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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, o/b/o A[redacted] S[redacted]

Petitianer,

vs.

Case No. 78,837
2nd DCA No. 97-00536

WILLIAM PRIVETTE,

Respondent.

ONDENT'S ANSWER EF

On Review from the District Court of Appeal,

Second District, State of Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

FLORIDA SUPREME COURT CASES

FLORIDA DISTRICT COURT OF APPEAL CASES

OUT-OF-STATE CASES

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA RULES OF CIVIL PROCEDURE

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner, State of Florida, Department of Health and Rehabilitative Services, will be referred to herein as HRS.

A. S. will be referred to herein as the mother.

Respondent, William Privette will be referred to herein as exactly that.

Reference to the appendix will be as follows: A - followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent, William Privette, agrees with the Petitioner's Statement of' the case and facts. However, the Respondent would note that Petitioner recites the stipulated facts as follows:

1. The child for whom support is being sought in this case is B. S.
2. The mother of B.S.is A. S..
3. B. S was born October 18, 1989.
4. A. S. was married to J.S. prior to October 18, 1989, and at the time the minor child was conceived.
5. A. S. was married to J.S. as of the date of the filing of the paternity action.
6. The birth certificate of B. S. lists her father as J. S..

(Petitioner's Initial Brief at p. vii)

The facts stipulated to by the parties originally were recited as follows, at (A-1):

1. The child for whom support is being sought in this case is B. S..
2. The mother of B. S. is A.S..
3. B. S. was born on October 18, 1989.
4. A. S. was married to J. S. prior to October 18, 1989.
5. A. S. was married to J.S. at the time B. S. was conceived.

6. A. S. is married to J.S. as of the date of instant action.

7. The birth certificate of B. S. lists her father as J. S.

What the Petitioner has done is to combine stipulated facts number 4 and 5. It is agreed that this makes no material difference. Respondent merely notes this for purposes of accuracy.

SUMMARY OF THE ARGUMENT

The Second District below employed the presumption of legitimacy in the way that it has always been utilized in this state - to further the best interests of the child. The opinion of the Second District explicitly takes into account the best interests of the child.

Attacking this, HRS turns the concept of standing on its head by claiming in effect that it, a government agency, has standing to overcome the presumption of legitimacy. HRS is the true party in interest in this litigation because only HRS stands to make a monetary recovery by possibly shifting the burden of support. The level of support to the child will be unaffected by the decision in this case.

HRS should not be able to abrogate onto itself standing to attack the legitimacy of the child. Before the child can be de-legitimized, the best interests of the child must be considered.

HRS' sole concern in this case is a monetary one. It does not take into account the best interests of the child.

* * * *

Before a citizen's right to privacy guaranteed by Article I, Section 23 can be pierced, HRS must demonstrate a compelling state interest. HRS has provided no authority for the proposition that expenditure of state monies in and of itself constitutes a compelling state interest. The determination of whether a state interest is compelling, vel non, must be a judicial, rather than a legislative determination. Else, the legislature could, on an

appropriations bill, render any provision of the constitution a nullity if the standard is adopted that expenditure of state funds on a particular subject matter makes the state interest compelling.

Moreover, even if it is held that the expenditure of state funds and/or the state policy that children be supported by their parents rather than the taxpayers is a compelling state interest the HRS action in this case must fall nonetheless, because HRS does not utilize the least intrusive means of furthering its goal.

ARGUMENT I

THE TRUE ISSUE IS THE BEST INTERESTS OF THE CHILD AND INQUIRY MUST BE FOCUSED ON WHETHER A GOVERNMENTAL AGENCY HAS STANDING TO OVERTURN THE PRESUMPTION OF LEGITIMACY.

By clever labeling, HRS attempts to color the issues involved and determine the outcome of this case. In its Preliminary Statement, HRS announces: "Respondent, William Privette, will be referred to herein as the putative father."[1] However, in its efforts to tag the Respondent as the father, WRS lets slip a profound truth in its preliminary statement. HRS is the petitioner. HRS is the true party here. HRS is the prime, indeed, the only mover behind this action. HRS is the one pursuing this action, not A. S., the mother.

A. S. has no interest in this case. The case was instigated by HRS. HRS instituted this action with one of its pre-printed forms, churned out in vast multitudes, typed in A. S.'s name, and presented it to her for her signature to get the ball ralling.

HRS filed the case, HRS brought the case forward at the trial court level, HRS opposed the writ of certiorari at the Second DCA,

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[1] Petitioner's Initial Brief, Preliminary Statement, p. vi. As noted by S.I. Hayakawa, "As soon as the process of classification is completed, our attitudes and our conduct are to a considerable degree determined. We hang the murderer, we lock up the insane man, we free the victim of circumstances, we pin a medal on the hero." Language In Thought and Action, 4th ed., Harcourt Brace Jovanovich, 1978, p. 203. Here of course, we would force "the putative father" to take a blood test.

and when the Second DCA found its position wanting, HRS pursued the matter to this court. Untold thousands in taxpayer funds have been expended by HRS in this relentless effort to tag William Privette with paternity. All, we are tald, in an effort to protect the public treasury.

The only reason this case is being appealed, indeed, the only reason that it was ever filed in the first place, is because HRS furnished child support money to A[redacted] S[redacted] for her minor child, B. S.. HRS has no interest in A. S. and B. S. other than using them as a vehicle to recover monies expended. HRS paid these monies, and is now attempting: to recoup them. Nothing more and nothing less.

Thus, HRS' fixated financial focus induces a hollow ring to all of its arguments in its brief. The fact is that whether or not William Privette is ultimately compelled to submit to a Human Lerbocyte Antigen test as a result of this court's decision, Briana Sease will still live with her mother and A[redacted] S[redacted] will still receive money far her support, assuming she qualifies under HRS guidelines.

HRS attempts to overcome the presumption of legitimacy here. It is the true party in interest. "The real party in interest is the person who actually has the interest in the outcome of the action; the person who will lose or gain from its outcome."[2]

As Trawick further explicated,

> The term parties in civil procedure refers to

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[2] Trawick, Fla. Prac. and Proc., Section 4-3 (1991 ed.)

> the persons who are litigants in an action.[3] The determination of who may or who must be parties is made under principles of substantive law. Most other matters relating to parties are procedural. The reason why the determination of who may or who must be parties is substantive results from the litigation itself. Each type of legal proceeding seeks one or more kinds of relief. Only those persons who have an interest in obtaining the relief can be plaintiffs or petitioners. Only those persons against whom the relief is properly sought can be defendants. The constitution says it by requiring due process. Thus the nature of the cause of action will determine who must or may be a party to the action.[4] (emphasis added)

It would further seem that historically, the real party in interest is determined by who stands to make a money recovery.[5]

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[3] The State, its agencies and political subdivisions may be parties. Trawick, Fla. Prac. and Proc., Section 4-2 (1991 ed.)

[4] Id. at Section 4-1. This raises two interesting issues. It would seem that J. S. is an indispensable party to this action. Yet, the record is devoid of any indication that HRS even notified him of this action. HRS certainly did not join him. Secondly, though the HRS claims that the purpose of this action is to benefit B. S., it brought the action on behalf of A. S., the mother. Thus, the question is whether the rights of B. S. are properly before the Court. HRS claims to be furthering the rights of B. S., but HRS explicitly brought this action an behalf of her mother, not her.

[5] Id. at Section 4-3, n.1: Harris vs. Smith, 150 Fla. 125, 7 So.2d 343 (1942) when the real party in interest was the assigner of a chose in action; Whitfield vs. Webb, 100 Fla. 1619, 131 So. 786 (1911) when he was the indorsee of a promissory note; Kahn vs. American Surety Co. of New York. 120 Fla. 50, 162 So. 335 (1935) when he was the assignee of a bond; Sammis vs. Wrightman, 31 Fla. 45, 12 So. 536 (1893) when he was the assignee of a judgement; Johnson vs. Florida Brewing Co.. 90 Fla. 148, 105 So. 319 (1925) when he was the bailee of chattels; Maxwell vs. Southern American Fire Insurance Co., 235 So.2d 768 (3 DCA 1970) when he was a third party beneficiary on a contract; Alford vs. Barnett National Bank of Jacksonville. 137 Fla. 564, 188 So. 322 (1939) when he was a pledgee with right of possession; Bastida vs. Batchelor, 418 So.2d 297 (3 DCA 1982) when he was the conditional seller of stock[.]

The only possible party here who stands to make any type of monetary recovery is HRS. HRS will still provide the same level of support to B. S. under these circumstances.

It is HRS that is attempting to bastardize B. S. in an effort to recoup monies advanced to her mother, not William Privette. HRS waxes effusive and fulsame in its brief over all sorts of unspecified but darkly hinted at medical conditions on the part of the child that can only be alleviated, in HRS' view, with an HLA test in this case.[6]

The mother of the child advances no such claim. Indeed, her disinterest is such that she never provided any testimony at the original hearing. No concern over family lineage for medical purposes. No interest over whether the child would qualify for some sort of federal benefits. Not word one. Indeed, HRS did not even call her as a witness.

Indeed, none of HRS' now claimed concerns over parentage for medical reasons, federal benefits, etc. were ever raised as grounds initially for compelling the HLA test; nor were they addressed at the Second DCA. HRS now attempts to interject these concerns, in a parade of the horribles, as a gloss to legitimize its dogged effort to illegitimize B. S..

Let us reduce all of the rhetoric, and focus on the true state of affairs. HRS paid A[redacted] S[redacted] support money for B. S., and HRS now wants to recoup that money. That is what this case is

[6] In terms of the record, HRS never introduced any evidence to substantiate this argument.

about.

Indeed, HRS' determined efforts to bastardize the child raises into question whether HRS is acting in furtherance of the best interest of the child. HRS' efforts to, in effect, render her an illegitimate child can hardly be deemed to be in her best interests. It is an interesting question whether a Guardian Ad Litem should have been appointed to protect her interests from her putative benefactor, given HRS' efforts to bastardize her.[7]

Because of HRS' determined efforts to bastardize this child, with the attendant social opprobrium that would be heaped upon her as a consequence, it is clear that HRS' true interest is the recovery of money expended, not the best interest of the child.

When one realizes that the sole, actual, and overriding interest of HRS in this case is to collect money, it explains the HRS' perversion of the standing argument in this case. William Privette has no desire to bastardize the child; that is what HRS is attempting to do.

William Privette does not question her parentage, he raises no claim as to her legitimacy, he does not contest the presumption of the law that her father is J S . It is HRS that attacks her legitimacy and attempts to illegitimize the child, Where is HRS'

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[7] F.R.Civ.P. 1.210(b) provides in pertinent part: "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." It would seem that the infant, B. S. is not represented in this action because HRS brings it on behalf of A.S..

standing to question the legitimacy of this child? HRS is the petitioner, HRS brought the initial action, HRS is the true party in interest here -- what stake or interest does it have to ask that this child be bastardized? Obviously, the mother has no desire to see her baby bastardized. She compliantly signed the pre-printed forms when presented to her by HRS mandarins, but stood mute when the time came to present testimony in court in support of this action. And yet, HRS is here, claiming that it is acting in the best interest of this child. Somehow, in the logic of HRS, the bastardization of this child is in her best interests. It is certainly in the best interests of HRS, because then a possible roadblock would be removed in its efforts to collect money, How bastardization would rebound to the benefit of the child in this circumstance is more difficult to discern, however.

Not only does HRS seek to compel William Privette to submit to an invasive medical procedure, concomitantly, it seeks to illegitimize a child in its efforts to collect money. This is all done under a claim of acting the child's best interest. Likewise, the staggering expenditure of taxpayer funds in this case is justified as an exercise of protecting the state treasury.

> The purpose of the strong presumption of legitimacy when a child is either born or conceived in wedlock is to protect the interest and welfare of the child. "The child's welfare is paramount. Too often this is forgotten." Blitch vs. Blitch, 341 So.2d 251, 252 (Fla. 1st DCA, 1976) [citing to Sacks vs. Sacks, 267 So.2d 73, 75 (Fla. 1972)].

Given the fact that the true party in interest here is HRS, its standing to delegitimize the child must be questioned.

There is no indicia of any kind that the mother, A. S., made any demands, levied any claim, advanced any assertion that William Privette was the father of this child before HRS placed the pre-printed forms before her for signature.

This action was instituted by HRS with the placing of the pre-printed form before A. S., which she signed on August 28, 1990, more than 10 months after the birth of the child.(A-4) In the intervening 10 months-plus, the record is devoid of anything the mother said or did indicating any responsibility on the part of William Privette toward this child. This time frame clearly indicates that the mother of the child had and has no desire to question the parentage of her child, or to bastardize her child.

The decision of the Second District Court of Appeal in this action is a sober and well reasoned one. Because of the paucity of evidence advanced by HRS, and because of the conflicts in the evidence,[8] the court implemented a balancing test. The result is fair, just, and appropriate. It recognizes the compelling issues involved, bastardization of the child and protection of William Privette's Constitutional right to privacy.

Before HRS can invade a citizen's right to privacy in the factual context in which this case was decided, the lower court held:

> In our view a proper balance can be struck by

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[8] Including, but not limited to, the sworn complaint alleging William Privette as the father, contradicted by the official birth certificate wherein information was furnished under pain of criminal penalty for false information specifying that J S is the father.

> requiring, before ordering HLA or similarly intrusive testing in a contested paternity action, a threshold showing that the complaint is brought in good faith and is likely to be supported by reliable evidence. 585 So.2d 364, 366.

To protect the "too often forgotten"[9] interest in maintaining the child's legitimacy, the lower court further held,

> When, as in the present case, the issue is complicated by the effect of the presumption of legitimacy, the trial court should also determine whether the child's interests will be adversely affected by allowing a party to circumvent that presumption. Id.

When, as here, for 10 months after the birth of the child the mother makes no claim that William Privette is the father, when nothing is done to question the parentage of the child until the government instigates the action, where the child will be possibly bastardized as a result of the government's actions, where the child has the same surname as the husband of the mother, where the child was conceived and born during the marriage between the mother and the husband, where the official state vital statistic, the birth certificate, specifies that the husband of the wife, J S , is the father, where William Privette has not acknowledged the child as his own, nor paid any support, nor evinced any other indicia of fatherhood, then in a case such as this, some threshold showing is required before the government can invade a person's privacy rights.

In the factual framework of this case, the lower court's decision to require that a showing be made that the complaint is

[9] Sacks vs. Sacks, 267 So.2d 73, 75 (Fla. 1972).

brought in good faith and is likely to be supported by reliable evidence is both fair and just. The decision that a trial court should also consider whether bastardization of the child is in the child's best interest certainly is directed to the best interest of the child.

Why does HRS feel it inappropriate for it to have to meet the two-pronged threshold requirement[10] fashioned by the court below? HRS has advanced no claim that it would be burdensome or impossible. Why does it contest the lower court's ruling that the child's interest in her continuing legitimacy be weighed by the trial court? Does HRS claim that this is not in the best interest of the child?

HRS is in effect claiming standing in an effort to illegitimize B. S. In Pitcairn vs. Vowell, 580 So.2d 219 (Fla. 1st DCA, 1991) a decision upon which HRS relies, the court noted the contention of the respondent,

> Also, she says, petitioner's position, which requires respondent to overcome a presumption that was created to protect the welfare of the child, employs the presumption in a manner that frustrates and prevents the natural mother's efforts to protect her child. 580 So.2d at 220.

In Pitcairn, the mother was attempting to establish paternity to obtain support. Here, the support is already being provided to the child by HRS. There will be no damage to the child in this case if the decision of the lower court here is upheld - HRS will

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[10] Complaint brought in good faith and likely to be supported by reliable evidence 585 So.2d 364, 366.

continue to send the support. The child will, of course, face the risk of illegitimacy if HRS prevails. Should HRS be able to force the child to bear the stigma of illegitimacy so that HRS can attempt to shift the financial burden out of its budget and into the pocket of the respondent?

In Pitcairn, the mother may have indeed been legitimately seeking to protect her child by gleaning support. In Pitcairn, though, it was the mother, acting alone, without the guiding hand of HRS. Here, the mother did nothing for nearly a year until HRS stirred up this litigation.

It is submitted that if HRS has standing to argue for bastardization of the child, William Privette has a right to argue legitimacy as a shield to defeat HRS' actions. He certainly has standing to compel HRS' demand that he be farcibly compelled to submit to an invasive medical procedure.

It should be stressed that application of the test enunciated by the court below will occur only in a strictly limited context. It would seem that the ruling below will only be operative in cases where the following factors are present:

1. The mother is married at the time of conception and birth.

2. Official records, such as the birth certificate, indicate that her husband is the father.

3. It is alleged that a stranger to the marriage is the father.

4. The state has in some way interjected itself as a party.

In a factual predicate such as this, the Second District's

requirement of a threshold showing of good faith plus a requirement that the complaint is likely ta be supported by reliable evidence coupled with a determination by the trial court whether the best interests of the child would be served by possible illegitimacy supports all interests.

The constitutional right of a citizen to be left free from unreasonable governmental intrusion into his private affairs will be afforded protection by the threshold showing. The best interests of the child will be served by a determination of whether possible illegitimacy is in the child's interests.

Thus, the rights of those most ta be affected by the ordering of an intrusive medical procedure will be protected and served. In no way does this threshold showing and determination of whether the child will be best served by possible bastardization preclude or frustrate any purported interest on the part of HRS - compelling or otherwise.

It would seem that HRS would be able to meet all requirement of the rule laid down by the Second District. Though it seems *so,* we will never know, because HRS never even attempted to comply.

To demonstrate good faith, HRS should at minimum explain why the mother originally provided information under penalty of criminal prosecution for an official state record, the birth certificate, specifying that her husband was the father, and nearly a year later, at the instigation of, and with the cooperation of HRS, vouching for the validity of a complaint alleging that another man is the father.

To demonstrate that the complaint is likely to be supported by reliable evidence, it would not appear to be unduly burdensome for HRS to at least eliminate the husband as the potential father. Though he, J. S., and the mother, A. S. were married at the time of conceptian and the date of birth, HRS has not attempted to subject him to an HLA test. Though the birth certificate specifies that he is the father, HRS has made no showing, indeed, it has not made any claim that he is unavailable for such testing.

To satisfy the requirement that "the trial court should determine whether the child's interests will be adversely affected by allowing a party to circumvent"[11] the presumption of legitimacy HRS should be required to make some showing that the risk of illegitimacy is counterbalanced by some benefit that would flow to the child as a possible result of this action. Would the child be at some medical risk absent a determination of who her father is? No showing of any kind has been made that that is the case here. Would the child be deprived of financial support? Again, not the case here, because HRS will continue to provide support if required. Let HRS at least explain to the trial court why the risk of illegitimacy is in the child's best interests.

HRS claims that the decision of the Second District "has expanded the availability of the presumption [of legitimacy] beyond its historic role."[12] This is not the case. A close reading of the cases reveals that the Second District does nothing but utilize the

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[11] 585 So.2d 364, 366.

[12] Petitioner's Initial Brief, p.1

presumption in the way that it has always been utilized - namely to protect the best interests of the child.

The Second District decision merely impliments this well established principle, and as a result, inquiry is focused on the true issue of whether "by allowing a party to circumvent"[13] the presumption of legitimacy, the child's best interests are served. What the Second District's decision does is uphold the presumption of legitimacy which flows to the benefit of the child. The case law is clear that historically, the courts of this state disfavor the bastardization of a child. This the HRS attempts to do here, and acting in conformity with the rule of authority, the Secand District protects the best interests of the child.

In Sacks vs. Sacks, 267 So.2d 73 (Fla. 1972), this Court upheld the decision of the Third District which held legitimate a child born after a marriage to an initial husband, where the child was born during the existence of a second, common law marriage. In holding the second husband to be the father even though conception occurred during the existence of the first marriage, the court noted the second husband cohabited with the mother at the time of conception, claimed benefits accruing from the father-child relationship, and stated he was the father. A reading of Sacks indicates that the Court was strongly influenced by the fact that, as here, the birth certificate specified who the father was.[14]

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[13] 585 So.2d 364, 366

[14] "Not only does the birth certificate name respondent as the father..." 267 So.2d, 73, 75; "As noted above, even the birth certificate names the respondent as the father." Id at 76.

> The courts of this state have created a strong presumption in favor of Legitimacy to protect the interests of the child when the child was either born or conceived in wedlock. * * * This presumption was created to protect the welfare of the child. Sacks, 267 So.2d 73, 76 (cites omitted).

Has J. S., the husband of A. S., disowned the child here? Has J. S., the legally presumed father, benefitted Prom the father-child relationship? Has HRS done anything to even ascertain this? How can HRS doggedly pursue a stranger to this marriage when there is not even a scintilla of information in the record that the husband in the marriage during which the child was conceived and born has disowned or disavowed the child?

Sacks illustrates that the true rule, followed throughout the years by the courts of this state that the law favors the legitimacy of children barn during a marriage, and that the presumption is that the husband of the mother is the father of the child. Whatever party - husband, mother, ex-husband, boyfriend, future husband - questions the legitimacy has a heavy burden. Why should it be different for HRS?

HRS claims that it is improper that it be required to dispel the legitimacy presumption before intrusive testing is ordered.

> Other than the Privette decision, there is no established principle of law which requires a mother to disprove her husband is the father of the child in order to discover a putative father's blood sample.[15]

However, T.D.D. vs. M.J.D.D., 453 So.2d 856 (Fla. 4th DCA 1984), a case upon which HRS relies, seems to reach a holding

[15] Petitioner's Initial Brief, p.8.

squarely opposite to what HRS claims, supra. In T.D.D., the court quashed an order compelling a husband to submit to an HLA blood test. The HLA blood test was sought by the wife, who claimed that the husband was not the father.

In remanding the case, the Fourth District ordered the trial court to consider whether the wife was estopped Prom questioning the parentage of the child born during the marriage, since the wife had always represented to the husband that he was the father, and swore to this in her pleadings.[16] As seems to be uniform in Florida, the Fourth District ordered the trial court to consider whether the illegitimacy possibly flowing from the HLA blood test was in the child's best interests.[17]

Thus, the wife in T.D.D. was precluded - absent a further hearing by the trial court - Prom challenging the paternity of the husband. She had to overcame the presumption, in effect, before the action could proceed to an HLA blood test.

Eliminating the husband as the father has histarically been a vital element in de-legitimizing a child. In Sacks vs. Sacks, 267 So.2d 73 (1972), a husband in a subsequent common law marriage was unable to disprove the presumption of legitimacy, and he was held to be the father. This was so even though conception occurred during the existence of the first marriage. In Eldridge vs. Eldridge, 16 So.2d 163, 164 (Fla. Div. A. 1944), wherein the husband claimed that he was not the father, it was stated:

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[16] c.f. note 8, supra.

[17] 453 So.2d 856, 858.

> The better rule is that the husband is not required to prove his contention beyond all reasonable doubt, yet his proof must be sufficiently strong to clearly remove the presumption of legitimacy.

As can be seen from the above cases, the husband of the mother must be eliminated as being the father of the child before that child can be de-legitimized. This well established rule of law should be applied equally to all parties who contest the legitimacy of a child, whether it be the husband (Eldridge), the wife/mother (T.D.D.), or a subsequent common law husband (Sacks). It should apply as well to HRS.

It is HRS - here the prime mover of this litigation - that seeks to frustrate the presumption erected in favor of the child. It is HRS who attacks the legitimacy of this child. It is HRS that attempts to overturn the presumption of legitimacy in an effort to bastardize the child.

As noted, supra, William Privette - a stranger to this marriage - makes no claim as to fatherhood of this child. William Privette raises no question as to the legitimacy of this child. William Privette recognizes and respects the presumption of the law and the legitimacy of this child.

HRS claims at great length that the Second District opinion creates a new rule of law regarding overcoming the presumption. As is evident from Sacks, T.D.D., and Eldridge, the Second District opinion does nothing more than implement the rule already established and in place.

HRS claims further that,

> This type of evidentiary hearing relating to the presumption of legitimacy would apparently require that the husband of the petitioning mother will have to disavow the father-child relationship in order for the court to [order] the HLA Test.[18]

To which William Privette responds, What is improper about that? How is it unwise, unfair or impracticable? Shouldn't at least the presumptive father be eliminated as such before a stranger to the marriage is dragged into litigation by a state agency?

It is clear that it is HRS who is questioning the presumption of legitimacy, not William Privette.

HRS claims,

> Until the Privette decision, the law did not grant standing for a putative father in a paternity action to employ a presumption created to protect a child, a child he claims not to have fathered. This is particularly so when the presumption is employed to frustrate and prevent the natural mother's efforts to protect the child.[19]

However, HRS is silent as to where it is in the law that allows a governmental agency, calling the legal shots at every turn, to have standing to attack the presumption. Nor does it explain how the presumption of legitimacy here frustrates and prevents A. Sease's "efforts to protect the child."[20]

As noted, supra, the mother never offered any testimony, made any claim for support, nor advanced any argument that William

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[18] Petitioner's Initial Brief, at p. 13.

[19] Petitioner's Initial Brief, p.2.

[20] Id.

Privette was the father unt HRS became involved. Indeed, he birth certificate, when the information was gathered at the time of the child's birth says that her husband, J. S., is the father. How does the presumption of legitimacy in any way frustrate or prevent her from protecting the child? From her silence at the original court proceeding, one can only deduce that things were going along smoothly until HRS stirred up this litigation.

HRS also takes aim at the Second District's utilization of the best interests of the child doctrine:

> This type of inquiry, including the additional Privette requirement of an investigation into the emotional position of the child, is not in the best interest of the child.[21]

Why not? It should be noted that the Second District ordered that the best interests of the child be considered. It twists the tongue to even utter HRS' claim that such is not in the best interests of the child. By this contention, HRS admits that it does not have the best interests of the child at heart. HRS wants the best interests of the child excluded from consideration in cases such as this.

To quote HRS' own argument,

> It is the child's best interest[s] which are paramount. The interests of the child in having a "legitimate" father run deeper than concerns of integrity of the family u it [or] of social or community embarrassment.[22]

And yet, it is this very interest of the child that the HRS

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[21] Id.

[22] Petitioner's Initial Brief, p.3, citing to Gammon vs. Cobb, 355 So.2d 261, 265 (Fla. 1976).

seeks to destroy here, an interest that HRS itself specifies is paramount. If this is the paramount interest of the child and HRS seeks to frustrate the presumption of legitimacy and in effect destroy the child's paramount interest, why did it not seek appointment of a guardian ad litem to represent this "paramount" interest which it now seeks to destroy?

The consequences of what HRS seeks from this Court, in this action, will, at least to the natura1 persons involved, be permanent, far reaching and life-long. B. S. may be declared a bastard. J. S may be declared not to be the father of a child specified as h s an the birth certificate, conceived and born during his marriage to A. S.. William Privette will have his privacy rights irreparably invaded. A. S. may well face criminal prosecution for violation af F.S. 382.026(1).[23]

Did HRS apprise A[redacted] S[redacted] of her potential criminal liability when it presented her with the pre-printed form to swear to? It appears that not only does HRS intend to act contrary to the child's best interests by attempting to de-legitimize her, it also took no concern of the mother's interests.

Because of the conflicts of interest, and the potential of criminal liability attaching to A[redacted] S[redacted] when HRS provided her with the complaint to sign, did HRS advise her that shemight want to seek independent legal advice *so* as to protect her rights in

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[23] (1) Any person who wilfully makes or alters any certificate or record or certificate therefrom provided for in this chapter, or who shall wilfully furnish false or fraudulent information affecting any certificate or record required by this chapter, is guilty of a misdemeanor of the second degree[.] F.S. 382.026(1).

this context?

Careful consideration of the facts of this case leads to the inescapable conclusion that HRS is working at cross-purposes to the interests of all other parties concerned. Careful consideration of the law reveals that the presumption of legitimacy has always been utilized as a shield to protect the best interests of the child. That is exactly how the Second District employed it in this case.

As noted by Judge Nimmons in his dissenting opinion in Pitcairn vs. Vowell, 580 So.2d 219, 223 (Fla. 1st DCA 1991):

> "The rule is for the protection of the child and should not be lightly considered" [citing to Blitch vs. Blitch, 341 So.2d 251 (Fla.1st DCA 1976)] * * * I cannot agree with the majority's conclusion that the petitioner does not have standing to raise the presumption of legitimacy. As far as I have been able to discern, there is no case authority for the majority's position. The petitioner's invocation of the presumption of legitimacy serves the salutary purpose out of which the presumption was borne, i.e., maintaining the legitimacy of children. Indeed, precluding the petitioner Prom invoking the presumption runs counter to that purpose. The fact that the petitioner may benefit from such presumptian by demonstrating that the obligation of support rests elsewhere is no reason to bar its use in this case.

The presumption goes to the best interest of the child. William Privette does not question the applicability in this action. HRS is the party that seeks to overcome the presumption. The presumption has always been utilized as a shield to protect the best interests of the child. As noted, William Privette does not contest or question the presumption in this case. William Privette is a stranger to this marriage. William Privette has never

acknowledged this child as his, nor has the mother ever made any such claim until HRS stirred up this litigation nearly a year after the birth of this child. As noted, the mother never offered any testimony in support of this thesis when HRS summonsed William Privette into court.

HRS' displeasure in this matter seems to stem from the fact that the weight of the law is against it, and it in effect claims that the presumption of the law should be blindly ignored in this case so that it may proceed with its collection efforts.

What HRS seeks to do is an eerie permutation of Judge Nimmons' observation in his dissent in Pitcairn, supra. What HRS seeks to do is benefit by destroying the presumption of legitimacy by attempting to demonstrate that the obligation of support rests elsewhere.

HRS further claims:

> The Privette Court's concern with the presumption of legitimacy and allowing a putative father to raise the presumption as a defense, actually runs counter to the best interests of the minor child[24]

Again, HRS is silent as to how its efforts to overturn the presumption goes to the best interests of the child. The child will receive the same level of benefits from HRS. How does bastardization help the child?

As HRS further claims:

> "[T]he presumption's purpose has historically been to enforce parental rights and responsibilities. See, for instance T.D.D.

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[24] Petitioner's Initial Brief, p. 5

vs. M.J.D.D., 453 So.2d 856 (Fla. 4th DCA 1984). ..[25]

However, the T.D.D. decision explicitly states,

> We also note that an important issue exists as to whether the wife's attempts to declare the child illegitimate is in the child's best interest. * * * [s]hould he [trial judge] determine that estoppel does not lie, then the questions of parentage, custody, visitation and the best interests of the child must be decided. 453 So.2d 856, 858 (cites omitted, emphasis added).

As is evident, even from the cases relied upon by BRS, the true purpose of the presumption of legitimacy is to protect the best interests of the child. It should not be twisted into its obverse by HRS to aid in shifting the obligation of support elsewhere.

The Second District opinion recognizes the competing interests, implements a well recognized balancing test, and is certainly appropriate in the factual context of this case. It is far, just, and appropriate. It is respectfully submitted that the decision of the Second District should be affirmed.

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[25] Id.

ARGUMENT XI

HRS HAS NOT ESTABLISHED THE STATE INTEREST AS COMPELLING, MOREOVER, IT HAS NOT UTILIZED THE LEAST INTRUSIVE MEANS TO ACCOMPLISH ITS GOAL.

Article I, section 23, Florida Constitution: Right of Privacy - Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

* * * * *

HRS also attempts to irrevocably invade William Privette's constitutionally guaranteed right to privacy in this case. Besides the important issue of bastardization of B. S. at the hands of HRS, the issue of William Privette's constitutional right to privacy, his right to be free from unwarranted governmental invasion of his body must be addressed as well. In its headlong rush to garner funds, HRS fails to pay heed to this entirely. What is at issue here is whether a person can be forcibly compelled to submit to an invasive medical pracedure because HRS wants to recover money.

William Privette does contest and does question the power of a governmental agency to invade his right to privacy in a factual context such as this case.

When confronted with the competing concerns below, the Second

District employed a balancing test, as the courts of this state have historically done. This is a legitimate and reasonable response, sanctioned by this court when employed by lower courts. See Rasmussen vs. South Florida Blood Service, 500 So.2d 533 (Fla. 1987). Balancing tests are also utilized by this court, as well. Public Health Trust of Dade Counts vs. Wons. 541 So.2d 96 (Fla. 1989).

It would seem that both Rasmussen and Wons severely undercut the reasoning employed by HRS have to justify its attempted forcible invasion of William Privette's constitutionally guaranteed right to privacy. In Wons, this Court affirmed a decision of the Third District which precluded a forcible blood transfusion from being administered to a Jehovah's Witness. This result was had even though, absent a transfusion, the person might well die.

In so doing, this court rejected as a compelling state interest the state's interest in ensuring that the children involved be raised by two parents, rather than one. 541 So.2d 96, 97. Wons affirms that for the state to be able to forcibly compel a medical procedure, it can only be in a circumstance where the state interest is compelling, Id.

As noted in Rasmussen, wherein disclosure of the identities of blood donors was denied,

> This opinion in no way changes or dilutes the compelling state interest standard appropriate to a review of state action that infringes privacy rights under article I, section 23 of the Florida Constitution[.] Rasmussen, at 535 (cites omitted).

As Rasmussen further noted,

> Moreover, in Florida, a citizen's right to privacy is independently protected by our state constitution. In 1980, the voters of Florida amended our state constitution * * * to include an express right of privacy. * * * In approving the amendment, Florida became the fourth state to adopt a strong, freestanding right of privacy as a separate section of its state constitution, thus providing an explicit textual foundation for those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions Id. at 536 (footnotes omitted)

Rasmussen thus gives explicit recognition that state action must comport with the command of the Constitution. This concept was explicitly considered by the Second District in its reasoning:

> However, we cannot agree that the statute is dispasitive where, as here, the objection to the testing is grounded in the right to privacy guaranteed by our state constitution, Article I, Section 23. - 585 So.2d 364, 366.

Thus the Second District appropriately reviewed the conflict between the statute (F.S. 742.12) and the Constitution (Art. I, Section 23) and appropriately found the Constitution ascendant over the statute. The statute must conform to the constitution, and not vice versa.

Rasmussen is also of importance because of its observation in note 4, (500 So.2d at 536): "The other three [states with a freestanding constitutional privacy provision] are Alaska, California and Montana. Six other states - Arizona, Hawaii, Illinois, Louisiana, South Carolina, and Washington - protect privacy to a lesser degree." Therefore, the foreign jurisdiction cases upon which HRS relies should be viewed with a critical eye because they arise from New Jersey (Essex), New York (L. vs. K. and

M. vs. E.) and Washington (Meachum) - states with no constitutional privacy guarantee as we have here in Florida. Because these states have no Constitutional privacy provision that parallels Florida's, perforce, they do not and cannot deal with the issue addressed in this case. Therefore, the precedential value of these cases is nil because they do not confront the issue raised in this case.

Intriguingly, the one case cited by HRS from a state with a Constitutional privacy provision analogous to Florida according to Rasmussen, (Schults of California) does nothing but support the rationale of the Second District below. Schults was a criminal action: "The issue here involves the Fourth Amendment." 170 Cal. Rptr. 297, 299. Schults never even addressed, much less passed upon the California state constitutional privacy provision, nor did it address or pass upon the best interests of the child, another vital issue here.

Thus, even though Schults is a criminal case and does not address the two salient issues here,[26] it is appropriate to consider it, at least in part, because it does mandate a preliminary threshold showing, and does explicitly call for a balancing test to weigh the competing interests involved before an HLA test can go forward,[27] exactly as the Second District does below.

In its attack on the decision by the court below, HRS strives

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[26] Namely, the constitutionally guaranteed right to privacy and the best interests of the child.

[27] 170 Cal. Rptr., 297, 299 (citation omitted).

mightily to elevate a statute to a position ascendent over the constitution. HRS contends that F.S. 742.12 is dispositive, and controls the issue, Article I, Section 23 of the Florida Constitution notwithstanding.

HRS argues that F.S. 742.12 commands that an HLA test be had, and is content to there let the matter sit, ignoring the conflict between the statute and the constitution. The statute (F.S. 742.12) provides a mechanism for mandatory blood takings; the Constitution (Art. I, Section 23) forbids governmental intrusion into a person's private affairs "except as otherwise provided herein." Herein, as within the confines of the Constitution. Nowhere does the constitution state that the constitutional right to privacy is inviolate "except as otherwise provided by statute.''

That is the underlying fallacy which permeates HRS' position: HRS bases its position on the mandates of a statute and ignores the conflict between the statute and the Constitution as the statute is applied in this case.

The issue here is not what is mandated by the statute. The issue here is whether the mandate of the statute can be implemented in conformity with the constitionally guaranteed right to privacy. Thus, the focus should not be on what the statute compels, the true inquiry rather is whether application of the statute on these facts and under the controlling case law comports with the Constitution.

HRS claims that the broad scope of modern discovery eliminates any constitutional privacy right to William Privette in this case, citing *to* Southern Mill Creek Products Co., Inc. vs. Delta Chemical

Company, 203 So.2d 53, (Fla. 2d DCA 1967).[28] However, F.R. Civ. P. 1.280(b)(1) specifically states:

> (b) Scope of Discovery. Unless otherwise limited by Order of the Court in accordance with these rules, the scope of discovery is as follows:
>
> (1) **In General.** Parties may obtain discovery regarding any matter, not privileged ... (emphasis added).

It would seem that a privilege grounded upon a specific constitutionally guarantee is as valid a claim that could be conceived of under the law. As noted in Gasparino vs. Murphy, 352 So.2d 933 (Fla. 2d DCA 1977), a case upon which HRS relies,

> We could not agree more with the Supreme Court's statement that to "... properly balance [the] competing interests is a delicate and difficult task." 352 So.2d at 936, cite omitted.

In Gasparino, the court held that a policeman sued for wrongful death could not be compelled to submit to a psychiatric examination. The Gasparino court weighed the competing interests, and found those advanced by the party seeking compulsory testing wanting, much as the Second District did in this case.[29]

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[28] Petitioner's Initial Brief, p. 10.

[29] Gasparino cited to Union Pacific Railway Co. vs. Botsfard, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891), wherein it was noted: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 352 So.2d at 935. As further noted in Gasparino: "In Fred Howland, Inc. vs. Morris, 143 Fla. 189, 196 So. 472 (1940), the court held that "[a]t common law a compulsory examination ... was unheard of and would be denounced as a most iniquitous practice" Id., cite omitted.

HRS relies on two United States Supreme Cases, Breihaupt vs. Abram, 352 U.S. 432, 1 L.Ed.2d 448, 77 S.Ct. 408 (1957) and Schmerber vs. California, 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826 (1966) both of which arose in the context of criminal cases.[30] Astonishingly, on the next page, however, HRS concedes that

> It is recognized that the right of privacy contained in the Florida Constitution is broader than that of the Federal Constitution.[31]

Therefore, the federal cases are, by HRS' own admission, based on a narrower constitutional guarantee than the one presented to this court.[32] However, even though it does not encompass the totality of the constitutional guarantee at issue here, Breithaupt is instructive based upon the fallowing reasoning:

> Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by the whole community sense of "decency and fairness'' that has been woven by common experience into the fabric of acceptable conduct.
> Breihaupt, at 436-437 (U.S.).

In this case, does not decency command that the best interests of the child be considered? Does not fairness dictate that the action be brought in good faith when reviewed in the context of the facts of this case? Does not common experience lead to the

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[30] Id. at 14. Neither case, of course, addresses the best interests of the child doctrine.

[31] Id. at 15, citing to Winfield vs. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985).

[32] c.f. Schults, supra, relied upon by HRS, where the controlling issue was the U.S. Fourth Amendment.

conclusion that this actionmust be supported by reliable evidence? Does **not** the community notion of acceptable conduct embrace the conclusion that the presumptive father be disproved as such before a governmental agency can force a **man** - a stranger to the marriage - to a compulsory invasion of his privacy?

HRS states that the compelling state interest in this case which would vitiate William Privette's constitutional privacy right is the expenditure of the state **monies.**[33] The State of Florida **does** have a valid interest in assuring that children **are** maintained by their parents rather than the taxpayers. It is a valid state interest, but is **it** a compelling one?

This court, and the legislature have both indicated that the state has an interest in assuring that parents support children rather than the taxpayers, but nowhere has it been held to be a compelling interest.

In State, Dept. of **HRS** o/b/o Gillespie vs. West, 378 So.2d **1220, 1227** (Fla. **1979)** this court noted,

> The state **...** wants children to be maintained from **the** resources of their natural parents **so** that the burden on the public welfare systems and thus the **taxpayers**, will be lessened.

See also Gammon **vs.** Cobb, 335 So.2d **261, 265** (Fla. **1976),** discussing "the attendant financial burden to the state if the natural parents are not **made** to bear that burden to the fullest

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[33] Petitioner's Initial Brief, **p.** 16.

extent possible."[34]

It is clear that the expenditure of public funds standing alone cannot and does not in and of itself constitute a compelling state interest. The fact that public funds are expended is not determinative in and of itself.

In United States Trust Co. vs. New Jersey, 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505 (1977) the court struck dawn an attempted repeal by the state of New Jersey of a 1962 joint covenant between New York and New Jersey in reference to bonds issued by the Port Authority of New York and New Jersey. In finding the action violative of the Federal Constitution's Contract Clause, the court repudiated the notion that because the state has a financial stake in the outcome, this state financial interest is determinative:

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. 52 L.Ed.2d 92, 112 (footnote omitted).

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[34] To much the same end is F.S. 409.2551, which states, in pertinent part: "It is declared to be the public policy of this state that this act be construed and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through public assistance programs."

It is submitted that what HRS is arguing here falls under the same proscription. HRS argues that because public funds have been expended, this raises the state interest to a compelling one. Because state funds are expended, the state interest is compelling, therefore the privacy guarantee of Article I, Section 23 can be ignored, the HRS argument *goes.*

However, it is submitted that the rationale articulated by the U.S. Supreme Court in United States Trust, supra refutes this proposition. HRS' position that once the state spends a dollar the state's interest becomes compelling would render every provision of the Constitution of Florida as a nullity should the state fund a program that contravenes some provision of the Constitution.

Under HRS' view, every dollar disgorged from the state treasury would be sufficient in and of itself to permit invasion of the Constitutional right to privacy. Because the state expends money, its interest is compelling, therefore the applicable section of the Constitution under attack must fall, in the view of HRS. To paraphrase the United States Supreme Court in U.S. Trust, supra: If the state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Constitutional Right to Privacy would provide no protection at all.

HRS' battle cry of "compelling state interest" cannot decide the issue.[35] As Mr. Justice Holmes observed some 75 years ago:

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[35] c.f. n.1 of this brief, in reference to HRS' labelling of the petitioner.

"[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne vs. Eisner, 245 U.S. 418, 425, 62 L.Ed. 372, 38 S.Ct. 158 (1918). Thus, the circumstances of the particular case must determine whether the state interest is compelling, not the expenditure of state funds. *See* also, the observations of this court in Sacks vs. Sacks, 267 So.2d 73, 75 (Fla. 1972): "To apply [a] general rule to the unique factual situation in the case sub judice is improper. * * * Where, as in the instant case, a general principle of law is applied *to* a case, although not applicable to the particular facts of that case, conflict is created. In McBurnette vs. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962), we stated:

> We have therefore, assumed jurisdiction upon the ground that the decision in this case creates a conflict by expressly accepting an earlier decision of this court as controlling precedent in a situation materially at variance with the case relied on. (p. 565)"

Thus, the circumstances of' the particular case control whether the state's interest is a compelling one, not the fact that state funds are expended.

HRS claims that the state's compelling interest here is the support of children by their parents by the taxpayers. As has been noted, supra, this is a legitimate state concern. However, no authority has been provided by HRS where this state interest has been determined compelling, thus allowing it to be used as a mechanism for vitiating Article I, Section 23.

It must be stressed that although both the cases cited by HRS, speak of a state interest, neither finds the state interest compelling. And it would seem, under Winfield, that the determination of whether a state interest is compelling, vel non is a determination to be made by the courts, not the legislature. Otherwise, a majority vote in the legislature on any spending bill would designate anything compelling and in effect, eliminate the Constitution as a yardstick by which to check the legislature's action. And it would further seem that expenditure of state funds, to be conceded, a legitimate state interest, is not in and of itself a compelling state interest. U.S. Trust.

Under Winfield, when Article I, section 23 is the touchstone upon which governmental action is contested, the burden is clearly on the state - here, HRS:

> Since the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. 477 So.2d 544, 547.

It would seem that under the requirements of Winfield, HRS' position in this case must fail. As noted, supra, HRS has provided no authority for the proposition that expenditure of state funds and/or the legislature's interest that children be supported by parents rather than taxpayers is a compelling state interest. A

legitimate state interes , to be sure, but not a compelling one.

Even should this Court utilize this case as a vehicle to explicitly hold that expenditure of state funds constitutes a compelling state interest, or, in the alternative, that the legislature's expressed policy of children being supported by the parents rather than the taxpayers constitutes a compelling state interest, it is submitted that HRS' position would fail the second prong of Winfield.

The HRS cannot demonstrate that it is utilizing the least intrusive means of accomplishing the goal, the goal apparently being the restriction of the use of state funds. In this case, HRS never even eliminated the husband and legally presumed father. HRS has open to it a compulsory blood taking statute (742.12) but it, for reasons unknown, has not eliminated him as the father, even though he is legally presumed as such.

If HRS is indeed serious about having parents pay for their children, why has it brought no action of any type against the spouse of the mother - the legally presumed father? He has not even been eliminated as a suspect, but HRS is nonetheless doggedly pursuing a man not a party ta the marriage.

HRS could easily conform its conduct to the requirements of the Second District decision and thus accomplish its goal through a less intrusive means. Why it does not do *so* is a mystery. Perhaps it is nothing more than inertia and resistance to a set of procedures that are new to it. It would seem that compliance could certainly be achieved by the following procedures in a case such as

this:

1. Appointment of a guardian ad litem to represent the interests of the child when HRS seeks to overcome the presumption of legitimacy in its efforts to show that the obligation of support lies elsewhere.

2. If the birth certificate specifies that a man other than the one HRS is pursuing is the father, the mother should be advised of this conflict, and advised that she should seek independent legal counsel to ascertain whether she risks criminal prosecution under F.S. 382.026(1) by now vouching for a complaint inconsistent with the facts contained in the official state record.

3. Joinder of the man specified on the birth certificate as an indispensable party.

4. Elimination of the man listed on the birth certificate as a possible father through HLA testing before pursuing a man who is a stranger to the marriage. As HRS forcefully argues here, the statute is compulsory, therefore, it should have no difficulty in compelling such testing.

5. To demonstrate good faith, HRS, if it decides to proceed, should make a showing explaining the inconsistency between the official state record (birth certificate) and the allegations of fatherhood in the complaint it is now prosecuting.

6. Demonstrate to the trial court how the risk of illegitimacy which will be borne by the child will be overcome by some benefit possibly accruing to the child by HRS' efforts to prosecute a paternity action such as this.

HRS claims that no less intrusive means are available to it in this circumstance. This fails to recognize that it could act in conformity with William Privette's constitutional rights merely by complyingwith the decision of the Second District and implementing the six suggestions for compliance with that decision, supra.

Employment of the Second District's decision is clearly a less intrusive means. Implementation of the six suggestions, supra would enable HRS to pursue its ends with due regard for the constitutional rights of William Privette. Adherence to the Second District's decision would also protect the best interests of the child.

Common sense and fairness dictate the result of the holding by the Second District. The Constitution should tolerate nothing less.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Second District be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to: William H. Branch, Esq., Boyd & Branch, P.A., 1407 Piedmont Drive East, Tallahassee, Florida 32312 this 2 day of JULY, 1992.

DANIEL A. DAVID