same consent-and-waiver provisions due to its recognition that an unwed father's pre-birth conduct may be very relevant to the issue of whether his consent should be excused because he abandoned, deserted, or was otherwise callous or destructive toward his child's needs--causing the child to be placed, at birth, with the adoptive parents. See also Wylie v. Botos, 416 So.2d 1253 (Fla. 4th DCA 1982), (putative father's lack of written consent to newborn adoption excused on grounds of implied consent and estoppel).

As construed in Guerra v. Doe, supra, the legislative intent behind §63.062(1)4's provision for the filing of an acknowledgment-of-paternity is to give such a putative father his procedural due process right to a day in court; rather than absolute and arbitrary veto power over an adoption. Guerra's analysis is consistent with the legislature's intent as it was expressed during a Senate Judiciary Committee hearing which took place in April of 1975 on Senate Bill 41. Portions of the hearing have been transcribed and are submitted with this brief as Appendix 2.

The background on Senate Bill 41 is that it dealt with Florida's Adoption Act, and sought, in part, to give the known father of an illegitimate minor an opportunity to consent or object while still preserving the privacy and confidentiality of the petitioner and child. The bill was introduced by Senator Tom Gallen (who also had introduced the 1973 bill which became "The Florida Adoption Act"). Bill 41 became effective law in Chapter 75-226, Laws of Florida.

Significantly, the discussion on Bill 41 required Senator Gallen's explanation of "The Florida Adoption Act" and the interplay between the necessary consents of §63.062(1) and the waiver-of-consent provisions of §63.072. Specifically, he indicated that the legislative intent behind §63.072's retention of the permissive language of "the court may excuse" was to prevent a putative father from having absolute veto power over the adoption proceeding when and if the court believed that the granting of the adoption would be in the child's best interest and welfare. See Appendix 2.

Based then upon the legislative intent expressed in the Senate Judiciary Committee hearing on Senate Bill 41, the permissive language found in both §§63.062 and 63.072, Guerra v. Doe, supra, and Wylie v. Botos, supra, is clear that a Florida trial court has the inherent power to grant the adoption of an illegitimate child over the objection of a putative father (whose consent might be otherwise required by the filing of a post-birth acknowledgment of paternity) by excusing that consent when the

father has failed to timely grasp his opportunity to be a responsible parent; when there has been a valid consent executed by the unwed mother; and when the adoption would otherwise be in the child's best interest.

In view of public policy factors, the veto-power position which has been consistently advocated by Respondents, before both the trial court and the Fifth District, constitutes a tremendous invasion into the privacy rights of the unwed mother who turned to the adoption alternative because she is unable to adequately provide for the child's emotional or physical needs in the absence of meaningful support from the putative father. Further, Respondents' position violates legitimate public policy considerations favoring live, healthy births; the early placement and bonding of adopted children; the psychological security of adoptive parents; and exposes adoptive parents to harassment, interference, or extortion by a putative father. Perhaps the most repugnant, but logical, consequence of Respondents' position is that it would be possible for a known, putative father to arbitrarily withhold consent (thereby making the child unadoptable) and consign an innocent child to a "twilight zone" of perpetual foster care rather than to a real home.

In short, there is no language in Chapter 63 indicative of a legislative intent to provide substantive veto power to an unwed father at the complete expense of the child; the complete expense of the natural mother who has been placed in a "no-win" situation by the hostility or callous indifference of the

biological father to the pregnancy; or at the complete expense of the adoptive parents.

Two cases which have upheld a trial court's granting of an adoption of an infant, born to an unwed mother, over the objection of the putative father are Wylie v Botos, supra; and In Re Adoption of Mullenix, supra. It is significant that neither in Wylie, supra; nor Mullenix, supra, was there a finding of abandonment or unfitness by the putative father before his parental rights were terminated. See also In Re Adoption of Child by P, 277 A.2d 566 (App. Div. 1971); In Re G.K.D., 332 SW2d 62 (Mo. App. 1960).

The salient facts in Wylie v. Botos, supra, were that the biological parents were living together when the child was conceived. They discussed their alternatives but the decision was eventually made by the biological mother. The biological father knew that he could have established his rights to the child via marriage, but he did not do so because he thought it would "look bad" if he married her while she was pregnant. Id. at 1255. He knew the biological mother had decided in favor of adoption and that she had made arrangements consistent with that decision. Two days after giving birth, the mother executed her consent form. And, on the next day, the child was placed with the prospective adoptive parents in a private adoption arrangement. Subsequent to the filing of the petition, but well before the final hearing date, the biological parents filed objections in the adoption action and also filed a Petition for Habeas Corpus. Less than five months after the child's birth, the parents were married.

The Wylie trial court ruled, inter alia, that the natural mother's consent had been executed lawfully and that the natural father's consent could be excused on the grounds of abandonment. In particular, the lower court noted the father's lack of interest in, or responsibility for, the child then developing in the mother's womb; the failure of the biological parents to reach a firm, explicit agreement regarding responsibility for the child; the father's knowledge of the adoptive plan; his actions and attitudes exhibiting a "set purpose to shed himself of this responsibility;" the father's first unequivocal interest in the child appearing subsequent to the birth and coinciding with influence exerted by the biological mother's stepfather and mother. Wylie v. Botos, supra, at 1256.

On appeal, the Fourth District affirmed the trial court's action of denying the natural father's claim and granting the adoption--albeit on the basis of implied consent and estoppel. In a footnote explanation of its holding that the putative father's written consent was not necessary, under the facts of the case, the Court stated:

> To hold otherwise would be to grant the natural father even greater rights than the natural mother possessed, a result which we do not believe the legislature intended. What would happen in the case where the natural father of a child born out of wedlock had no actual knowledge of the natural mother's pregnancy and maternity until after a petition for adoption was filed, a question of possibly constitutional dimensions, is not presented to us, since the natural father here was at all times fully aware of such facts.
>
> * * * * *

> We think the natural father's attempt to upset the adoption proceedings stands on the same footing as that of the natural mother.

Supra at 1257. The Wylie Court expressly found it unnecessary to reach the issue of abandonment. Id. at 1256, n. 3.

In Mullenix, supra, the biological mother placed the child up for adoption for reasons identical to the case sub judice. Within a couple of days of learning about the pregnancy, the putative father indicated he was not ready to marry the natural mother on her desired timetable and she responded by leaving the State of Texas shortly thereafter, without telling the putative father where she was going. He first learned of the child's birth upon receiving a letter from the attorney for the adoptive parents which sought his consent.

In affirming the trial court's granting of the child's adoption by "strangers," i.e., loving, adoptive parents, over the putative father's objection, the First District rejected the father's constitutional argument that he was denied substantive due process by the termination of his parental rights absent proof of unfitness. The Court noted he had been accorded procedural due process by his participation in the hearing. Turning to Florida statutory law, the First District also ruled that since the putative father did not appear to fall within the five categories set forth as condition precedents to adoption in §63.062, Fla. Stat., the adoption could be granted in the absence of his consent and without regard to the waiver-of-consent provisions of §63.072.

B. The Significance and Applicability of Wylie v. Botos, 416 So.2d 1253 (Fla. 4th DCA 1982).

In a nutshell, the significance of Wylie v. Botos, Id., is that the Wylie Court indicated that an unwed father can, by the force of his pre-birth conduct, give implied consent to the adoption of his newborn child and be estopped to claim his written consent is necessary once the child is placed with the prospective adoptive family.

When the Fifth District decided to invalidate the order granting John Doe's adoption, it did so based on two independent grounds. One ground was its view that the trial court place undue reliance on a factually distinguishable case when it relied upon Wylie v. Botos, Id., to support its finding that Richard impliedly consented to John Doe's adoption and is now estopped from claiming his written consent is required. Petitioners, Bob and Jane Doe, submit that the material facts of Wylie v. Botos, Id., are far too close to those of the present appeal to sustain the Fifth District's view that Wylie, Id., has no applicability and was improperly relied upon by the trial court.

The material facts shared between Wylie, Id., and the present case are that both cases involve newborn infants given up for private adoptions by unwed mothers; putative biological fathers who could have established their rights to the children, by means of support or marriage, but who intentionally refrained from doing so notwithstanding knowledge of the pregnancy and actions taken by the natural mothers in furtherance of adoption

arrangements; substantial acquiescence by the biological fathers to the natural mothers' plans for adoption placement; valid consents executed by the natural mothers two days after giving birth; the absence of written consents executed by the biological fathers; joint action taken by reconciled sets of biological parents to halt the adoptions after the children are placed with the potential adoptive parents but before the adoptions become final; and subsequent marriages between the sets of biological parents as they strive jointly to defeat the adoption placements on the basis that the biological fathers' written consents were not obtained by the adoptive parents.

The Fifth District did not address the numerous "common facts" listed above but, instead, pointed out two minor distinctions. First, that the Wylie biological father failed to file his acknowledgment of paternity until two months after birth (and also subsequent to the adoption petition being filed), in contrast to this appeal where the acknowledgment was filed prior to the adoption petition being filed. Second, that the Wylie biological father showed acquiescence to his child's adoption by having helped to financially support the natural mother with the understanding that he would be reimbursed by the adoptive parents.

In attaching any degree of significance to when the acknowledgment of paternity is filed vis-a-vis the adoption petition, the Fifth District overlooked Guerra v. Doe, supra, which indicates that a biological father secures his procedural due process right to a hearing on the issue of consent by filing the

acknowledgment a reasonable time before the adoption hearing; regardless of whether the acknowledgment is filed before or after the petition for adoption. Additionally, the Fifth District failed to properly consider that in the private adoption context, the rights of the adoptive parents are triggered immediately by the direct placement of the child into the adoptive home. See In The Interest of I.B.J., 497 So.2d 1265 (Fla. 5th DCA 1986). Accordingly, the operative (and, therefore, material) fact is not whether the biological father filed his acknowledgment of paternity before or after the adoption petition was filed--but whether he stepped forward to develop a parent-child relationship before or after John Doe was lawfully placed in the adoptive home.

Nor is Wylie v. Botos, Id., reasonably distinguishable merely because the Wylie biological father showed acquiescence to his newborn child's adoption by means of having helped to financially support the natural mother with the understanding he would be reimbursed by the adoptive parents. In the case sub judice, Richard Roe also acquiesced--albeit in a different manner. Richard Roe agreed to Mary's plans for adoptive placement from March of 1986 until some point in July of 1986 when he decided to block Mary's efforts to place the unborn child with a Jewish family (R. 20-21, 37-38, 56, 637). After his "change of heart" in July of 1986, he continued to acquiesce to the adoption by his deliberate, conscious decision to do nothing but watch the natural mother squirm in her predicament until the point where she felt compelled to leave Arizona at the end of July (R. 57, 624). With the natural

mother now in Florida, he continued to acquiesce by choosing to do nothing despite his full knowledge and understanding that the adoptive parents had put her up in a Florida apartment, were providing additional living expenses to her, prenatal care, and had agreed to pay all bills connected with the birth of the child (R. 26-28, 32-35). He continued to acquiesce by deliberately choosing to do nothing until such time as he learned on September 15, 1986 that the natural mother had given birth to a healthy male child and had placed him in an adoptive home (R. 39). Then, and only then, did he pick up the phone and call the natural mother, and, two days later, call the adoption intermediary (R. 39-631).

For the foregoing reasons, Wylie v. Botos, Id., is directly on point and provided solid authority for the trial court's legal and factual findings that Richard Roe impliedly consented to the adoption of John Doe and is, therefore, estopped to claim his written consent is required. Consequently, it was error for the Fifth District to invalidate the adoption order on the basis that Wylie v. Botos, Id., was inapplicable and improperly relied upon.

In conclusion, neither the Federal Constitution, nor Florida law, gives Richard Roe the right to veto this adoption. Neither federal constitutional law, nor Florida law, strips the trial court of all discretion when hearing a highly contested matter involving competing interests. If Richard Roe could be said to have any veto right available to him by way of the Constitution, or Florida Statutes, he has waived that right. See generally

Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945); Turner v. Turner, 383 So.2d 700, 703 (Fla. 4th DCA 1980).

Despite the stated legislative intent of Fla. Stat. §63.022 (1985) to "protect and promote the well being" of all persons involved in the adoptive process, the Fifth District's Opinion has incorrectly interpreted and applied Chapter 63's consent-and-waiver provisions in such a way as to grant the putative father far greater rights than the innocent John Doe and his best interest; far greater rights than the natural mother who turned to adoption because she finds herself unable to provide for the child's emotional and physical needs as a direct result of the biological father wilfully withholding support due to his rejection of the pregnancy and parental responsibilities; and far greater rights than the adoptive parents who have sought only to provide a loving home environment for a newborn infant who, at three days of birth, became the "center" of their family.

By the force of his knowing and deliberate conduct, Richard Roe gave his implied consent to John Doe's adoption and is now estopped from claiming his written consent is necessary.

POINT II

THE FIFTH DISTRICT COURT OF APPEAL ERRED BY INVALIDATING THE ORDER GRANTING JOHN DOE'S ADOPTION BY PETITIONERS OVER THE OBJECTION OF THE PUTATIVE FATHER WHOSE WRITTEN CONSENT WAS PROPERLY EXCUSED ON THE BASIS THAT HE ABANDONED THE CHILD PRIOR TO THE CHILD'S PLACEMENT IN THE ADOPTIVE HOME.

The second independent basis upon which the Fifth District's Opinion rests is that it is legally impossible to abandon a child who is placed up for adoption virtually at birth.

As the Fifth District noted, the issue it has termed "pre-birth abandonment" has not been directly ruled upon in Florida appellate decisions. However, in light of the facts, as well as the trial court's indication in paragraph forty-nine of the Final Judgment that it also considered the time frame following the child's birth, it is clear that the finding of abandonment relates to Richard's attitude and conduct from the moment he first learned a child had been conceived throughout the entire pregnancy term, and until such time as John Doe was placed in the adoptive home in reliance upon the natural mother's consent.

As the Georgia Supreme Court concluded in In Re Baby Girl Eason, supra at 462:

> [U]nwed fathers gain from their biological connection with a child an opportunity interest to develop a relationship with their children which is constitutionally protected. This opportunity interest begins at conception and endures probably throughout the minority of the child. But it is not indestructible. It may be lost.

When an unwed father abandons or fails to grasp his opportunity

interest by ignoring the needs of the developing child from conception, he has abandoned the child and his parental interest may be terminated.

Two cases which suggest an unwed father can abandon his child, in utero, by "walking away" emotionally and financially during the pregnancy are Wylie v. Botos, supra, and Guerra v. Doe, supra.

In Wylie, supra, the trial court granted the adoption over the objection of the unwed father, upon its finding of abandonment resulting from the father's lack of interest in, or show of responsibility, for the child as it developed in the mother's womb. The failure of the parents to reach a firm, explicit agreement regarding responsibility for the child; the father's knowledge of the adoptive plans; his attitude and actions which exhibited "a set purpose to shed himself of this responsibility;" plus the fact that his first unequivocal interest in the child surfaced after the child's birth and placement, and coincided with influence exerted by the biological mother's stepfather and mother. Id. at 1256. The Fourth District, on review, did not express disapproval of the abandonment finding; but merely stated it was unnecessary to reach that issue because of its determination that the Wylie father had impliedly consented and was estopped to insist his written consent is required.

In Guerra v. Doe, supra at 2, Judge Jorgenson's concurring opinion clearly suggests an unwed father can legally abandon his unborn child within the meaning of §63.072, Fla. Stat.,

depending on his conduct during the pregnancy term.

However, other states such as Georgia, Mississippi, Wisconsin, and Kansas have had occasion to rule more directly on the issue. Last year, the Georgia Supreme Court in In Re Baby Girl Eason, supra, considered a situation where the unwed father of a nine-month old girl sought to defeat efforts by a couple to finalize the adoptive process which had begun with the child's placement in their home shortly after birth. Like Richard Roe, the Eason biological father never had custody of the child he fathered. The Georgia Supreme Court remanded the case for factual findings on abandonment stating:

> However, evidence is in sharp conflict as to whether Scharlach has abandoned his opportunity interest through his conduct with regard to Eason and the child and otherwise. On remand, the trial court must first determine this issue. If it is determined that the opportunity interest has been abandoned, Scharlach's rights may be terminated.

Id. at 463[1].

Another case which concluded that a putative, natural father could abandon his unborn child is Doe v. Attorney W, 410 So.2d 1312 (Miss. 1982). The facts show that initially Doe seemed to be so pleased about the prospects of being a father that he asked the natural mother to marry him. However, he soon changed his mind and suggested at one point that she abort the pregnancy. She refused. Then he suggested adoption--contending that he was

---

[1] On remand, the trial court in In Re Baby Girl Eason, Nos. 86-A-180 and 86-1-7427-18 (Sup. Ct. Cobb County, Ga., February 3, 1988) held the unwed father had indeed abandoned his child pre-birth, and terminated his parental rights (See Appendix 5) in an unpublished opinion).

not ready for the responsibility of her and the baby. It was her desire to marry Doe and to keep the child. However, Doe refused to marry her. While he had contributed some support to the natural mother early on through the payment of rent, car payments, and some money for clothing, the putative father requested that she leave the apartment when she was approximately five months pregnant. About one month later, in March of 1980, the natural mother moved out. Her efforts to obtain financial aid for medical expenses related to her pregnancy were stymied by Doe's insistence she not cooperate with the requirement of listing the name of the father. In approximately her seventh or eighth month of pregnancy, she moved to Mississippi to have the baby and to arrange for the adoption. Despite his promises to help with expenses, Doe gave her only Twenty Dollars ($20.00) and made no contributions toward prenatal care. On May 15, 1980, approximately three weeks prior to delivery, Doe became aware, through a Mississippi attorney, that arrangements had been made for the adoption of the baby in Mississippi. Doe verbally agreed to consent to the adoption. However, when later contacted just after his daughter's birth, Doe expressed his desire for custody. Notwithstanding Doe's stated intention not to sign the consent, the child was placed in the adoptive home within three days of her birth in reliance upon the natural mother's consent.

When analyzed, there are at least six reasons why Doe, Id., has application to the instant appeal:

(1) Each of these unwed fathers were on early notice of the pregnancy and each had a great deal of knowledge of how the pregnancy was impacting the natural mother.

(2) Each of these unwed fathers had a very real and present ability to relieve the natural mother of much of the emotional and financial burdens directly resulting from the pregnancy.

(3) Each of these unwed fathers had an extended "window of opportunity" in which to accept responsibility for the unborn child, since neither of the natural mothers cut off communication with the biological fathers even though they were compelled by their circumstances to go to another state to make adoption arrangements and have the baby. Each of the fathers had the means at his disposal to step forward to assume some of the physical, mental, and financial burdens both before and after the natural mothers left the states where the fathers resided.

(4) Each of these unwed fathers made a deliberate, conscious decision to withhold emotional and economic support because of opposition to the pregnancy.

(5) There is an element of sustained cruelty attaching to the conduct of each of these unwed fathers which evinces a settled purpose to abandon the natural mother and the unborn child regardless of the consequences to the health of the child or the mother. This element of sustained cruelty cannot be attributed to a mere reluctance to marry; laggard behavior; or mere immaturity. One of the shared marks of this cruelty was the existence of a tremendous gap between the words and conduct of these fathers. A mark of cruelty peculiar to Richard Roe is how he pursued a "relationship" with Mary even after he had firmly and deliberately determined not to provide her any emotional or financial support necessitated by the pregnancy. He simply sat back and watched her suffocate under the physical, mental, and financial burdens of the pregnancy and childbirth while undoubtedly professing his "love" in a long distance phone call or on a piece of paper.

(6) Each of these unwed fathers bears sole responsibility for his failure to take any affirmative, unequivocal action to demonstrate any reasonable concern for his child's well being until such time as others' parental rights had become implicated.

See also State v. Lutheran Social Services of Wisconsin and Upper Michigan, 227 N.W.2d 643 (Wis. 1975), (best interest of child born out of wedlock served by terminating biological father's parental rights when he had disclaimed paternity, refused to marry mother, and showed general disregard for health and welfare of mother, and refused to accept responsibility for unborn child); But See In Re Adoption of Nelson, 451 P.2d 173 (Ka. 1969), (adoption of child born to married couple could not be sustained under statute dispensing with one parent's consent if he or she fails to assume parental responsibilities for period of two consecutive years).

It is legally possible for Richard Roe to have abandoned his biological child, by abandoning the child's pre-birth needs and the needs of the unwed mother; and that the trial court's findings on this issue should not have been overturned by the Fifth District. Wylie v. Botos, supra; Guerra v. Doe, supra; In Re Baby Girl Eason, supra; Doe v. Attorney W, supra.

Also, it is highly incongruous for the Fifth District to characterize Richard Roe's conduct as "laggard activity by a putative father" at the same time it has stated its acceptance of the trial court's factual findings. Upon being confronted with highly conflicting evidence, the trial court did not find Richard Roe's conduct was mere "laggard activity by a putative father." And, as the Fifth District correctly stated, "...There is evidence in this record to support the trial judge's fact findings, and we are bound as appellate judges to accept them as proven." See Crum v. United States Fidelity and Guaranty Co., 468 So.2d 1004 (Fla. 1st DCA

1985). The trial court implicitly rejected the argument that Richard Roe was only a "reluctant" father when it made the following legal and factual findings:

> 47. While the natural father is a person from whom a consent is required under §63.062 (1)(4), Fla. Stat., (1985), because he executed a certificate and filed it with the Bureau of Vital Statistics, his consent may be excused by the Court if he has abandoned the child. 'Abandonment' in this context means '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.' Hinkle v. Lindsey, supra, at 985.
>
> 48. Since the case sub judice has as its subject matter the contested adoption of a newborn, it necessarily follows that the putative father's opportunity to establish a pattern of conduct toward the child focuses on his conduct throughout the pregnancy term.
>
> 49. The Court finds by clear and convincing evidence, that the natural father abandoned the developing child by failing to provide the unwed mother with meaningful repetitive, and customary support either during the pregnancy or at any point before the unwed mother executed the consent two days following the child's birth. Wylie v. Botos, supra.
>
> 50. During this critical time frame, the natural father's conduct evinced a 'settled purpose' to shed himself of the responsibility presented by pregnancy. To this end, he was intent upon placing his 'freedom' and desires above the needs of the child developing in the natural mother's womb. Additionally, he withheld emotional and financial support that was within his ability to give when the natural mother lost her job and was incurring prenatal and other expenses that were beyond her ability to pay. This Court listed with rapt concentration to the natural mother about this agonizing period; how she defended her position against the Father's urging that she permit her unborn child to be destroyed by abortion; how she squeezed by economically, accepting welfare and the charity of

> others, and how in the early days of August in her 8th or 9th month of pregnancy she sought so desperately with the help of her family to replace her medical, health, and economic uncertainty and anxieties with security and direction when she finally chose the course of adoption for her unborn child and moved back to Florida. Historically, an equity Court has been concerned with unclean hands.

(R. 1150).

Further, the Petitioners take issue with the reasonableness of the Fifth District's concern that an unwed father cannot abandon a child who is placed up for adoption at birth (solely because the natural mother realizes she cannot provide an adequate home life in the absence of support which has not been forthcoming from the father), since one cannot be expected to "communicate" with an unborn child. No doubt it will come as a surprise to many an expectant father, married and unmarried alike, to learn he is not yet participating in his child's life, health, and future when he shows his parental concern by responding to the emotional and health needs of the woman carrying his child; by marvelling at the movement of a hand, the force of a kick, or the sound of a tiny, rapid heartbeat; by doing whatever is necessary to create a home environment which will meet the needs of a newborn; by helping to choose an obstetrician and hospital; and by taking steps to ensure that when that moment arrives, he is there to encourage the mother through labor. Frankly, the notion that an expectant father does not or cannot develop a parental relationship with an unborn child (because he can't talk to him or her) is completely without basis because it doesn't comport with common human experience. If the

ability to linguistically communicate was the "stuff" of parental concern, Helen Keller would have been an orphan.

In the case of Matter of Adoption of Robin U., 435 N.Y.S. 2d 659, 662 (Fam. Ct. 1981), the criteria for gauging the relationship of an unwed father to a younger child versus an older child was sensibly articulated as follows:

> There are pragmatic differences between the relationship of an unwed father with a newborn or very young child and the relationship of an unwed father with an older child. The unwed father of a newborn or very young child does not have the opportunity to establish an ongoing relationship with his child through substantial and continuous or repeated contact so that the quality of his relationship with the child's mother, his public acknowledgment of his fatherhood and his acceptance of financial responsibility for the newborn child's birth must be used as indicia of his parental concern.

In conclusion, the Petitioners respectfully contend the trial court was correct in its determination that pre-birth abandonment can occur, and, in fact, did occur in this case. Therefore, the Fifth District erred in invalidating John Doe's adoption where Richard Roe abandoned his "opportunity interest" by intentionally withholding economic and emotional support from the moment he first learned of his child's conception and extending until after the child was placed in the adoptive home.

POINT III

THE FIFTH DISTRICT ERRED IN RULING IT COULD NOT CONSIDER THE BEST INTEREST OF JOHN DOE, NOW TWENTY-TWO MONTHS OF AGE, AS AN APPROPRIATE AND COMPELLING FACTOR IN DETERMINING WHETHER TO SUSTAIN OR INVALIDATE HIS ADOPTION.

Before this Court is John Doe, an infant some twenty-two months old; adopting parents, Bob and Jane Doe, who have been in custody of John Doe all but the first three days of his life; and two biological parents who played "chicken" on Florida's adoptive highway. Though many of the facts were hotly contested, the following observations are well supported by the record and are beyond serious dispute:

(1) The sole reason Mary Roe surrendered her parental rights in her newborn child was because Richard Roe had deliberately chosen to withhold emotional and economic support throughout pregnancy and she, therefore, found herself lacking those resources needed to adequately care for John Doe as a single parent.

(2) At the time Mary Roe signed the consent form, she knew what she was doing and she clearly understood the serious and binding nature of the document.

(3) Infant, John Doe, is a completely innocent child and victim in this litigation. He is at risk of suffering the greatest harm, more so than any of the adult parties.

(4) His removal from the only home and parents he has ever known in his life of twenty-two plus months would result in inflicting serious psychological damage to him.

Chapter 63 combines with Florida case law to require that a determination be made that a child is, in fact, adoptable either

by means of acquired consents or by court excusal. Clearly, a trial court is not free to grant the adoption of a child merely because it believes the adoptive home offers more in the way of responsible parents or material advantages than what the natural parents seem capable of providing. See Hinkle v. Lindsey, 424 So.2d 983 (Fla. 5th DCA 1983); Adoption of Braithwaite, 409 So.2d 1178 (Fla. 5th DCA 1982).

However, the instant case does not arise from a judicial exercise in socio-economic child redistribution. Rather, it concerns a child voluntarily relinquished by an unwed mother placed in a no-win situation by a putative, biological father who was totally unsupportive and hostile toward the child from his first knowledge of conception until the day he told his mother, "Mother, can you believe I have a son? I'm going to go get it." (R. 774). It concerns an innocent child who was placed in the adoptive home before the biological father decided to exhibit an unequivocal interest in his healthy son, and who has lived all his life with "strangers" who never were strangers, but his real parents; his parents, in fact, to whom he has bonded. Lastly, it concerns the biological father, who, in fact, was the absolute stranger to the child from conception forward.

The Fifth District's assertion that the "best interest of the child" doctrine is irrelevant, and extends no protection to infant John Doe, is erroneous. It is erroneous because it amounts to nothing short of an irrebuttable presumption that "blood is thicker than water" without any consideration of whether firmly

developed parent-child relationships have formed in the adoptive family, as a result of bonding, which warrant constitutional and statutory protection.

Any case which focuses on the relationship between a parent and child necessarily raises the paramount question of what is in the child's best interest and welfare.

In Lehr v. Robertson, supra, at 624, when the Supreme Court was examining the nature of Lehr's interest, the Court indicated that in all its cases concerning the relationship of parent and child, "[it] has emphasized the paramount interest in the welfare of the children and has noted that the rights of the parents are a counter-part of the responsibilities they have assumed." Lehr v. Robertson, supra, at 624. In affirming the legitimacy of non-blood family relationships, the Lehr Court quoted from Smith v. Organization of Foster Families For Equality and Reform, supra, as follows:

> The actions of judges neither create nor sever genetic bonds. '[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...as well as from the fact of blood relationship.'

Lehr, supra, at 626.

The "best interest" doctrine must be considered in adoption proceedings under Chapter 63. Section 63.022(1) provides in part:

> (1) It is the intent of the legislature to protect and promote the well-being of persons adopted and their natural and adoptive parents and to

> provide to all children who can benefit by a permanent family life.

Effective October 1, 1987, and therefore applicable to this case, is the amendment of Chapter 63, Fla. Stat., (1987) to provide that the best interest of the child or children to be adopted must be considered and can override lack of consent or abandonment.

As amended, §63.022(2)(1), Fla. Stat., (1987) (specifically states:

> (1) 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 interest of the person to be adopted.

The words of the above statute are not ambiguous. The plain, unequivocal language of §63.022(2)(1), Fla. Stat., (1987) affirmatively requires that a court must apply the best-interest standard in all matters. No other reading or interpretation would be consistent with the words set forth in the statute.

There have been a number of cases in Florida which have held that the best interests of the child to be adopted can override the lack of consent and/or the lack of abandonment. For example, this Court in In Re Adoption of Cox, 327 So.2d 776, 777 (Fla. 1976), said:

> It is frequently said that contested adoptions are the most difficult of all cases for trial judges. Where a natural mother seeks the return of her child after she has bettered her position to care for the child and has reconsidered her original motives for allowing the adoption, the burden placed on the trial judge is even more weighty. We recognize the difficulties inherent in making a decision in matters of this nature, and we are most reluctant to substitute our judgment (or let the District Courts substitute their judgments) in the resolution of these emotionally-

> charged matters. Where the trial judge has guided his decision by reference to the best interest of the child and fully considered all of the evidence before him, there is very little room for the exercise of appellate discretion. (emphasis added)

Given the trial court's undisturbed finding that the best interest of John Doe would dictate that he remain with the Petitioners, as well as the 1987 amendment found at §63.022(2)(1), it is apparent that the Fifth District erred in concluding that the best interest of John Doe was irrelevant and could not override the lack of consent and/or the lack of abandonment to support the granting of an adoption.

In conclusion, the best interest of John Doe is a legitimate and compelling factor in a court's determination of whether to sustain or invalidate his adoption. The following observation is especially appropriate to this case:

> [T]he goal in child-placement litigation ought to be always the maximization of the child's interest. The implementation of that goal may involve detriment to an adult in order to protect a relatively helpless, developing child. If a choice between competing values and a hierarchy necessarily involves selection one to the detriment of another, it is preferable to have the detriment involve an adult who is presumably a fully-developed psychological being, rather than a child.[2]

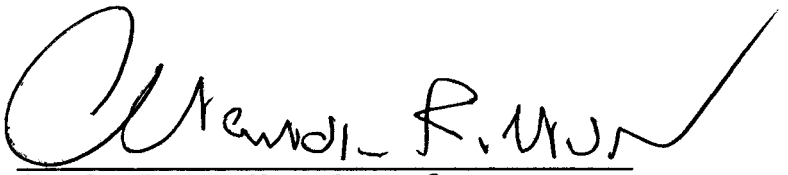
---

[2] Termination of Parental Rights In Adoption Cases: Focusing on the Child, 14 J.Fam.L. 547, 558 (1975-76)

CONCLUSION

Based on the foregoing legal authorities and arguments, the Petitioners, BOB DOE and JANE DOE, request this Court to reverse the judgment below which invalidated the adoption of the infant, JOHN DOE.

Respectfully submitted,



CHANDLER R. MULLER, of
MULLER, KIRKCONNELL, LINDSEY
AND SNURE, P.A.
1150 Louisiana Avenue, Suite 1
Post Office Box 2728
Winter Park, Florida 32790
Telephone: (407) 645-3000

Attorneys for the Petitioners
BOB DOE and JANE DOE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to John L. O'Donnell, Jr., DeWolf, Ward & Morris, P.A., 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801 this 14 day of July, 1988.

CHANDLER R. MULLER, of
MULLER, KIRKCONNELL, LINDSEY
AND SNURE, P.A.
1150 Louisiana Avenue, Suite 1
Post Office Box 2728
Winter Park, Florida 32790
Telephone: (407) 645-3000

Attorneys for the Petitioners
BOB DOE and JANE DOE