IN THE SUPREME COURT OF FLORIDA

Case No.: 74,242

MARIE CHRISTINE NADINE THEIS,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.

_____/

INITIAL BRIEF OF PETITIONER

R. CORY SCHNEPPER, Esquire
KATHLEEN L. SPALDING, Esquire
LEVIME, BUSCH, SCHNEPPER & STEIN, P.A.
9100 South Dadeland Boulevard
Datran Center, Suite 1010
Miami, Florida 33156
(385) 666-1088

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PREFACE

This is an appeal of a decision of the District Court of Appeal, First District, dated May **23, 1989,** which denied the claim of the Claimant, Marie Christine Nadine Theis, for death and dependency benefits under the Florida Workers' Compensation Law. This claim arises from the death of George Theis, an employee of the City of Miami.

In its denial of the Claimant's claim for death and dependency benefits, the District Court of Appeal, First District, certified the following question to this Court as a matter of great public importance:

> WHETHER THE DEFINITION OF "CHILD" IN SECTION **440.02(5),** FLORIDA STATUTES **(1987),** AND FLORIDA'S PUBLIC POLICY FAVORING THE LEGITIMACY OF CHILDREN PERMITS A CHILD BORN OF A LEGITIMATE MARRIAGE BUT FATHERED BY SOMEONE OTHER THAN THE HUSBAND, TO BE DENIED DEATH AND DEPENDENCY BENEFITS UNDER SECTION **440.16,** FLORIDA STATUTES **(1987).**

Throughout this brief, the Petitioner, Marie Christine Nadine Theis, will be referred to as the "claimant" or "Nadine". The Respondent, City of Miami, shall be referred to as the "employer" or the "City". References to the Record on Appeal will be designated by the letter "R" followed by a numeral. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

On August 28, 1986, George Theis (hereinafter referred to as George), an employee of the City, was performing his duties as a mechanic with the City of Miami, when he was crushed by a payloader truck and was killed **(R.173).** On December 1, 1986, a workers' compensation claim was filed in Tallahassee by Edwidge St. Lot (hereinafter referred to as Edwidge), as the mother and natural guardian of her then minor child, Nadine **(R.174).** Edwidge claimed death and dependency benefits for Nadine, who was alleged to be the legitimate daughter of George by his prior marriage to Edwidge. **(R.423).**

On January 9, 1987, the City filed a Notice to Controvert all benefits, alleging that Nadine was not a rightful heir nor dependent of George Theis **(R.425).** A request for final hearing on this matter was made, but prior to same being heard, the City filed a Motion to Compel the taking of blood samples from Edwidge and Nadine. This motion was heard by the Deputy Commissioner and, over strenuous objections by the claimant, an Order was entered compelling the taking of these blood samples **(R.4-7,433-34).**

After these blood samples were taken, a merits hearing on the claim was held on the February 22, 1988 **(R.20).** As Nadine had, by that time, obtained the age of majority, the styling of the claim was amended to show Nadine as the correct party

claimant (R.21). At this hearing, over the continued strenuous objections of claimant's attorney, the Deputy Commissioner admitted into evidence the results of the blood sample testing of Edwidge and Nadine, as well as a copy of a Mercy Hospital Patient Blood Bank Record, alleged to show the results of blood testing on George (R.74,96,410,420). As a result of this evidence presented at the merits hearing, as well as the testimony and other documents submitted into evidence, the Deputy Commissioner entered an Order on April 13, 1988, finding that Nadine was not the "natural legitimate daughter" of George (R.437-41), and as such was not entitled to worker's compensation death and dependency benefits.

A Petition for Rehearing was filed on April 19, 1988 (R.443-44). After a hearing on this Motion, an Order denying same was entered on April 22, 1988 (R.446).

The Claimant filed a Notice of Appeal on May 11, 1988. In an opinion filed May 23, 1989, the District Court of Appeal, First District, affirmed the decision of the Deputy Commissioner. In its opinion, the District Court agreed with the Deputy Commissioner that Nadine was not a "child" under Fla.Stat. 404.02(5) and 440.16 entitled to workers' compensation benefits since she was not the natural, biological child of George Theis. At the same time, the Court, recognizing the "harsh result" of its construction of the statute, certified the following question to the Supreme Court of Florida as one of great public

importance:

> WHETHER THE DEFINITION OF "CHILD" IN SECTION 440.02(5), FLORIDA STATUTES (1987), AND FLORIDA'S PUBLIC POLICY FAVORING THE LEGITIMACY OF CHILDREN PERMITS A CHILD BORN OF A LEGITIMATE MARRIAGE BUT FATHERED BY SOMEONE OTHER THAN THE HUSBAND, TO BE DENIED DEATH AND DEPENDENCY BENEFITS UNDER SECTION 440.16, FLORIDA STATUTES (1987).

The petitioner filed her Notice to Involve Discretionary Jurisdiction of the Supreme Court of Florida on May 26, 1989.

STATEMENT OF THE FACTS

George Theis was a **55** year old mechanic working for the City of Miami when he was killed suddenly on August **28, 1986** after being crushed struck by a payloader truck **(R.173).** George Theis was divorced at the time of his death, but he supposedly left two children: Garry, married and Nadine, age **14.** Despite an average weekly wage of **$660.00** per week, he left virtually no assets in his **estate.(R.133,140,144).**

Edwidge Obas and George Theis, both citizens of Haiti, were married in Haiti on January **12, 1959 (R.216).** A son, Garry, was "adopted" in **1961 (R.274).** They lived together as a family in Haiti until November **1, 1969,** when George left for the United States **(R.208).** On November **17, 1969,** two and one-half weeks after George left Haiti, Marie Christine Nadine Theis was born **(R.323).**

Nadine's birth certificate was filed in the Haitian registry January **12, 1970.** The document indicates that Nadine was born November **17, 1969,** and that she is the legitimate female daughter of Edwidge, wife of George Theis **(R.196, 253, 256).** As George Theis was in the United States at the time Nadine's birth certificate was filed, he could not file a concurrent certificate of birth stating that Nadine was his daughter **(R.325).** However, in his application for United States permanent resident status dated February **11, 1970,** just three months after Nadine's birth, George

listed both Garry and Nadine as his children, and Edwidge as his wife (R.208).

In April, 1970, George's brother, Roger Theis, was in Haiti and stopped by the home of Edwidge. It was that time that Roger first saw Nadine who was then about five months old (R.125). Upon his immediate return to New York City, Roger talked with his brother George about Nadine. At that time, George is alleged to have told his brother that Nadine was not really his biological child. However, this matter was never spoken about again with Roger for as long as George lived (R.126).

George later brought his family from Haiti to the United States, and became reunited with them in New York City. Nadine received her official visa to come to the United States on June 17, 1970. The official United States Immigration Records show Nadine Theis to be the daughter of George Theis (R.195,198). After arriving in New York City, George and Edwidge, along with their two children, set up house, living together as a family until their divorce in 1974 (R.128).

Edwidge Theis obtained a Judgment for Divorce against George Theis on May 24, 1974 in Port-Au-Prince, Haiti. Later, on July 17, 1974, the divorce decree was entered in the official Haitian records (R.250,259). The divorce decree required George, who was declared to be the father of Nadine, to pay child support payments for Nadine of $30.00 per month (R.230,249,252,259).

Although George Theis did not appear at the divorce proceedings, it is clear that George was notified of the divorce proceedings and did not contest them **(R.230).** He subsequently remarried another woman **(R.130).**

In **1975,** George attempted to get his United States citizenship, but had some problems doing so because of a lack of proof of support of his two children, Garry and Nadine **(R.224).** George signed an Affidavit for the United States Immigration Service on March **12, 1975** indicating that upon his divorce, his two children had been divided between he and his wife, with Garry living with George and Nadine living with her mother **(R.353).** This was the reason he was not paying support for Nadine at that time. He also included in the Affidavit a statement indicating that "I do not support my child Nadine" and that "both of these children were legally adopted by me and my wife when we was married" **(R.222).** Edwidge, on June **1, 1976,** likewise signed an Affidavit for George to present to the immigration service, indicating, at that time, a refusal of any economic support for Nadine from George **(R.223).**

After his divorce from Edwidge, George continued to live in New York City until approximately **1979 (R.384).** During that time, George visited with Nadine at Nadine's grandmother's house every weekend **(R.384).** After moving to Miami in approximately **1979,** George often saw Edwidge's sisters, who also lived in the South Florida area **(R.38,134).** Gene Napoleon, the husband of one

of Edwidge's sisters, and thus Nadine's uncle, testified that at these weekly visits George would express both this concern and his love for his daughter, Nadine (R.38). Further, George would say that no matter what anyone had said, Nadine was still his daughter (R.42-3).

George stayed in constant contact with Nadine, calling her frequently (R.49-50,303). George and Nadine would discuss "things fathers and daughters talk about" (R.50). He sent money monthly to Edwidge for clothes and expenses for Nadine, and paid half of Nadine's parochial school tuition (R.49,51,303,327). All of Nadine's school records, from elementary, grade school and high school, indicate her father to be George Theis (R.234,236,239).

The money contributed by George for Nadine's tuition and other expenses continued to be sent to Edwidge up to the time of George's death, and absent that contingency, were expected to be continued.(R.40,43)

Several months after her divorce from George, Edwidge married Hughes St. Lot (R.270). Edwidge admitted to having known Mr. St. Lot while both were still living in Haiti, and over objection, testified to having sex with Mr. St. Lot one time, prior to Nadine's birth, while still married and living with George (R.277-8, 283).

Shortly after the accident that ultimately resulted in his

death, George was taken to Mercy Hospital in Miami. There, a phlebotomist drew some of his blood. This blood sample was later analyzed along with the blood samples of Nadine and Edwidge, ordered by the Deputy Commissioner for the purpose of determining whether George was the biological father of Nadine. Over objection, G.L. Ryals, Ph.D., an employee of a blood testing company known as Genetic Design, testified that based on the blood groups of George, Edwidge and Nadine, it was not biologically possible for George Theis to be the biological father of Nadine (R.108).

Prior to the workers' compensation proceedings that led to this appeal, Nadine Theis had no inkling that George Theis was not her biological father (R.55).

SUMMARY OF ARGUMENT

The definition of "child" in Fla.Stat. **440.02(5)** should not be interpreted so as to deny a child born of a legitimate marriage and recognized by law as the husband's child, from receiving death and dependency benefits under Fla.Stat. **440.16**, even if the husband was not the child's biological father.

Fla.Stat. **404.02(5),** which sets forth the definition of "child" for the purposes of the Florida Worker's Compensation Law, should be construed so as to define a child as an individual with whom a deceased worker-parent had a legally recognized parent-child relationship at the time of the decedent's death. Such an interpretation is in accord with previous decisions of this Court, with the specific terms of the statute, and with the public policy of this state favoring the legitimacy of children. The legislature included no language in the statute requiring that the lawful child of a deceased worker also be that workers' biological child.

Any interpretation of Fla.Stat. **440.02(5)** that requires a child recognized by law as the legal child of a deceased worker to be, in addition, that worker's biological child, improperly precludes lawful but not formally adopted children from receiving any workers' compensation death benefits. As a class, such children would be denied workers' compensation death benefits under the statutory interpretation urged by the City. Such an

interpretation of the definition of "child" should not be adopted by this Court, absent an indication in the statute that the legislature intended to preclude lawful, but not adopted non-biological children from coverage under the Florida Workers' Compensation Law.

Finally, even if a "child" is defined under Fla.Stat. 440.02(5) as a biological child, Florida public policy should preclude the employer/carrier from having standing to question the biological paternity of a child recognized by law as the child of a deceased worker. It is the existence of a legal parent-child relationship, not actual, biological, paternity, that should determine eligibility for workers' compensation death benefits. Thus, in this case, the City's inquiry should have been limited to inquiries into the existence of a legal parent-child relationship, and should not have been allowed to be extended to include the taking of blood from the claimant and her mother for the purpose of determining the claimant's biological paternity.

Even assuming, arguendo, that the City is given standing to explore the issue of the paternity of a child claiming workers compensation death benefits, such standing should be, at best, derivative of the rights of its employee. Thus, the City's ability to question paternity should have been limited, at best, to those rights of George Theis, had George ever sought to question parentage (which he did not). So limited, in applying

principles of Florida's Domestics Relations Law and Haitian Domestic Relations Law (as rules of comity require them to be applied within the State of Florida in this matter), the City should have been estopped from contesting the legal parent-child relationship between George and Nadine.

ARGUMENT

I.

THE DEFINITION OF "CHILD" IN FLA.STAT. 440.02(5) SHOULD NOT BE INTERPRETED SO AS TO DENY A CHILD BORN OF A LEGITIMATE MARRIAGE AND RECOGNIZED BY LAW AS THE HUSBAND'S CHILD, FROM RECEIVING DEATH AND DEPENDENCY BENEFITS UNDER FLA.STAT. 440.16, EVEN IF THE CHILD WAS FATHERED BY SOMEONE OTHER THAN THE HUSBAND.

A. UNDER FLA.STAT. 440.02(5) A "CHILD" SHOULD BE DEFINED AS AN INDIVIDUAL WITH WHOM THE DECEASED WORKER-PARENT SHARED A LEGALLY RECOGNIZED PARENT-CHILD RELATIONSHIP.

This is a case of first impression in a workers compensation claim. This Court has never before been required to determine whether Fla.Stat. 440.02(5), which sets forth the definition of "child" for the purposes of the Florida Workers' Compensation Law, requires that a legally recognized child also be the biological child of a deceased worker before becoming eligible for death benefits. Claimant urges that this Court not adopt such a definition.

Fla.Stat. 440.16, entitled "Compensation for Death", provides for death benefits "to the child or children" of a deceased employee. Fla.Stat. 440.02(5), entitled "Definitions: Child", defines child to include "a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased..." Neither of these sections require a "child" to be

the "natural" or "biological" child of the deceased.

The essence of the meaning of "child" under Fla.Stat. 440.02 (5) is not biological parentage. Rather, as this Court has previously recognized, regardless of paternity, a "child" is a person with whom the parent had a legally recognized parent-child relationship at the time of the parent's death. Tarver v. Everareen Sod Farms, Inc., 533 So.2d 165 (Fla. 1988) (hereinafter Everareen Sod).

In Everareen Sod, this Court held that a virtually adopted child did not meet the definition of "a child legally adopted" under Fla.Stat. 440.02(5), since "...the clear intent of the statute is that there be a legal obligation of the parent-worker prior to the death..." Everareen Sod, at p.767.

The "legal obligation" standard adopted by this Court in Evergreen Sod should apply equally to the definition of "child" under Fla.Stat. 440.02(5). The "clear intent" of the statute is not that a child be a biological child, an additional requirement not contained in the statute, but rather simply that the legal relationship of parent-child exist before workers' compensation death benefits may be awarded.

Even without providing proof of biological parentage, it is evident that Nadine Theis clearly met her burden of proof that she was the legally recognized daughter of George Theis. Under the divorce decree entered in Haiti in 1974, George Theis, who was declared to be the father of Nadine, was obligated to furnish

his daughter support of $30.00 monthly (R.249). It is undisputed that George had knowledge of the divorce proceedings and that he never contested them (R.129-30,230). In addition, George acquiesced to the divorce by his later remarriage (R.130).

In Florida, final judgments of dissolution are res judicata on the issue of paternity. Johnson v. Johnson, 395 So.2d 640 (Fla. 2d DCA 1981); Nostrand v. Olivierri, 420 So.2d 374 (Fla. 2d DCA 1983). Thus, the divorce decree standing alone, acknowledging as it does that Nadine Theis is the daughter of George Theis and requiring George to support his daughter, is res judicata on the issue of Nadine's paternity. Nadine is by law recognized as the daughter of George Theis.

In addition, under Florida statute, an illegitimate non-biological child may be legitimized by a father accordance with Fla.Stat. 732.108, which provides:

> Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father. Such illegitimate child shall inherit from his mother and also, when so recognized, from his father, in the same manner as if the child had been born in lawful wedlock. However, such illegitimate child does not represent his father or mother by inheriting any part of the estate of the parents' kindred, either lineal or collateral, unless his parents have intermarried, in which event such illeaitimate child shall be deemed leaitimate for all purposes.

In Knauer v. Barnett, 360 So.2d 399 (Fla. 1978), this Court

held that a child legitimized pursuant to this statute did not have to be a "biological" child of the reputed father who complied with the above statutory provisions. The Court held that:

> Where an individual affirmatively seeks to assume the responsibilities of fatherhood, provisions for determination of paternity, like [Section 732.1081 do not require proof of paternity by that person.

In this case, George Theis affirmatively sought the responsibilities of fatherhood and fulfilled the statutory requirements of Fla.Stat. 732.108 with regard to Nadine. He and Edwidge married, and continued their marriage after Nadine was born. In addition, in at least two documents signed in the presence of witnesses, George declared himself to be the father of Nadine:

1. In his Application to file Petition for Naturalization, dated October 1, 1974, George Theis declared that he had two children, Nadine Christine and Yves Garry. This portion of the application was signed by two witnesses.(R.219-21)

2. In an affidavit attached to his Application to file Petition for Naturalization, George Theis declared that he did not at that time provide support "for my child Nadine" because he and Edwidge had split custody of the children, with Nadine living with her mother and Garry living with George. He also declared that Garry and Nadine "were legally adopted by me and my wife

when we was married". This document was sworn before a witness. (R.222)

Under Florida law, George Theis complied with all the statutory requirements to legitimize what might otherwise biologically be considered an illegitimate daughter. Regardless of Nadine's biological parentage, Florida law should regard Nadine as the lawful daughter of George Theis, who acknowledged his paternity in writing before witnesses, and who married Nadine's mother. Nadine is, therefore, George's lawful child, and is "legitimate for **all** purposes", including qualification as George's child under the Florida Workers Compensation Law. Thus, the fact that Nadine's biological father may be someone other than George should be irrelevant to Nadine's rights to claim death benefits.

I.

THE DEFINITION OF "CHILD" IN FLA.STAT. **440.02(5)** SHOULD NOT BE INTERPRETED SO AS TO DENY A CHILD BORN OF A LEGITIMATE MARRIAGE AND RECOGNIZED BY LAW AS THE HUSBAND'S CHILD, FROM RECEIVING DEATH AND DEPENDENCY BENEFITS UNDER FLA.STAT. **440.16**, EVEN IF THE CHILD WAS FATHERED BY SOMEONE OTHER THAN THE HUSBAND.

B. AN INTERPRETATION OF FLA.STAT. **404.02(5)** THAT REQUIRES A LEGALLY RECOGNIZED CHILD TO ALSO BE THE BIOLOGICAL CHILD OF A DECEASED WORKER IMPROPERLY IMPOSES ON SUCH A CHILD AN ADDITIONAL PREREQUISITE FOR WORKERS' COMPENSATION DEATH BENEFITS NEITHER CONTEMPLATED BY THE LEGISLATURE NOR FAVORED BY PUBLIC POLICY.

The decision by the District Court of Appeal, First District, that a "child" under Fla.Stat. **440.02(5)** must be the biological child of a decedent for the purposes of collecting workers' compensation death benefits inserts into the statute an additional prerequisite for benefits that was not included by the legislature. The statute provides that the definition of child includes **"a** posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased..."Nowhere is this statute do the words "natural" or "biological" appear.

In statutory construction, the applicable rule is expressio unius est exclusio alterius: where one thing is expressed and others are not, the legislature is presumed to have intended to omit the items not expressed. City of Miami v. Cosgrove. **516**

So.2d 1125 (Fla. 3d DCA 1987). Applying this rule of statutory construction to the case at bar, it is evident that the requirement that a "child" be a biological child, an additional prerequisite for workers' compensation benefits not expressed in Fla.Stat. 440.02(5), should not be imposed judicially where the legislature chose not to do so.

Moreover, the fundamental purpose of the death benefits provisions of Florida Workers' Compensation Law is to relieve society of the burden of caring for dependents of a deceased worker by placing the burden on industry, rather than on society. C.F. Wheeler Co. v. Pulbins, 11 So.2d 303 (Fla. 1943). It is often stated that the Law should be construed liberally, to effectuate the purpose for which it was enacted. Sherman v. Peoples Water & Gas Co., 138 So.2d 745 (Fla. 1962). In cases where the law is capable of disparate interpretations, the interpretation more favorable to the employee and his dependents should be adopted. Platzer v. Burger, 144 So.2d 507 (Fla. 1962). In the case at bar, the decision of the District Court of Appeal to require a legally recognized child to also be the biological child of a decedent worker restricts by judicial fiat the class of children to whom workers' compensation benefits are available. An interpretation that serves to encourage, rather than restrict benefits, for the legally recognized children of a deceased worker, would be more in keeping with the remedial purposes of the Florida Workers' Compensation Law, and should be adopted by

this Court.

Further, the District Court, in its opinion, has contravened the expressed public policy of the State of Florida, which favors the legitimization of children and the protection of the family. Knauer v. Barnett, 360 So.2d 399 (Fla. 1978). These public policy considerations correctly base parent-child relationship upon legalities, and not to a single biological act of procreation. To do otherwise would invite havoc in all litigation dealing with death. Insurance companies, for example, in vehicle accidents or products liability claims involving death, in addition to compensation claims, could demand blood tests by all claimed survivors. This type of inquiry, logically the next step, should not, and cannot, be condoned or allowed.

Moreover, under the interpretation of Fla.Stat. 440.02(5) urged by the City and adopted below by the District Court of Appeal, an entire class of lawful children would be precluded from receiving workers' compensation death benefits. A child recognized as the lawful child of a deceased worker, but who is not the biological or adopted children of the deceased worker, would not be eligible for benefits as a "child" since he is not the decedent's biological child, even if a legal parent-child relationship exists. Similarly, such a child cannot be termed a decedent's acknowledged illegitimate child, since he is not the decedent's biological, illegitimate child. Unless formal adoption

proceedings have been carried out, he is not adopted.

Following the interpretation adopted by the District Court of Appeal, the only way Nadine Theis could have received workers' compensation death benefits would be if her own father had legally adopted her. The effect of this interpretation is to preclude from coverage a girl who was acknowledged by her father from birth as his own, whose father never sought to challenge numerous public assertions that Nadine was his child, and whose father was under a legal obligation per court order to support his daughter Nadine. Why would such a man adopt his own daughter?

To better illustrate the dilemma posed by the District Court's decision, consider the following scenarios:

1. The father of a child conceived by means of artificial insemination dies in a work-related injury. Under Fla.Stat. 742.11, such a child is "irrebutably presumed" to be legitimate if both husband and wife have consented in writing to the procedure. Even so, the child is not the biological child of the father. The father never formally adopted the child, understanding the child to be recognized by law as his son. If a "child" under Fla. Stat. 440.02 (5) is defined as a biological child, the child in this scenario is barred from receiving workers' compensation death benefits.

2. A child is born out of wedlock. The father later marries the mother and, before a city official and other witnesses, formally acknowledges the child as his son. An

official entry of this declaration is recorded in the child's birth records. The child is never formally adopted by the father, who presumes the boy to be his legally recognized son. Later, after the father's death in an industrial accident, the son seeks workers' compensation death benefits. Blood tests requested by the carrier/employer show the child cannot be the biological son of his father. If a "child", under Fla.Stat. 440.02 (5) is defined as a biological child, the child in this scenario is also barred from receiving workers' compensation death benefits.

The decision o preclude non-biological children recognized at law, but not formally adopted, from receiving workers' compensation death benefits is, as the District Court of Appeal's noted, "a harsh result". The legislature, in enacting legislation intended to cast the burden of caring for a worker's children upon industry, rather than society, cannot have contemplated that a child recognized at law would be barred from receiving death benefits under the Workers' Compensation Law. The term "child" should not be so defined as to allow this result. Thus, as phrased, the certified question should be answered in the negative.

I.

THE DEFINITION OF "CHILD" IN FLA.STAT. 440.02(5) SHOULD NOT BE INTERPRETED SO AS TO DENY A CHILD BORN OF A LEGITIMATE MARRIAGE AND RECOGNIZED BY LAW AS THE HUSBAND'S CHILD, FROM RECEIVING DEATH AND DEPENDENCY BENEFITS UNDER FLA.STAT. 440.16, EVEN IF THE CHILD WAS FATHERED BY SOMEONE OTHER THAN THE HUSBAND.

C. EVEN ASSUMING, ARGUENDO, THAT A "CHILD" UNDER FLA.STAT. 440.02(5) IS DEFINED AS A BIOLOGICAL CHILD, FLORIDA PUBLIC POLICY SHOULD PRECLUDE A COLLATERAL PARTY NOT OTHERWISE INVOLVED IN THE DETERMINATION OF BIOLOGICAL PARENTAGE STANDING TO QUESTION THE PATERNITY OF A CHILD RECOGNIZED BY LAW AS THE CHILD OF A DECEASED WORKER.

The District Court of Appeal, First District, in its decision, has allowed a collateral third party, not otherwise normally involved in the determination of biological parentage, standing to question the legitimacy or illegitimacy of a child. In doing so, the District Court has also granted to the City the power to question legitimacy under circumstances where even its own employee would have been estopped to do so.

It is the position of the claimant that Florida public policy should preclude the City from having standing to challenge the legitimacy of Nadine Theis. The statutory and decisional law of this State, to date, makes no provision for a collateral third party to enter, on its own, into a determination of paternity. Chapter 742 of the Florida Statutes, entitled Determination of Paternity, states in pertinent part that:

> Determination of Paternity Proceedings; Jurisdiction
>
> A. Any woman who is pregnant or has a child, any man who has reason to believe that he is the father of the child, or any child may bring proceedings in the Circuit Court, in chancery, to determine the paternity of a child when paternity has not been established by law or otherwise.

Thus, the City of Miami should not have the requisite standing under Chapter 742 to challenge the paternity of Nadine Theis in a workers' compensation forum. This is especially true since that issue had previously been determined through a valid Haitian dissolution proceeding, and is also evidenced by George's acknowledgment of Nadine in the United States Immigration Documents (R.208, 219-222).

In other settings, within the State of Florida, collateral third parties have attempted to question paternity. In all cases, standing has been denied. In the case of In re: Estate of Broxton v. Johnson, 425 So.2d 23 (Fla.4th DCA 1982), the appellate court questioned the purported lineal descendants' standing to adjudicate the paternity of their mother. In doing so, the Court went on to state that:

> It is one thing to permit Lillian to attempt to bastardize herself for reasons that to her appear good and sufficient. It is quite another thing to grant her lineal descendants standing to do so for her own personal gain.
>
> We are aware of no Florida case permitting a child or more remote lineal descendant to bastardize an ancestor per judicial

proceedings.

Id. at 25.

In Knauer v. Barnett, 360 So.2d 399 (Fla. 1978), the Supreme Court of Florida further delineated its position regarding this matter. The facts in Knauer are strikingly similar to those of the case sub judice. There, the trial judge attempted to interpret the term "natural parents" to mean "biological parents", when interpreting the provisions of Fla.Stat. 731.29(1) (1973). Knauer also involved evidence of immigration documents, the estrangement of the "parents", and the purported allegation that the son was not the biological child of the father in that "there was not a drop of my blood in that boy." Knauer at 402-03.

The Supreme Court of Florida held that the decedent, having complied with all provisions of the statute governing illegitimate children as heirs, rendered his son legitimate for all purposes, and thus made unnecessary in the proceeding actual proof of paternity. In holding as such, the Supreme Court of Florida went on to say that although the husband and reputed father had the right to challenge the parentage of a child who has been legitimized,

> ...this right does not extend...(and) is not accorded to the father's collateral kindred after his death. Because of the absence of standing of the collateral kindred of William to challenge the parentage of Charles, the district court determined that the evidence relied upon by the circuit judge in ruling

> that Charles is not the blood issue of William was irrelevant. Charles' legitimization resulting from the acknowledgment and marriage, by definition, rendered him the blood issue of the marriage of Wiliams and Marcelle.

Id. at **403**.

As in Knauer, supra, the case at bar involves a child recognized by law a the lawful child of her father. George Theis was married to Nadine's mother and continued to be married to her after Nadine's birth. He acknowledged Nadine as his own child in sworn immigration documents, and he accepted a divorce decree that declared Nadine to be his daughter and ordered him to pay child support. Since Nadine should be considered by law to be George Theis' child, the City should have no standing to question her paternity.

In Knauer, the Court also stated that:

> Eldridge and Gammon both rest on strong policy reasons which countervail the policy of legitimizing children. To permit the collateral kindred of William to challenge the parentage of Charles, however, is not supported by any such policy consideration and would seriously undermine the status of every child born out of wedlock who was subsequently legitimized by acknowledgment and intermarriage pursuant to Section 731.29(1).

The claimant acknowledges that the City, in a worker's compensation forum, cannot be precluded from inquiring as to whether a legal parent-child relationship between Nadine and George Theis existed at the time of George's death. This is the scope of inquiry contemplated in Knauer, supra, and, in fact,

should be the only relevant inquiry in this case.

If one assumes, arguendo, that the City, pursuant to its obligations to provide benefits under the Florida Workers' Compensation Law, is given standing to question the legitimacy of Nadine, to what extent should this standing extend? Claimant would contend in this situation there is no logic in extending the right of the City to question paternity beyond those of its employee, by whose death the City derives its obligation to pay benefits. Thus, at best, the City's standing to question the legitimacy of Nadine should be limited to those rights that George had, if he had chosen to exercise same.

In cases involving determination of legitimacy, as a general rule, the regular domestics relations law of the State controls in workers' compensation proceedings. See Larsons Workers' Compensation Law Section 62.21(b) at Page 11-6. Under principals of comity, Florida Courts in this case should look to the laws of Haiti in order to determine questions relating to the legitimacy of Nadine Theis, since she was conceived and born in Haiti, and since all parties were at the time of her birth citizens of Haiti. See, Kroitoro v. Chase Manhattan Bank, N.A., 522 So.2d 1061 (Fla. 3rd DCA 1988). Further, Nadine Theis' birth certificate was recorded in the Haitian registry, and George Theis had a child support obligation with respect to Nadine in his divorce decree from Edwidge, which he was bound to accept (as

by his remarriage George is estopped from contesting same).

The Constitution of Haiti contains provisions relating to the family, and within Article **186**, states that legitimate children and illegitimate children who have been legally acknowledged shall have equal rights to the education, protection, support, and care of their parents. Article **169** states that the "law" shall fix the conditions under which an effort may be made to determine paternity. The legal system of Haiti is governed by both the Constitution and the Civil Code of Haiti, and pertinent portions had been translated and presented to the Deputy Commissioner to assist in the adjudication of the claim herein. As is more fully demonstrated within Law **#8**, entitled Concerning Paternity and Affiliation, at Article **293** thereof, Haitian law provides that a: "child conceived during a marriage has as its father the husband..." **(R.181)**

The articles contained within Law **#8** do provide the husband with the right to disavow the child if he fulfills certain requirements, but as is more fully demonstrated by a review of the translation of that law, the husband is only permitted to disavow the child within certain time periods. Article **297** of Law **#8** states:

> In the several cases in which the husband is permitted to protest (the legitimacy of a child), he must do so within one month if he is present at the place of birth of the child;
>
> within two months after his return if at said time he was absent;**...(R.182)**

Chapter II of Law #8, entitled Concerning the Proof of the Affiliation of the Legitimate Children, states within Article **300** that such affiliation is proved by the instruments of birth recorded at the registry of civil standing. Article **301** of Chapter II indicates that legitimate children can be affiliated and have same established, under certain circumstances:

> **1.** When the individual has at all times borne the surname of the father to whom he/she claims to belong;
>
> **2.** When the father has treated him/her as his child and has provided as such for his/her education and establishment;
>
> **3.** When the individual has been recognized as such in society and by the family **(R.183).**

Taken together, Haitian Law would not permit the contesting of paternity by George Theis. In the case at bar, there exists a valid Haitian divorce decree requiring George Theis to pay child support payments to his ex-wife Edwidge, for their legitimate minor child, Nadine Theis. The City has failed to introduce any evidence to indicate that the Haitian divorce decree is invalid. Thus, as a final judgment of dissolution, its provisions should have been enforced since there was no evidence that George Theis at any time attempted to contest the paternity of Nadine Theis. Further, this divorce decree was, at the very least, acquiesced to by George when he subsequently married someone other than Eldwidge **(R.117).** Additionally, George Theis never objected to

the filing of Nadine's birth certificate in the Haitian registry, which designated him as Nadine's father and required him to provide for her support (R.253).

Article 294 of Law #8 even goes so far as to preclude George from contesting paternity on grounds of impotence or even adultery (R.181). This law is applicable to the facts of the case herein. Specifically, Nadine was conceived during the Theis' valid and lawful marriage, and her birth was immediately made known to George. Nadine, at all times since her birth, bore the surname of her father, Theis, and for purposes of schooling, immigration and later legal proceedings had always been the "child of her father, George".

George would therefore be precluded, by the application of Haitian Law, from contesting the legitimacy of his daughter, Nadine. The City, whose rights at best should be derivative of those of George, thus should not have been given standing to utilize blood tests to reopen proceedings relating to Nadine's paternity, which paternity had previously been adjudicated through the Haitian divorce and the United States Immigration papers (which included George's own sworn affidavit admitting Nadine to be his child) (R.208,222). See, Nostrand v. Olivierri, 427 So.2d 374 (Fla. 2d DCA 1983); Johnson v. Johnson, 395 So.2d 640 (Fla. 2d DCA 1981), and Chapter 742 Fla.Stat. et seq.

In the Florida case of Johnson v. Johnson, 395 So.2d 640 (Fla. 2d DCA 1981), the former wives had filed their petition for

enforcement of child support and their former husbands responded by requesting that the wives and children be ordered to submit to physical examinations to determine their blood types. After the Circuit Court ordered the wives and children to submit to physical exams, the wives filed petitions for Writs of Certiorari. On appeal, it was held that the final judgments of dissolution, which resolved the issue of each child's paternity, were res judicata on the paternity issue and as such vacated the lower court's order and remanded the case to the Circuit Court.

In holding as such, the appellate Court indicated that despite recent cases to the effect that blood tests would be admissible in paternity litigation, such cases would not authorize courts to reopen proceedings and relitigate matters previously resolved. The Court also stated that if it were to allow former husbands to come into court long after the entry of a final judgment of dissolution and challenge the legitimacy of children born during their marriages, chaos would result, and former wives and their children, in many instances, would have to submit to a humiliating experience. **Id** at 641. This is exactly what the City of Miami should have been precluded from doing in the case at bar.

A similar situation existed in the case of Nostrand v. Olivierri, 420 So. 2d 374 (Fla. 2d 1983). In that case, the natural mother of a child and her present husband brought suit,

asking that a former husband, to whom the mother was wed at the time of the child's birth, be declared to have no rights of visitation or any other right of fatherhood. After the Circuit Court ordered the former husband to submit to blood tests, the husband filed for a Writ of Certiorari. On Certiorari, the appellate court held that the mother was barred by res judicata, or estoppel, from claiming that the former husband was not the father. The court indicated that the Nostrand case was not in the customary posture of a paternity action in which the mother of an illegitimate child seeks to establish the defendant as the child's father. Instead, the court stated that the case was at variance from those types since the Olivierris directly attacked the presumption that a child born during wedlock is legitimate. In reaching its decision, the court found that the mother had foreclosed her own course of action, since she had acknowledged in the marital separation agreement that the child was born of her marriage to Nostrand. Since she had obtained an Order requiring Nostrand to pay child support, she could not now be permitted to claim that he was not the child's father.

Similarly, in the case herein, George Theis would have been precluded from challenging his status as the father of Nadine. In remarrying after the divorce decree was entered in Haiti, he acquiesced to its terms and conditions and is estopped to contest same. Further, by his own acknowledgment in the immigration documents he admitted to the legitimacy of his daughter Nadine to

be his and his alone. At no time did he ever question the legitimacy of this relationship. Even when challenged by the United States Immigration Department to show why he had not provided support for Nadine, George did not contest a paternity relationship, but instead clearly indicated in his response, under oath, that "I do not support my child Nadine" primarily because his two children, Garry and Nadine, were split between he and his wife (R.222).

In granting the City standing to question the biological paternity of Nadine Theis, the District Court of Appeal, First District, granted to the City standing far beyond that which by law would be allowed to it's own employee, George. Public policy favoring the legitimacy of children and the preservation of the family should preclude the City from having this right. As the otherwise legal daughter of George Theis, Nadine should be entitled to appropriate compensation benefits. The court below having allowed the City standing to question Nadine's bioligical paternity, in light of an existing legal relationship of parent-child, the opinion below should be reversed by the appropriate answer to the certified question.

CONCLUSION

Based upon the foregoing arguments and authorities, the definition of "child" in Fla.Stat. **440.02(5)** should not be interpreted so as to deny a child born of a legitimate marriage, and recognized by law as the husband's child, from receiving death and dependency benefits under Fla.Stat. **440.16**, even if the child was biolgically fathered by someone other than the husband. A "child" under Fla.Stat. **440.02(5)** should be defined as a person with whom a deceased worker shared a legally-recognized parent-child relationship at the time of the worker's death. This interpretation is consistent with previous rulings of this Court, with the public policy of Florida favoring the legitimization of children, and the preservation of the family, and with the remedial purposes of the Florida Workers' Compensation Law.

This Court should reject any interpretation of "child" under Fla.Stat **440.02 (5)** that requires a legally recognized child of a deceased worker to be also the decedent's biological child. Such an interpretation violates the express terms of the Fla.Stat. **440.02(5),** which includes no such restriction. Moreover, such an interpretation precludes a non-biological child legally recognized as the decedent's child but not formally adopted from receiving any workers' compensation death benefits. The legislature cannot have intended to exclude this class of

children from coverage under the Florida Workers' Compensation Law, where, as Fla.Stat. **440.02 (5)** shows, no such exclusion was expressed.

Finally even assuming, arguendo, that a "child" under Fla.Stat. should be defined as a biological child, public policy should preclude a collateral party, such as the City which is not otherwise involved in the determination of biological parentage, standing to question the paternity of a child recognized by law as the lawful child of it's deceased worker. In this case, the City's inquiry should have been restricted to the issue of whether a lawful parent-child relationship existed between George and Nadine Theis at the time of George's death.

Even if the City has standing to question Nadine's biological paternity, public policy should limit such standing to be derivative, and should not be greater than the standing otherwise allowed the City's own employee. George Theis, having acknowledged Nadine as his daughter in several sworn statements, having married Nadine's mother and continued the marriage after Nadine's birth, and being under court order to support his daughter, Nadine, had no standing to challenge her paternity.

Therefore, the claimant respectfully requests that this court enter an order answering the certified question in the negative, reversing the opinion of the First District Court of Appeal, and remanding with instructions to make appropriate findings that Nadine Theis is the lawful daughter of George

Theis, and is entitled to the appropriate death and dependency benefits.

Respectfully submitted,

BY: _____
R. CORY SCHNEPPER, Esquire

BY: _____
KATHLEEN L. SPALDING, Esquire

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the foregoing Brief of Appellant was mailed on this 14th day of September, 1989 to Martha D. Fornaris, Esquire, One S.E. 3rd Avenue, Miami, Florida 33133.

Respectfully submitted,

LEVINE BUSCH SCHNEPPER & STEIN, PA
9100 South Dadeland Boulevard
Suite 1010, Datran Center
(305) 666-1088

BY: _____
R. CORY SCHNEPPER, Esquire

BY: _____
KATHLEEN L. SPALDING, Esquire

THEIS.SUPREME