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SUPREME COURT OF FLORIDA

CHERYL MORTENSON,
Petitioner/Appellant,

Case No. 76,750

vs.

2nd District - No. 89-02119

B. EDWIN JOHNSON,
Respondent/Appellee.

_____ /

ON WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT OF APPEAL

AMENDED BRIEF OF CHERYL MORTENSON, PETITIONER/APPELLANT

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PRELIMINARY STATEMENT

This is an appeal taken from an Order of the Thirteenth Judicial Circuit, The Honorable Vernon W. Evans, Jr., denying the Petitioner's request for attorney fees in conjunction with the defense of a Petition for Modification filed by the Respondent in a paternity action.

STATE OF THE CASE AND OF THE FACTS

This appeal is brought after the Defendant/Appellee/Cross-Appellant brought a motion for modification which resulted in extensive discovery and a lengthy hearing which took place on November 28, 1988, April 6, 1989, June 8, 1989 and June 27, 1989, all of which resulted in the denial of the motion.

Subsequently, the Petitioner/Appellant/Cross-Appellee filed her motion for attorney's fees under Chapter 742 Florida Statutes.

The Court subsequently ruled "The Court has carefully reviewed the paternity statute and finds as a matter of law and fact that the legislature failed to include a provision which would allow the recovery of attorney's fees on a petition to modify a paternity order." The Court further relied on the case of Find v Roher, 448 NE 2d 2045 (Ill. App. 5th District, 1983), which held that attorney's fees are not allowable absent a statute or contractual agreement providing therefore in a petition for modification in a paternity proceeding. The trial Court pointed out that the Illinois statute is very similar to the Florida statute and stated that the statute provides for attorney's fees in initial proceedings, however, fails to provide

for attorney's fees in connection with a petition for modification. The Court further relied on Stump v Foresi, 486 So 2d 62 (4th DCA 1986), which reversed an award of attorney's fees and costs to Appellee. The Stump Court went on to state they were without jurisdiction to determine support in a proceeding under any other statute.

The Petitioner/Appellant/Cross-Appellee took an appeal of the Court's ruling of his jurisdiction as to her right to attorney's fees in the defense of the Petition for Modification

The Second District Court of Appeals noting that the Fourth District Court of Appeals' opinion in P.G.A. v A.F. 564 So 2d 266 (Fla. 4th DCA 1990), had been reported and further, that the said case had been certified to this Court the Second District Court of Appeals also chose to certify to this Court as a matter of great public importance, the same question certified by the Fourth District in P.G.A. v A.F. 564 So 2d 266 (Fla. 4th DCA 1990).

QUESTION PRESENTED FOR REVIEW

WHETHER SECTION 742.031 OR SECTION 16.16 OF THE FLORIDA STATUTES, PROVIDING FOR AN AWARD OF ATTORNEY'S FEES IN AN ORIGINAL PATERNITY ACTION, CAN BE CONSTRUED AS ALSO SUPPORTING AN AWARD OF FEES IN A PORT-JUDGMENT PROCEEDING FOR MODIFICATION OF CHILD SUPPORT IN A PATERNITY ACTION?

SUMMARY OF ARGUMENT I

THE TRIAL COURT ERRED IN DENYING PETITIONER/
APPELLANT/ CROSS-APPELLEES' ATTORNEY'S FEES
AND COST IN DEFENDING A PETITION FOR MODIFICATION
IN A PATERNITY ACTION PURSUANT TO SECTION 742
FLORIDA STATUTES AND/OR SECTION 61 FLORIDA STATUTES.

The question of attorney's fees for the defense of a Petition for modification is one of first impression to this Court. The only authority thus far is the P.G.A. v A.F. 564 So 2nd 266 (Fla. 4th DCA 1990), decision in the Fourth Circuit, and, a law review article which appeared in the Florida Bar Journal and is appended to this Brief as Appendix A. The said law review article, while being a statement of a learning practitioner, is only such, and the matter should be decided by this Court.

The Petitioner/Appellant/Cross-Appellee would argue that Section 742.031 Florida Statutes provides that the Court has the power to order attorney's fees and cost in conjunction with a paternity hearing. There is no limiting language of that fact and the section clearly provides for attorney's fees and cost as well as other expenses. Section 742.06 Florida Statutes allows the Court to retain jurisdiction for further orders and states as follows:

"THE COURT SHALL RETAIN JURISDICTION OF THE
CAUSE FOR THE PURPOSE OF ENTERING SUCH OTHER
AND FURTHER ORDERS AS CHANGING CIRCUMSTANCE
OF THE PARTIES MAY IN JUSTICE AND EQUITY REQUIRE."

Clearly, Section 742.031 Florida Statutes authorizes attorney's fees, and Section 742.06 Florida Statutes grants to the Courts continuing jurisdiction over the subject matter. Thus, the trial Court has the jurisdiction to order such further attorney's fees as they find are necessary during the pendency of the paternity action, which could be for as long as the minority of the child.

For the Court to rule otherwise, would place mothers who petition under this statute in an unequitable situation, and would be a violation of Due Process and Equal Protection Rights as guaranteed under the United States and Florida Constitutions in the case at hand, the Respondent below is an attorney and a member of the Bar, and as such, can petition for modification, employee discovery tactics and appeal rulings of the Court; all only at the expense of his time. While on the other hand, the mother, Petitioner below, is forced to retain an attorney and pay the said attorney a reasonable attorney's fee to defend her position. For the Court to rule that the statute does not provide for further attorney's fees, is clearly not within the meaning of the legislative intent and the statute, and further, will result in an equitable situation for all mothers who petition under this chapter, wherein they are forced to defend petitions for modification. Certainly the Florida Legislature

did not intend for mothers of children in paternity actions to spend all of their child support on attorney's fees.

SUMMARY OF ARGUMENT II

THE PETITIONER IS ENTITLED TO ATTORNEY'S FEES IN DEFENDING HER ACTION FOR MODIFICATION PURSUANT TO SECTION 61.16 FLORIDA STATUTE.

In the case of P.G.A. v A.F. 564 So 2d 266 (Fla. 4th DCA 1990), Judge Gunter wrote a descending opinion wherein he points out that attorney's fees should be awarded to the prevailing party under a Petition for Modification pursuant to original award of paternity pursuant to Section 61.16 Florida Statute. The Petitioner/Appellant respectfully adopts the descending opinion of Judge Gunter as her own.

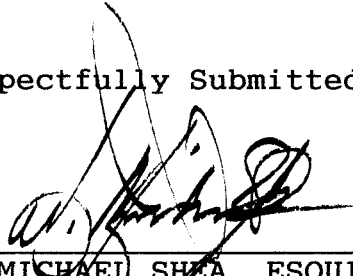
Judge Gunter goes on to point out that in his view a trial Court is authorized by Section 61.16 Florida Statute to award attorney's fees to a mother in a post-judgment proceeding for modification of an order of child support brought pursuant to Section 61.14(1), and points out that it should make no difference that the original order was pursuant to a paternity suit. It is, none the less, an order for child support. The Judge points out in his descent that there is sufficient language in Section 61.14 Florida Statute for a Court to handle the

paternity modification request under Section 61.14 Florida Statute. Once the Court has done so, then they can rely on Section 61.16 Florida Statute to award attorney's fees. Judge Gunter goes on to point out there is sufficient language in that section of the statute to authorize attorney's fees in modification proceedings.

CONCLUSION

For the foregoing reasons, the Petitioner/Appellant/Cross-Appellee requests this Court to reverse the trial Court and remand this cause to the trial Court for determination of attorney's fees.

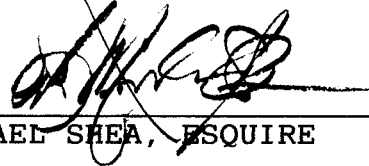
Respectfully Submitted:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail/Hand Delivery to B. Edwin Johnson, Esquire, 1433 South Ft. Harrison Ave., Suite C, Clearwater, FL 34616 this 8th day of January, 1990.



J. MICHAEL SHEA, ESQUIRE