IN THE SUPREME COURT
OF THE STATE OF FLORIDA

THOMAS A. STEFANOS and
BRIGITTE B. STEFANOS,

Petitioners

vs. Case No. 85,248

NELSON RIVERA-BERRIOS,

Respondent
_____/

DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Index to the Record on Appeal has been filed by the Clerk of the Fifth District Court of Appeal and all references to the documents contained in that index will be indicated by the corresponding page number of that index, designated by (R.).

The decisions entered by the Fifth District Court of Appeal in this matter have been included in an appendix attached hereto and designated by (App.).

STATEMENT OF CASE AND FACTS

In October of 1992, the Petitioners/Adoptive Parents received long-awaited news from The Adoption Centre, Inc. that a pregnant woman had chosen them to be the parents of her yet unborn child. Over the next four months, the Petitioners met with the birth mother, supported her emotionally and financially, and planned for the birth of the child. The Respondent/Biological Father had not provided any financial or emotional support during pregnancy, so the Petitioners were determined to be there for the natural mother. (R. 26). Upon the birth of the child on January 22, 1992, the Petitioners/Adoptive Parents were immediately notified and the child was placed in their care within two days. (R. 27).

On January 24, 1992, the adoption agency filed its Petition for Dependency and for Termination of Parental Rights. (R. 23) On March 2, 1992, the Honorable Charles N. Prather, Judge of the Orange County Circuit Court, Juvenile Division granted the Order of Adjudication permanently terminating the parental rights of both biological parents in the child, determining the child dependent, and committing the child to The Adoption Centre, Inc. for subsequent adoption. (R. 6-7, 24) The order terminating parental rights stated that the natural father had abandoned the child, and therefore was not entitled to know the whereabouts of the child, or the identity or location of any persons having custody of or adopting said child. The Petitioners retained Attorney Thomas Mooney, who filed the adoption petition with the Circuit Court, Adoption Division. On July 2, 1992, Respondent filed a Motion to

Vacate the termination order in the Circuit Court, Juvenile Division. (R. 24).

On July 23, 1992, Judge Prather of the Juvenile Division held a full evidentiary hearing permitting the Respondent to present all existing evidence concerning his challenge of the affidavit filed by the natural mother, the alleged deprivation of his due process rights and his assertion that his parental rights to the child should not be terminated. (R. 24). On August 19, 1992, Judge Prather entered the Order denying Respondent's Motion to Vacate Final Judgment of Termination of Parental Rights. (R. 23-30). Judge Prather's August 19, 1992 order contained extensive findings of fact based upon **"clear and convincing evidence"** that: **(1)** Respondent was not entitled to notice because he has never met any of the requirements of Florida Statute Section 39.462 (1)(a)(2) (Supp. 1992), **(2)** that the child has never known any other parents and is substantially bonded with her Adoptive Parents, and **(3)** that it is in the best interests of the child to remain with the Adoptive Parents on a permanent basis. (R. 24-27).

Despite permanent termination of his parental rights, the Respondent filed a Motion to Intervene and File Objection to the Petition in the adoption case on August 24, 1992. (R. 12-13). In that motion, the Respondent asserted that the "findings of abandonment as contained in the Final Judgment of Termination of Parental Rights are based on false and fraudulent misrepresentations made to the Circuit Court, Juvenile Division." (R. 12). The adoption court stayed all proceedings pending Judge

Prather's ruling and the Respondent's subsequent appeals of this ruling to the Fifth District Court of Appeal and the Florida Supreme Court. (R. 17). The Fifth District Court of Appeal per curiam affirmed Judge Prather's order terminating Respondent's parental rights in Appellate Case No. 92-2313 (R. 31, App. 2), denying Respondent's subsequent Motion for Rehearing on May 19, 1993. (R. 39). The Florida Supreme Court dismissed the Respondent's appeal for lack of jurisdiction and indicated that no motion for rehearing would be entertained. (R. 53).

On July 6, 1993, Petitioners noticed for hearing their Petition for Adoption and Respondent's Motion to Intervene. At the hearing, the Respondent appeared with a Supplemental Motion to Intervene which included the Respondent's written admission that the Child "has been under the exclusive care of Petitioners [Adoptive Parents] for the 18 months since her birth." (R. 63). Circuit Judge Miller denied the Supplemental Motion to Intervene based on estoppel by judgment and collateral estoppel, issuing an amended order reiterating Judge Prather's findings by clear and convincing evidence. (R. 130-131). Noting that Judge Prather rendered his decision during the pendency of the adoption case, Judge Miller's Order admonished the Respondent that he could not re-litigate the issues of his own abandonment and the Child's substantial bonding to her Adoptive Parents such that her manifest best interests require her to remain with her Adoptive Parents on a permanent basis. (R. 130-131).

The Respondent appealed Judge Miller's Amended Order Denying

his Motion to Intervene and again sought to re-litigate the issues determined by Judge Prather. On May 27, 1994, the Fifth District Court of Appeal reversed and remanded the order of the Circuit Court denying Nelson Rivera's Motion to Intervene in the pending adoption case. (App. 4-6). Despite the fact that the decision to terminate the natural father's parental rights was made by the Juvenile Division during a stay in the adoption proceeding, Judge Harris, writing for the majority, concluded that Estoppel by Judgment and Collateral Estoppel would not prevent the Biological Father from attempting to rehabilitate himself as a parent to contest the adoption. (App. 4-6) For this reason, Petitioners filed their Motion for Rehearing, Rehearing En Banc and to Certify the Question to the Supreme Court. Thereafter, the Fifth District Court of Appeal certified the following question to this Court as one of great public importance:

> May one who has had his parental rights terminated thereafter intervene in an ongoing adoption proceeding and contest for the adoption of his child?

On February 20, 1995, Petitioners filed their Notice to Invoke Discretionary Jurisdiction of this Honorable Court on the basis of the certified question. This Court postponed its decision on jurisdiction and ordered the filing of briefs on the merits.

SUMMARY OF THE ARGUMENT

The case at bar demonstrates that adoptive parents substantially bonded to their child should be permitted to obtain a final order of adoption free from the intervention of abandoning biological parents whose rights have been permanently terminated. The purported rehabilitation of the biological father's parental fitness should be irrelevant once the child has substantially bonded with her adoptive family.

Collateral Estoppel/Estoppel by Judgment precludes the biological father from re-litigating the issues surrounding the termination of his parental rights, especially when the termination was based upon clear and convincing evidence of his abandonment received during the pendency of the adoption proceeding. The unique procedural posture of this case involves the Juvenile Court's denial of the Biological Father's Motion to Vacate the order terminating his parental rights based upon clear and convincing evidence obtained during the pendency of the adoption case proving his abandonment and the resulting substantial bond which formed between the child and its adoptive parents. Failing to establish any parental rights to the child in this evidentiary hearing, the Biological Father cannot show that he manifested a substantial concern for the welfare of his illegitimate child prior to the filing of the adoption petition by the adoptive parents as required under Florida Statute Section 63.062(1)(b) (Supp. 1992). In the Interest of A.J.B., 548 So. 2d 906, 908 (Fla. 1st DCA 1989).

The Biological Father has no standing to assert an interest in the adoption of the child where he failed to manifest a substantial concern for the welfare of the child prior to the filing of the adoption petition. Kendrick v. Everheart, 390 So. 2d 53, 60 (Fla. 1980). This is because an unwed father's interest in a child arises not from biology, but rather as a result of the relationship he has established and the responsibility he has assumed with regard to the child. In the Matter of the Adoption of Doe, 543 So. 2d 741, 748 (Fla. 1989), U.S. cert. denied 493 U.S. 964, 110 S. Ct. 405, 107 L. Ed. 2d 371 (1989); Lehr v. Robertson, 463 U.S. 248, 257, 103 S. Ct. 2985, 2991, 77 L. Ed. 2d 614 (1983). Lacking standing, the Respondent stands as a total stranger to this adoption proceeding. Strict construction of the Florida Adoption Statutes reveals that the consent of the Biological Father is not required because he failed to meet any of the criteria of Florida Statute Section 63.062(1)(b) (Supp. 1992) prior to the filing of the adoption petition. Further, the Adoption Court was statutorily authorized to excuse the consent of the Biological Father because he had been found by court order to have abandoned the child. § 63.072(1), Fla. Stat. (1991). Florida Statute Section 63.062(4) (Supp. 1992) indicates that the Adoption Court must accept the consent given by the licensed child-placing agency alone as sufficient to grant the adoption petition.

Once an order permanently terminating the biological parents' parental rights is entered upon clear and convincing evidence, the court must look to the best interests of the child in determining

whether to grant the adoption petition. In the current case, the Juvenile Court found clear and convincing evidence that the Child had substantially bonded with her Adoptive Parents during the six month period before the Biological Father attempted to assert an interest in the Child. The Juvenile Court went further to hold that the manifest best interests of the Child are served by the Child remaining with the Adoptive Parents on a permanent basis. The Adoption Judge properly determined that Collateral Estoppel/Estoppel by Judgment required him to accept these findings of fact made by the Juvenile Court based upon evidence presented during the pendency of the adoption petition. The Child's best interests require that she remain with her loving adoptive parents. Neither the law nor common sense will allow a 3 1/2 year old child to be wrenched from the only family she has ever known to be placed with a total stranger. The Biological Father's attempts to remove the Child from her adoptive family further demonstrates his disregard for the welfare of this Child.

Both the United States Supreme Court and this Court have recognized the fundamental liberty interests of persons in preserving their existing family relationships. Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 2d 1042 (1923) Department of Health and Rehabilitative Services v. Privette, 617 So. 2d 305, 307-309 (Fla. 1993). The basis for the constitutional protection of the family relationship is the strong emotional connection arising from family members' intimate daily

associations, as opposed to any biological connection. By contrast, a biological father is not accorded a constitutionally protected liberty interest in the child where he fails to assume any parental responsibility or to develop a relationship with the child. Lehr v. Robertson, 463 U.S. 248, 261, 103 S. Ct. 2985, 2993, 77 L. Ed. 2d 614 (1983); In the Matter of the Adoption of Doe, 543 So. 2d 741, 744 (Fla. 1989), U.S. cert. denied 493 U.S. 964, 110 St. Ct. 405, 107 L. Ed. 2d 371 (1989). This Court must protect the fundamental liberty interests of the Adoptive Parents and the Child in maintaining their established family relationship, which clearly outweighs the Biological Father's attempt to rehabilitate himself after failing to establish a parental interest in the child.

Sound public policy requires that abandoned/illegitimate children be swiftly placed and allowed to remain in a loving, stable adoptive home. In the interests of all citizens, the institution of adoption must be encouraged and strengthened as an alternative to providing abandoned/illegitimate children with a concerned family. See §39.45(2), Fla. Stat. (1991). An abandoning biological father must not be allowed to veto a natural mother's decision to place the child in a secure adoptive home. Further, he should not be allowed to mount a custody battle against prospective adoptive parents who are substantially bonded to the child he long ago abandoned, especially once his parental rights have been permanently terminated. Such custody battles do not serve the best interests of the child and only discourage potential adoptive

families from accepting an adoptive child for fear that a biological father will attempt to rehabilitate himself long after having abandoned the child. Public policy dictates that this Court end the Biological Father's ploys to gain custody of the Child and order finalization of this Child's adoption by her existing family.

ARGUMENT

I. THE JUDICIAL DOCTRINE OF COLLATERAL ESTOPPEL/ESTOPPEL BY JUDGMENT PRECLUDES A BIOLOGICAL FATHER FROM RE-LITIGATING THE ISSUES DETERMINED IN THE COURT ORDER PERMANENTLY TERMINATING HIS PARENTAL RIGHTS DURING THE PENDENCY OF AN ADOPTION PROCEEDING.

The Judicial Doctrine of Collateral Estoppel/Estoppel by Judgment precludes a biological father from re-litigating in the pending adoption proceeding the legal and factual determinations concurrently made upon clear and convincing evidence in the Juvenile Court order affirming the termination of his parental rights. State ex rel. Young v. Florida Department of Health and Rehabilitative Services, 254 So. 2d 374, 375 (Fla. 3d DCA 1971). Final adjudication of material issues by a court of competent jurisdiction binds the parties in all subsequent proceedings, irrespective of any difference in form or the cause of action. Anders v. Anders, 13 So. 2d 603, 604 (Fla. 1943); Stanton v. Stanton, 60 So. 2d 273, 274 (Fla. 1952). Factual issues decided by a court of record cannot be called into question or retried at any time thereafter so long as the judgment or decree stands. In re Latch, 820 F. 2d 1163, 1166 (11th Cir. 1987); see also Black's Law Dictionary, at 551 (West 6th Ed. 1990). A circuit court may not disregard orders entered by another circuit court. Andy v. Lessem, 595 So. 2d 197, 198 (Fla. 3d DCA 1992).

The unique procedural posture created by the Biological Father's motion for the Juvenile Court to vacate the order terminating his parental rights during the pendency of the adoption

action, creates a situation in which the issues decided by the Juvenile Court are identical to those at issue in the pending adoption proceeding. This is because the law requires a biological father to take some action to manifest a substantial concern for the welfare of his illegitimate child prior to the filing of an adoption petition by a third party. § 63.062(1)(b), Fla. Stat (Supp. 1992); In the Interest of A.J.B., 548 So. 2d 906, 908 (Fla. 1st DCA 1989); Wylie v. Botos, 416 So. 2d 1253, 1256 (Fla. 4th DCA 1982); In re the Adoption of Mullenix, 359 So. 2d 65, 68-69 (Fla. 1st DCA 1978); Webb v. Blancett, 473 So. 2d 1376, 1378 (Fla. 5th DCA 1985).

In his opinion, Judge Harris mistakenly cites the case of Green v. State Department of Health and Rehabilitative Services, 412 So. 2d 413 (Fla. 3d DCA 1982) for the proposition that Collateral Estoppel is not available in this case. (App. 6). Unfortunately, Judge Harris fails to note the important differences between Green and the current case. First, the Green case does not involve a situation where the abandoning biological parent is attempting to prove his rehabilitation in order to defeat an existing adoption action filed by prospective adoptive parents, who have cared for the child during the lengthy period during which the biological parent abandoned the child. Rather, Green involves the successful attempt by the maternal aunt and uncle to keep the child placed in their care by the child's biological mother, despite HRS's contention that the order of permanent commitment estoppes the biological family from presenting evidence of their

rehabilitation. Second, the unavailability of Collateral Estoppel in Green is based upon the assumption that adoption proceedings occur at a point in time after final termination of the biological parent's parental rights. Id., at 415. In the case at bar, the finality of the termination proceeding has been challenged by the biological parent during the pendency of a third party adoption proceeding. The Biological Father's motion to vacate was filed thirteen months after he was advised of the pregnancy and six months after the birth of the child, her permanent commitment to an adoption agency and placement of the child in her adoptive home. (R. 26). It should be noted that no adoption petition has ever been filed by the Biological Father. Third, Green did not involve an evidentiary hearing held upon the Biological Parent's motion to vacate the Juvenile Court Order Terminating his Parental Rights during a pending adoption proceeding filed by third party adoptive parents. Unlike the Green case, the Biological Parent was permitted to present all evidence available to him through the date of the evidentiary hearing (which occurred after the filing of the Petitioners' Adoption Petition), including his claimed rehabilitation as a parent. After consideration of all this evidence, the Juvenile Court refused to vacate its March 2, 1992 order terminating his parental rights and permanently committing the child for adoption. (R. 24). Finally, in contrast to the decision in Green, Judge Harris denies use of Collateral Estoppel in an attempt to prevent the Child from being adopted by the prospective parents to whom she has become substantially bonded as

a result of her abandonment by the Biological Father. (R. 70-71), See In the Matter of the Adoption of Doe, 543 So. 2d 741, 744 (Fla. 1989), U.S. cert. denied 493 U.S. 964, 110 S. Ct. 405, 107 L. Ed. 2d 371 (1989).

As noted by Judge Griffith in her concurring opinion to certify this question:

> The trial court decided the facts and weighed the evidence adverse to Judge Harris' view of the evidence. The majority of a panel of this court affirmed the lower court's decision. (App. 2)

The Juvenile Court found that the Biological Father never evinced a resolute or settled purpose to assume his parental duties. (R. 26). Despite Judge Harris's implications to the contrary, the Biological Father had the opportunity to continue contact with the natural mother during her pregnancy; to assert his interest in the Child; to seek an attorney and file an acknowledgement of paternity or a paternity action; to provide the mother with physical, financial and emotional support for the pregnancy; and thereby, prevent the circumstances whereby the Child was abandoned and ultimately placed with the Adoptive Parents. He took none of these actions. Even when the Biological Father saw the pregnant mother after their break-up, he did not inquire about the Child. (R. 25).

Despite Judge Harris's statements to the contrary, the Biological Father was the only person who had the ability and responsibility to prevent the delay in asserting his parental rights and permanent commitment of the Child and her placement with in the care of the adoptive parents. Nothing in the Green case

indicates that a biological parent whose rights were permanently terminated can challenge the adoption petition filed by an adoptive family who has cared for the child since its birth.

Collateral Estoppel/Estoppel by Judgment was properly applied by the Adoption Judge to preclude the Biological Father from re-litigating the factual and legal conclusions made in the Juvenile Judge's August 19, 1992 Order concerning his failure to assume his parental responsibilities prior to July 23, 1992. (R. 130-131); Stanton v. Stanton, 60 So 2d. 273, 274 (Fla. 1952); Green v. State Department of Health and Rehabilitative Services, 412 So. 2d 413, 414 (Fla. 3d DCA 1982). "Any rights the natural [father] may have had to the child has been permanently lost. To allow final proceedings to be re-opened by means other than proper appeal of the original order would be to wrench from the word 'permanent' its intended meaning under this statute." Thompson v. Department of Health and Rehabilitative Services, 353 So. 2d 197, 198 (Fla. 3d DCA 1977).

The Juvenile Court made three major findings of fact and law. First, it found that the biological father failed to meet any of the criteria for notice of the proceedings under Florida Statute Section 39.462(1)(a)(2) (Supp. 1992). These factors are identical to the criteria which a biological father must meet prior to the filing of the adoption petition in order for his consent to be required under the Florida Adoption Statutes. See Section 63.062(1)(b), Fla. Stat. (Supp. 1992); In the Interest of A.J.B., 548 So. 2d 906, 908 (Fla. 1st DCA 1989). Specifically, Judge

Prather determined that the Biological Father: (1) was not married to the child's mother at the time of its conception or birth, (2) never adopted the child, (3) never established himself by court proceeding to be the child's father, (4) never acknowledged in writing or filed with the Department of Health and Rehabilitative Services an acknowledgement of his paternity, and (5) has never provided the child with support in a repetitive, customary manner. (R. 24-25).

Second, the Juvenile Judge held that the father had abandoned the Child in that he had exhibited "only marginal efforts towards the Child that did not evince a settled purpose to assume all parental duties". (R 26). Third, the Juvenile Court found that the Child had become substantially bonded to the Adoptive Parents during the period of abandonment and that it was "in the manifest best interests of the Child to remain with the Adoptive Parents on a permanent basis." (R. 27). All findings of the Juvenile Court were based upon clear and convincing evidence and were necessary to the Court's final determination to permanently terminate the Appellant's parental rights. L.T. v. Department of Health and Rehabilitative Services, 464 So. 2d 201, 202 (Fla. 5th DCA 1985).

In his Motion to Intervene, the Biological Father admitted that the child "has been under the exclusive care of Petitioners" since her birth. (R. 63). Therefore, the Respondent cannot show rehabilitation of his parental duties based on this record. As this Court recognized in In the Matter of the Adoption of Doe, the bonding which occurred between the Child and Adoptive Parents over

the six months the Natural Father failed to acknowledge or declare a paternal interest in the Child has become a material consideration in these proceedings. 543 So. 2d 741, 744 (Fla. 1989), U.S. cert. denied 493 U.S. 964, 110 S. Ct. 405, 107 L. Ed. 2d 371 (1989). Because of this bonding, "the child would be psychologically damaged if it were removed from the adoptive home at [this] stage of the proceedings." In the Matter of the Adoption of Doe, Supra, at 744.

The Doctrine of Collateral Estoppel begs that the issues determined by the Juvenile Court not be re-litigated in order to promote judicial economy, assure certainty of result and ensure respect for the judgment already rendered by the Orange County Juvenile Court in this matter. John Alden Life Insurance Company v. Cavendes, 591 F. Supp. 362 (S.D. Fla. 1984). The Biological Father should not be allowed to re-litigate the issues decided by the Juvenile Judge during the pendency of the adoption proceeding. The Adoptive Parents' reliance upon the order permanently terminating his parental rights and committing the Child to the adoption agency should not be undermined. They have opened their hearts and home to adopt this child, whom the Juvenile Court had directed be placed for subsequent adoption. See § 39.469(2)(b), Fla. Stat. (1991); § 39.47(1), Fla. Stat. (1991); and § 63.062(4), Fla. Stat. (Supp. 1992). The Green decision must not be misread to permit abandoning biological parents to intervene in third party adoption actions and initiate custody battles in an attempt to

prove rehabilitation in an effort to be reunited with their offspring.

II. RESPONDENT HAS NO STANDING TO INTERVENE IN THE ADOPTION PROCEEDING BECAUSE HIS PARENTAL RIGHTS WERE PERMANENTLY TERMINATED BY ORDER OF THE JUVENILE DIVISION BASED UPON CLEAR AND CONVINCING EVIDENCE OBTAINED DURING THE PENDENCY OF THE ADOPTION CASE.

Standing is defined as possessing a requisite interest in a justiciable controversy so as to be permitted to seek and obtain judicial resolution. Sierra Club v. Morton, 405 U.S. 727, 732, 92 S.Ct. 1361, 1364, 31 L.Ed. 2d 636, 641 (1972); General Development Corporation v. Kirk, 251 So. 2d 284, 286 (Fla. 2d 1971). This Court has indicated that an unwed father "is required to show that he has manifested a substantial concern for the welfare of his illegitimate child before he may be accorded standing to assert an interest with respect to that child." Kendrick v. Everheart, 390 So. 2d 53,60 (Fla. 1980); Department of Health and Rehabilitative Services v. Herzog, 317 So. 2d 865, 867 (Fla. 2d DCA 1975). Failure by the biological father to take such action prior to the filing of the Adoption Petition prevents the father from asserting any interest or say in the final adoption proceeding. § 63.062(1)(b), Fla. Stat. (Supp. 1992); In the Interest of A.J.B., 548 So. 2d 906, 908 (Fla. 1st DCA 1989); Wylie v. Botos, 416 So. 2d 1253, 1254-1255 (Fla. 4th DCA 1982); In re the Adoption of Mullenix, 359 So. 2d 65, 68-69 (Fla. 1st DCA 1978). This is because "the unwed father's interest springs not from his biological tie with his illegitimate child, but rather from the

relationship he has established with and the responsibility he has shouldered for his child." In the Matter of the Adoption of Doe, 543 So. 2d 741, 748 (Fla. 1989) citing Comment, 46 BROOKLYN L. REV. 95, 115-116 (1979); Lehr v. Robertson, 463 U.S. 248, 257, 103 S. Ct. 2985, 2991, 77 L. Ed. 2d 614 (1983). See also Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed 2d 511 (1978).

On July 15, 1993, Circuit Judge Jeffords D. Miller denied Appellant standing to intervene in the adoption action. (R. 130-131). Judge Miller correctly determined that Appellant was a stranger to the adoption action, because his parental rights were permanently terminated by Order of Circuit Judge Prather based upon "clear and convincing evidence" received at the time the adoption proceedings were pending. (R. 23-30). Based upon the evidence presented during an evidentiary hearing held during the pendency of the adoption proceeding, Juvenile Judge Charles N. Prather found that the Appellant had not met any of the five criteria for notice under the Termination Statutes. (R. 24-25), § 39.462(1)(a)(2), Fla. Stat. (Supp. 1992). These criteria are identical to the five prerequisites which a biological father must meet before his consent is required in an adoption action. See § 63.062(1)(b), Fla. Stat. (Supp. 1992). Juvenile Judge Prather went further in finding clear and convincing evidence that the Biological Father had "abandoned the Child in that his efforts were only marginal efforts that do not evince a settled purpose to assume all parental duties." (R. 26).

The Respondent stands as a total stranger to this adoption

proceeding based upon the adjudication of his abandonment of the Child and permanent termination of his parental rights. (R. 23-30); In the Matter of the Adoption of Doe, Supra, at 748-749; Wylie v. Botos, Supra, at 2355-2356; In re the Adoption of Mullenix, Supra, at 69; Department of Health and Rehabilitative Services v. Herzog, 317 So. 2d 865, 867 (Fla. 2d DCA 1975); Andy v. Lessem, 595 So. 2d 197 (Fla. 3d DCA 1992). Having failed to establish any parental rights to the Child during the pendency of the adoption proceeding, the Respondent has no standing and should be estopped from intervening in the adoption proceeding. Wylie v. Botos, Supra, at 1257. Respondent's failure to assume his parental responsibilities "removes from the natural father the privilege of vetoing the adoption by refusing to give consent." In the Matter of the Adoption of Doe, Supra, at 749. The Respondent should not be allowed to nullify "the mother's ability to provide for the best interests of the child and herself." Id., at 746.

III. STRICT CONSTRUCTION OF FLORIDA ADOPTION STATUTES INDICATES THAT AN ADOPTION MAY BE COMPLETED WITHOUT THE CONSENT OF A BIOLOGICAL FATHER WHO HAS NOT MET THE CRITERIA OF FLORIDA STATUTE § 63.062(1)(b) (Supp. 1992) PRIOR TO THE FILING OF THE ADOPTION PETITION.

THE FINDING OF ABANDONMENT BY A COURT OF COMPETENT JURISDICTION DURING THE PENDENCY OF THE ADOPTION ACTION FURTHER EXCUSES THE NEED FOR THE BIOLOGICAL FATHER'S CONSENT PURSUANT TO FLORIDA STATUTE § 63.072(1) (1991).

Statutes concerning adoption are in derogation of the common law and therefore must be strictly construed. In re Miller, 227 So. 2d 73 (Fla. 4th DCA 1969); Tsilidis v. Padakis, 132 So. 2d 9 (Fla. 1st DCA 1961). Florida Statute Section 63.062(1)(b) (Supp.

1992) explicitly states that a written consent to the adoption is not required from the biological father unless he meets one of the five criteria listed therein. Florida courts have indicated that this statute requires that the criteria be met prior to the filing of the adoption petition. In the Interest of A.J.B., 548 So. 2d 906, 908 (Fla. 1st DCA 1989); Wylie v. Botos, 416 So. 2d 1253, 1256 (Fla. 4th DCA 1982); In re the Adoption of Mullenix, 359 So. 2d 65, 68-69 (Fla. 1st DCA 1978). As stated previously, these criteria are identical to those required for notification of a biological father under Florida Statute Section 39.462(1)(a)(2) (Supp. 1992) in a permanent termination of parental rights proceeding, which are fully enumerated in Section II of this Brief. During a stay in the adoption case, Juvenile Judge Prather made a determination based upon clear and convincing evidence, that the Respondent had failed to meet any of these criteria. Judge Miller was correct that Estoppel by Judgment and Collateral Estoppel precluded the Respondent from re-litigating his failure to meet the five criteria of Florida Statute Section 63.062(1)(b) (Supp. 1992) and that his consent was not required. (R. 130-131).

Based upon clear and convincing evidence of his abandonment of the child, Circuit Judge Prather permanently terminated the Respondent's parental rights and committed the Child to The Adoption Centre, Inc. for subsequent adoption. (R. 23-30). The Florida Adoption Statute Section 63.062(4) (Supp. 1992) indicates that once a parent's rights to the minor have been terminated, the consent of the appropriate licensed child-placing agency alone is

sufficient for the adoption. In this matter, the consent of The Adoption Centre, Inc. was attached to the Petition for Adoption. (R. 4-5). Further, the Florida Department of Health and Rehabilitative Services responded affirmatively to the Adoption Court concerning the Child's placement with the Adoptive Parents. (R. 9).

Florida Adoption Statute Section 63.072(1) (1991) permits the court to excuse the consent of a parent who has abandoned the child. Circuit Judge Miller properly ruled that Estoppel by Judgment and Collateral Estoppel required him to accept Judge Prather's determination that the Biological Father had abandoned the Child. (R. 130-131) Judge Miller was correct in excusing the consent of the Biological Father and refusing to allow him to re-litigate the issues surrounding his abandonment through a Motion to Intervene in the adoption proceeding. As recognized by both the Juvenile Court and Adoption Court in this case, the failure of the Biological Father to provide any assistance to the natural mother pre-birth and post-birth, "vested...the natural mother with the sole parental authority to consent to the adoption of the child and removed from the natural father the privilege of vetoing the adoption by refusing to give consent." In the Matter of the Adoption of Doe, 543 So. 2d 741, 749 (Fla. 1989), U.S. cert. denied 493 U.S. 964, 110 S. Ct. 405, 107 L. Ed. 2d 371 (1989). Strict construction of the Adoption Statutes precludes the need for the consent of the natural father under the circumstances of this case.

IV. UPON TERMINATION OF PARENTAL RIGHTS BASED UPON CLEAR AND CONVINCING EVIDENCE, THE BEST INTERESTS OF THE CHILD BECOME THE COURT'S GUIDING CONCERN.

Once the biological parent's rights have been permanently terminated by a court of competent jurisdiction based upon clear and convincing evidence, the Court must look to the best interests of the child in determining whether to grant the adoption petition. Fielding v. Highsmith, 13 So. 2d 208, 209 (Fla. 1943); In re Camm, 294 So. 2d 318, 329 (Fla. 1974), U.S. cert. denied 419 U.S. 866, 95 S. Ct. 121, 42 L. Ed. 2d 103 (1974). Florida Statute Section 63.022(2)(l) (Supp. 1992) places an obligation upon the court in an adoption proceeding "to promote and protect the best interests of the person to be adopted." See In the Matter of the Adoption of Doe, 543 So. 2d 741, 744 n. 1 (Fla. 1989), U.S. cert. denied 493 U.S. 964, 110 S. Ct. 405, 107 L. Ed. 2d 371 (1989).

The Florida Adoption Statutes mirror the United States Supreme Court's emphasis on "the paramount interest in the welfare of the child" and reflect that "the rights of the parents are a counterpart of the responsibilities they have assumed." Lehr v. Robertson, 463 U.S. 248, 257, 103 S. Ct. 2985, 2991, 77 L. Ed. 2d 614 (1983); See also Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979). Based on the foregoing, this Court has indicated that the Florida legislature never intended for abandoning biological fathers to retain an absolute veto power over the decision of the biological mother to place the child for adoption. In the Matter of the Adoption of Doe, Supra, at 746.

The abandoning biological father should not be allowed to nullify the biological mother's ability to provide for the best interests of the child and herself. Id.

This Court has held that bonding between the child and her adoptive parents becomes a material consideration where the biological father failed to acknowledge or declare a parental interest in the child until after the child has been with the adoptive parents for a significant period of time. In the Matter of the Adoption of Doe, Supra, at 744. The current case involves just such a circumstance. The abandoning Biological Father failed to acknowledge or declare a paternal interest in the Child until thirteen months after he was advised of her existence and six months after her birth, during which time substantial bonding occurred between the Child and the Adoptive family. (R. 26-28). Once aware that the Biological Father was seeking to vacate the termination of his parental rights in Juvenile Court, the Adoption Court stayed its proceedings pending the final outcome of the Juvenile Court's evidentiary hearing and subsequent appeals. (R. 17).

Based upon the evidentiary hearing held during the pendency of the adoption action, Juvenile Judge Prather found "clear and convincing evidence" that the Biological Father's abandonment of the Child created a situation in which "substantial bonding has taken place between the Child and the Adoptive Parents and that the manifest best interests of the Child are served by the Child remaining with the Adoptive Parents on a permanent basis." (R. 27).

In so finding, Juvenile Judge Prather met his obligation to consider whether the termination of the Respondent's parental rights was in the best interests of the child. In re Adoption of H.Y.T., 458 So.2d 1127, 1128 (Fla. 1984); Webb v. Blancett, 473 So. 2d 1376, 1379 (Fla. 5th DCA 1985); Hinkle v. Lindsey, 424 So. 2d 83 (Fla. 5th DCA 1983).

Judge Harris erroneously indicates that the issue before the Adoption Judge was whether the Biological Father has been sufficiently "rehabilitated" so that he may now contest for the adoption of the child. In so doing, Judge Harris mistakenly relies on the case of In the Interest of T.G.T., 433 So. 2d 11 (Fla. 1st DCA 1983), which substantially differs from the case at bar. T.G.T. does not involve a pending adoption proceeding as in this case, but is strictly a termination of parental rights proceeding. Id. at 12. Further, T.G.T. does not stand for the proposition that every biological parent has the right to contest for the adoption of his child. Rather, T.G.T. merely indicates that while a termination order is final, it does not prevent the biological parent from later petitioning for adoption.

In the current case, the Biological Father has never filed a petition for adoption. He seeks to mount a custody battle with prospective Adoptive Parents whom have filed an adoption petition and to whom the Child has formed a substantial bond. In the current case, the Child has never known any other parents, having been raised exclusively by the Petitioners since her birth by virtue of her abandonment by the Biological Father. Even in cases

of uncontroverted evidence of paternity, this Court has recognized the necessity of considering the best interests of the child in remaining with the only family she has known and to which she is substantially bonded over the objection of an abandoning, biological father. Department of Health & Rehabilitative Services v. Privette, 617 So 2d 305, 309 (Fla. 1993); See also In re Adoption of a Minor Child, 593 So. 2d 185, 189 (Fla. 1991), citing with approval Berhow v. Crow, 423 So.2d 371 (Fla. 1st DCA 1982).

In the Order denying the Biological Father's Motion to Intervene, Circuit Judge Jeffords Miller recognized the importance and quoted the findings by clear and convincing evidence of Judge Prather that the Child had substantially bonded to the Adoptive Parents within the six months following her birth in which the Biological Father failed to acknowledge a paternal interest, and that it was in the best interests of the Child to remain permanently with the Adoptive Parents. (R. 130-131). As Judge Miller recognized, the Biological Father could not undo the circumstances surrounding the termination of his parental rights and the bonding of his Child to the Adoptive Parents. These facts were established by clear and convincing evidence in the evidentiary hearing conducted by Judge Prather during the pendency of the adoption case. (R. 23-30). Further, these facts have not changed, as exhibited by the Biological Father's admission in his Motion to Intervene that the Child "has been under the exclusive care of the Petitioners [Adoptive Parents] ... since her birth." (R. 63).

Bonding between this Child and her Adoptive Parents has greatly intensified over the two and one half years since Judge Prather's findings by clear and convincing evidence. The Child is now 3 1/2 years old. She has long since taken her first steps towards her parents, learned to speak the words "Mommy" and "Daddy", to exhibit her love for the Adoptive Parents and to recognize her Adoptive Parents as the source of her security. The Biological Father's argument that he is now fit to assume parental responsibilities is totally irrelevant, because he remains a stranger to the Child. In re Matter of the Adoption of Doe, Supra, at 743. The Biological Father's failure to acknowledge or declare a paternal interests in the Child until thirteen months after learning about her existence and six months after the Child had been placed with the adoptive family constitutes both the basis for the termination of his parental rights and the catalyst for the occurrence of substantial bonding between the Child and the Petitioners. (R. 26, 130-131), Id., at 744.

The Biological Father's attempts to defeat the Child's adoption by the only family she has ever known fails to demonstrate that he values the best interests of the Child. Based upon the strength of her substantial bonding with the Adoptive Parents over the past 3 1/2 years, "the psychological trauma of removal is grave enough to threaten destruction of the Child." Bennett v. Jeffries, 40 N.Y. 2d 543, 356 N.E. 2d 277, at 284 (1976), affirmed 399 N.Y. 2d 697 (1977). As this Court has indicated, "the law does not require such cruelty toward children." Department of Health and

Rehabilitative Service v. Privette, 617 So. 2d 305, 309 (Fla. 1993).

The best interests of the Child dictate that the Biological Father should not be allowed to further delay the Child's adoption into her existing family during her fleeting childhood years, especially because the Biological Father has never established a paternal interest in the Child nor formally filed an adoption petition. As in the case of In re the Adoption of Mullenix, 359 So. 2d 65, 68 (Fla. 1st DCA 1978), "the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except [Respondent]."

V. PROTECTION OF THE CONSTITUTIONAL LIBERTY INTERESTS OF THE PETITIONERS/ADOPTIVE PARENTS AND THE CHILD IN MAINTAINING THEIR ESTABLISHED FAMILY RELATIONSHIP MUST OUTWEIGH THE RESPONDENT/BIOLOGICAL FATHER'S ATTEMPT TO REHABILITATE HIMSELF AT THIS LATE DATE.

The United State Supreme Court and this Court have recognized the fundamental liberty interest which persons have in their existing family relationships. Wisconsin v. Yoder, 406 U.S. 205, 231-233, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15 (1972); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974); Department of Health and Rehabilitative Services v. Privette, 617 So. 2d 305, 307-309 (Fla. 1993). By contrast, a biological father is not accorded a constitutionally protected liberty interest in his child unless he "comes forward to participate in the rearing of his child." Lehr v. Robertson, 463 U.S. 248, 261, 103 S. Ct. 2985, 2993, 77 L. Ed. 2d 614 (1983),

citing Caban v. Mohammed, 441 U.S. 380, 392, 99 S. Ct. 1760, 1768, 60 L. Ed. 2d 297 (1979); Kendrick v. Everheart, 390 So. 2d 53, 60 (Fla. 1980). While the Adoptive Parents have provided total physical, financial, emotional and spiritual support for this Child, the Biological Father has failed in all these regards, has been adjudicated to have abandoned the Child, and his parental rights have been permanently terminated by court order. (R. 24-27).

This Court has acknowledged the constitutional liberty interest of persons in preserving their existing family relationships. Department of Health and Rehabilitative Services v. Privette, 617 So. 2d 305, 307-309 (Fla. 1993). The Florida Courts have recognized that the basis for protection of the family relationship is the strong emotional connection arising from the family members' intimate daily association, as opposed to any biological connection. Berhow v. Crow, 423 So. 2d 371, 373 (Fla. 1st DCA 1982), cited with approval by this Court in In re Adoption of a Minor Child, 593 So. 2d 185, 189 (Fla. 1991). In so ruling, this Court follows the lead of the United States Supreme Court which "has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." Lehr v. Robertson, 463 U.S. 248, 258, 103 S. Ct. 2985, 2991, 77 L. Ed. 2d 614 (1983). The United States Supreme Court has held that a biological father who has not asserted a paternal interest in his child enjoys no constitutionally protected interest in that child. Lehr v.

Robertson, Supra, 463 U.S. at 261-262, 103 S. Ct. at 2993-2994. In contrast, the United States Supreme Court has repeatedly indicated that the U.S. Constitution protects family relationships rooted in "a deeply loving and interdependent relationship between an adult and child in his or her care...even in the absence of blood relationship." Smith v. Organization of Foster Families, 431 U.S. 816, 843-844, 97 S. Ct. 2094, 2109-2110, 53 L. Ed. 2d 14 (1977); See also Michael H. v. Gerald D., 491 U.S. 110, 130, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989), U.S. rehearing denied 492 U.S. 936, 110 S. Ct. 22, 106 L. Ed. 2d 634 (1989). In fact, the United States Supreme Court has stated that "biological relationships are not exclusive to determination of the existence of family....Thus the importance of the family relationship, to individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life' through the instruction of children." Smith v. Organization of Foster Families, 431 U.S. at 843-844, 97 S. Ct. at 2109.

In the present case, both the Petitioners/Adoptive Parents and the Child have a fundamental liberty interest in maintaining the close, family relationship which they have formed in reliance upon the order permanently terminating the rights of the Biological Parents and committing the Child to The Adoption Centre, Inc. for subsequent adoption. The bonding between Petitioners/Adoptive Parents and the Child became substantial during the six month period in which the Biological Father abandoned the child, as found

by clear and convincing evidence by order of Juvenile Judge Charles N. Prather, and has grown increasingly stronger over the past three years. (R. 226-27). Based on Judge Prather's order and the circumstances, Adoption Judge Jeffords Miller properly denied the Biological Father's Motion to Intervene on the basis of Collateral Estoppel/Estoppel by Judgment. (R. 130-131).

As in the Supreme Court case of Quilloin v. Walcott, "the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except [Respondent]. Whatever might be required in other situations, we cannot say that the state was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the 'best interests of the child'." 434 U.S. 246, 255, 98 S. Ct. 549, 555, 54 L. Ed. 2d 511 (1978).

VI. SOUND PUBLIC POLICY PRECLUDES CONSIDERATION OF A BIOLOGICAL FATHER'S LATEST ATTEMPTS AT PARENTAL REHABILITATION MADE AFTER PERMANENT TERMINATION OF HIS PARENTAL RIGHTS AND THE FILING OF A THIRD PARTY ADOPTION PETITION.

Once parental rights have been permanently terminated and an adoption petition has been filed by a prospective adoptive family substantially bonded with the child, sound public policy precludes the biological father from attempting to undermine that adoption by proving parental rehabilitation. The Florida Adoption Statutes indicate that the adoption court must enter orders which "promote and protect the best interests of the person to be adopted". § 63.022(2)(l), Fla. Stat. (Supp. 1992). Both the Florida

Termination Statutes and case law emphasize the permanency of an order terminating one's parental rights. § 39.469(2)(b), Fla. Stat. (1991); In the Interest of T.G.T., 433 So. 2d 11, 12 (Fla. 1st DCA 1983). As stated in Thompson v. Department of Health and Rehabilitative Services, to allow a putative father to mount a second challenge to the termination of his parental rights is "to wrench from the word 'permanent' its intended meaning" under the Florida Termination Statutes. 353 So. 2d 197, 198 (Fla. 3d DCA (1977); See § 39.469(2)(b), Fla. Stat. (1991).

Permanency of orders terminating parental rights is necessary, especially where a child is placed with a licensed child-placing agency for subsequent adoption, as in this case. Florida Statute Section 39.47(1) (1991) and Florida Statute Section 63.062(4) (Supp. 1992) both indicate that the consent to adoption obtained from the appropriate licensed child-placing agency alone is sufficient in the adoption proceeding. (R. 4-5). In reliance upon these statutory procedures, the Adoptive Parents submitted their application to The Adoption Centre, Inc. to adopt a child. In reliance upon these statutory procedures, the natural mother approached The Adoption Centre, Inc. to place her child for adoption and chose these Adoptive Parents through the agency profile. The Petitioners met often with the biological mother to plan for the birth of the Child, providing both with the emotional and financial support denied them by the abandoning Biological Father. In reliance upon these statutory procedures, the biological mother immediately contacted the Adoptive

Parents/Petitioners and placed the Child in their custody within 48 hours of her birth. (R. 27). In reliance upon these procedures, The Adoption Centre, Inc. gave its consent to the adoption of the Child by these Adoptive Parents. (R. 4-5). In reliance upon these statutes, the Adoptive Parents have in fact petitioned for the adoption of this child, to whom they were substantially bonded prior to the Biological Father's attempt six months later to intervene in this proceeding.

Once a court of competent jurisdiction has found clear and convincing evidence during the pendency of the adoption proceeding that the child has substantially bonded with its adoptive parents, the best interests of the child require that an adoption order be entered in favor of the adoptive parents and that the biological father be denied any further opportunity to intervene. The biological father creates such a situation when he abandons the child and fails to take any further affirmative action until a point in time after which the child has become bonded to her adoptive parents. The abandoning Biological Father must not be allowed to circumvent the permanency of the termination order as affirmed by the Appellate Court and to mount meaningless appeals of the order denying his right to intervene in the adoption action. To rule otherwise would be to deprive this Child from enjoying the love, security and permanency of the only home she has ever known during her fleeting childhood years. It is unjust to allow a biological father who has never taken steps to support or legitimate the child to hold such sway over the lives of the

biological mother, the child and the prospective adoptive parents. Further, it is not right to allow the Biological Father to wrench a 3 1/2 year old child away from the only family she has ever known.

It is in the interests of all citizens that the institution of adoption be encouraged and strengthened as an alternative to provide abandoned/illegitimate children with a stable, loving two-parent home. An abandoning biological father must not be allowed to veto a natural mother's decision to place the child for adoption. Further, he should not be allowed to mount a custody battle against prospective adoptive parents substantially bonded to the child he long ago abandoned, especially once his parental rights have been permanently terminated. Such a result not only defeats the mother's desire to place the child in a stable, loving home, but also discourages potential adoptive families from opening their family to an adoptive child for fear that their efforts would be defeated by a biological father who attempts to rehabilitate himself long after the child has been placed for adoption.

As Judge Harris notes in the Fifth District Court of Appeal's Opinion, "the passage of time required by these proceedings is harmful to everyone." (App. 6). Sound public policy calls for abandoned children to be swiftly placed within a loving, stable adoptive home. See § 39.45(2), Fla. Stat. (1991). The Biological Father alone is responsible for abandoning the Child and for making it necessary to place the Child in an adoptive home. Permitting the Biological Father to re-litigate the issues surrounding

permanent termination of his parental rights further delays the Child's ability to enjoy a secure, loving home with the only family she has ever known. These attempts by the Biological Father fail to demonstrate parental love and concern for the Child. Public policy dictates that this Court end this Biological Father's ploys to gain custody of the Child whom he has never seen. In the best interests of the Child, this Court must allow finalization of the Child's adoption by her existing family.

CONCLUSION

For the reasons stated herein, Petitioners Thomas A. Stefanos and Brigitte B. Stefanos, Adoptive Parents, respectfully request this Honorable Court to answer the certified question in the negative; deny the Respondent any further right to intervene in this adoption; and affirm the Trial Court Judge's Order denying Respondent's Motion to Intervene.

Respectfully submitted this 24th day of March, 1995.

Heidi M. Tauscher, Esquire
HEIDI M. TAUSCHER, P.A.
1521 Mount Vernon Street
Orlando, FL 32803
(407) 895-5000
Fla. Bar No. 0509167

Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 24th day of March, 1995 to: BARRY APFELBAUM, Esquire, 3211 South Conway Road, Orlando, Florida 32812.

Heidi M. Tauscher

Heidi M. Tauscher, Esquire
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Fla. Bar No. 0509167

Attorney for Petitioners

CERTIFICATE OF FILING

I HEREBY CERTIFY that the original and seven (7) copies of the Petitioners' Initial Brief on the Merits, including the Appendix, and a 3.5" computer disk containing the Brief in 5.1 WordPerfect format were filed by Federal Express with the Florida Supreme Court on this 24th day of March, 1995.

Heidi M. Tauscher

Heidi M. Tauscher, Esquire
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Attorney for Petitioners

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1995

NELSON RIVERA-BERRIOS,

Appellant,

v. CASE NO. 93-1919
THOMAS A STEFANOS and
BRIGITTE B. STEFANOS, his wife,

Appellee.

Opinion filed February 3, 1995

Appeal from the Circuit Court
for Orange County,
Jeffords D. Miller, Judge.

Barry Apfelbaum,
Orlando, for Appellant.

Heidi M. Tauscher, of
Heidi M. Tauscher, P.A.,
Orlando, for Appellee.

ON MOTION FOR REHEARING EN BANC

HARRIS, C. J.

We grant En banc rehearing for the purpose of certifying the following question to the supreme court:

> MAY ONE WHO HAS HAD HIS PARENTAL RIGHTS TERMINATED THEREAFTER INTERVENE IN AN ONGOING ADOPTION PROCEEDING AND CONTEST FOR THE ADOPTION OF HIS CHILD?

DAUKSCH, COBB, PETERSON, and THOMPSON, JJ., concur.
GRIFFIN, J., concurs specially, with opinion, in which DIAMANTIS, J., concurs.
DIAMANTIS, J., concurs specially with opinion, in which DAUKSCH, SHARP, W., and GOSHORN, J., concur.

GRIFFIN, J., concurring specially. 93-1919

I join in voting to certify the question and while Judge Diamantis' question seems more precise, either would suffice to bring this issue to the high court's consideration. I write only to raise a caveat about Judge Harris' characterization of the evidence in the termination of parental rights proceeding. The trial court decided the facts and weighed the evidence adverse to Judge Harris' view of the evidence. The majority of a panel of this court affirmed the lower court's decision.

DIAMANTIS, J., concurs.

DIAMANTIS, J., concurring specially.

I would grant en banc rehearing for the purpose of certifying the following question to the supreme court:

> MAY A PERSON WHOSE PARENTAL RIGHTS HAVE BEEN TERMINATED INTERVENE IN AN ADOPTION PROCEEDING IN ORDER TO CONTEST THE ADOPTION OF THE CHILD AND TO SEEK TO ADOPT THE CHILD?

DAUKSCH, SHARP, W., and GOSHORN, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

NELSON RIVERA-BERRIOS,

Appellant,

v.

CASE NO. 93-1919

THOMAS A STEFANOS and
BRIDGITTE B. STEFANOS, his wife,

Appellee.

Opinion file May 27, 1994

Appeal from the Circuit Court
for Orange County,
Jeffords D. Miller, Judge.

Barry Apfelbaum,
Orlando, for Appellant.

Heidi M. Tauscher, of
Heidi M. Tauscher, P.A.,
Orlando, for Appellee.

HARRIS, C. J.

Nelson Rivera-Barrios is again before this court. In his initial appeal, he sought to reverse a determination that his parental rights should be terminated because of neglect and abandonment -- even though, because the mother admittedly lied about knowing his name or address, he was given no notice of the hearing initially terminating his parental rights.[1] Because

---

[1] At the termination hearing (although the court ruled that the father was not entitled to notice) the court also found that appellant had neglected and abandoned his child. The Supreme Court of Iowa, in response to a similar factual pattern, reached a different result:

this court's majority issued a *per curiam* decision without opinion, the Supreme Court lacked jurisdiction to review our earlier determination. *See Rivera-Berrios v. Adoption Center, Inc.*, 617 So. 2d 1067 (Fla. 5th DCA 1993), *rev. dismissed*, 623 So. 2d 494 (Fla. 1993).

Appellant is back again; this time his efforts to intervene in and assert a cross-claim for adoption in a pending adoption case involving his child were denied under the doctrine of *res judicata*, estoppel by judgment and collateral estoppel based on the judgment referred to in the preceding paragraph. The issue before us, then, is whether one who has had his parental rights terminated may thereafter contest for the adoption of his child. The answer, quite clearly, is yes. Because a termination proceeding is not the same cause of action as an adoption proceeding, *res judicata* is inapplicable; estoppel by judgment (or collateral estoppel) is not available because appellant's present fitness to adopt was not determined by the previous action. *See Green v. State Dept. of Health, etc.*, 412 So. 2d 413 (Fla. 3rd DCA 1982). *Green* holds:

> It is established law that the termination of the natural parents' rights by commitment proceedings does not foreclose their right to seek adoption pursuant to chapter 63, *supra*.

Green, 412 at 415.

> While it is true that Daniel has not shared in any of the expenses in connection with the birth, he was never requested to do so. Nor was there any need to pay the expenses until he learned the child was his. Abandonment is defined as the relinquishment or surrendering of parental rights and includes both the intention to abandon and the acts by which the intention is evidenced.

In Interest of B.G.C., 496 N.W. 2d 239 (Iowa, 1992).

The issue properly before the adoption judge was whether the natural father has been sufficiently "rehabilitated" so that he may now contest for the adoption of his child. *See In Interest of T.G.T.*, 433 So. 2d 11 (Fla. 1st DCA 1983).

We are required by our earlier decision to recognize that the father was derelict in failing to pay medical bills for the birth of his child and support for the child (even though the mother admits that she led him to believe she had had an abortion) and that this lack of support justified a finding of neglect and abandonment. Even so, the adoption court must now determine if the father's subsequent, very public declaration of his desire to assume all future financial responsibility for the child and his exhaustion of every conceivable legal remedy to do just that has now evinced a resolute, firm and settled purpose to assume his parental duties. The adoption court must further determine whether these actions demonstrate that "no matter what derelictions originally caused the loss of parental rights, there has been a rehabilitation to the point where parental suitability and fitness have reached a level sufficient to warrant adoption." *Green*, 412 So. 2d at 415.

We acknowledge that the passage of time required by these proceedings is harmful to everyone. As children grow older, bonding occurs and new directions are difficult. Because of that, the legislature should, consistent with due process, impose strict time standards with expedited hearings and appeals in these types of action. Even so, it does not appear that the father is responsible for the delay, and he is entitled to a fair hearing on the merits of his petition.

REVERSED and REMANDED for action consistent with this opinion.

COBB, J., concurs.
SHARP, W., J., concurs in result only, without opinion.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1993

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

NELSON RIVERA-BERRIOS,

Appellant,

v.

CASE NO. 92-2313

THE ADOPTION CENTRE, INC.,

Appellee.

Decision filed March 26, 1993

Appeal from the Circuit Court
for Orange County,
Charles N. Prather, Judge.

Barry Apfelbaum, Orlando, for Appellant.

Heidi M. Tauscher, Orlando, and
Thomas R. Mooney of Meyers, Mooney, Schott
& Meyers, Orlando, for Appellee.

PER CURIAM.

AFFIRMED.

GRIFFIN and DIAMANTIS, JJ., concur.
HARRIS, J., dissents with opinion.

I hereby certify that the above and foregoing is a true copy of instrument filed in my office.

FRANK J. HABERSHAW, CLERK
DISTRICT COURT OF APPEAL OF
FLORIDA, FIFTH DISTRICT

Per Robin L. Fleming
Deputy Clerk

Exhibit "B"

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. DR 92-7446
DIVISION 38

IN RE: Petition of THOMAS A. STEFANOS and BRIGITTE B. STEFANOS, his wife, to adopt a white female child.

_____/

1993 JUL 16 AM 10:24

AMENDED
ORDER DENYING MOTION TO INTERVENE AND FILE OBJECTION TO PETITION FOR ADOPTION AND SUPPLEMENTAL MOTION TO INTERVENE

The Court having reviewed Nelson Rivera-Berrios's Motion to Intervene and File Objection to Petition for Adoption, the Supplemental Motion to Intervene and the Response and Second Response to Motion to Intervene and Objection, having reviewed the court file, having heard argument and being otherwise duly advised in the premises does hereby

ORDER, ADJUDGE AND DECREE that:

Nelson Rivera-Berrios's Motion to Intervene and File Objection to Petition for Adoption and Supplemental Motion to Intervene are hereby denied based upon the res judicata, estoppel by judgment and collateral estoppel affects of the decision of Charles N. Prather rendered on August 20, 1992 in Orange County Circuit Case No: JU 92-471, affirmed by the Fifth District Court of Appeal Per Curiam on March 26, 1993 in Appellate Case No: 92-2313, with the Florida Supreme Court denying Petition for Review and refusing to entertain any Motion for Rehearing on June 24, 1993 in Florida Supreme Court Case No: 81,958. Specifically, Judge Prather found by clear and convincing evidence that Nelson Rivera-Berrios had not meet the requirements of Florida Statute Section 39.462(1)(a), had abandoned

the child and that "substantial bonding has taken place between the child and adoptive parents and that the manifest best interests of the child are served by the child remaining with the adoptive parents on permanent basis." The Court denies the motions of Nelson Rivera-Berrios to intervene and object based upon the fact that these issues have been conclusively determined by clear and convincing evidence before Judge Prather and may not be re-litigated.

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida this 12 day of July, 1993.

CIRCUIT JUDGE

Conformed copies furnished by U.S. regular mail this 15 day of July, 1993 to:

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(407) 895-5000

BARRY APFELBAUM, ESQUIRE
3211 South Conway Road
Orlando, Florida 32812

THOMAS MOONEY, ESQUIRE
17 South Lake Avenue
Orlando, Florida 32801

JUDICIAL ASSISTANT/~~ATTORNEY~~

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

JUVENILE DIVISION 6

CASE NUMBER JU92-471

IN THE INTEREST OF:

ANASTASIA GUTIERREZ,

A Child.

_____/

O R D E R

THIS CAUSE came on to be heard August 14, 1992 on the Motion for Rehearing as to the Order on Father's Motion to Vacate Final Judgement of Termination of Parental Rights entered July 30, 1992. The subject Motion for Rehearing was filed by the Petitioner and Adoptive Parents.

On January 22, 1992 the Child was born. On January 24, 1992, the Petitioner, The Adoption Centre, Inc. filed its Petition for Dependency and Petition or Termination of Parental Rights. The biological Mother filed an Affidavit and Acknowledgement of Surrender, Consent and Waiver of Notice at the time the Petition was filed, dated January 22, 1992. The biological Father filed nothing and notice was furnished him by publication based on an affidavit completed by the

Exhibit "A"
App. 10

biological Mother January 22, 1992. On March 2, 1992, the Court entered an Order of Termination of Parental Rights, Order of Disposition and Final Judgment of Termination of Parental Rights. At the hearing resulting in said Order, neither the biological Mother or Father appeared. On July 2, 1992, a Motion to Vacate Final Judgement of Termination of Parental Rights was filed by the biological Father herein. A hearing on said motion was had July 23, 1992. The Court entered an Order Granting the Father's Motion to Vacate Final Judgement of Termination of Parental Rights by order dated July 30, 1992. Thereafter, the subject Motion for Rehearing of the Court's Order of July 30th was filed.

The Order entered by this Court July 30, 1992, wherein the Final Judgement of Termination of Parental Rights was vacated, was, upon reconsideration, in error. Said order was entered based on the premise that the Father was entitled to Notice by Publication and that the same was legally and factually deficient. Section 39.462(1)(a), Florida Statutes, specifies who is entitled to receive personal service. The biological father herein was

not entitled to receive personal service pursuant to the subject statute. Not being entitled to personal service, the biological Father was not entitled to service by publication. Therefore, the defects in the Father's service by publication are of no consequence.

This brings us to this issue of whether or not the biological Father is entitled to relief based on his Motion to Vacate Final Judgement of Termination of Parental Rights and the facts adduced at the hearing of July 23, 1992. This Court finds he is not entitled to such relief.

The Mother and Father met in March of 1991. Three days later they commenced a sexual relationship which lasted approximately three and one-half months. The Mother conceived the end of March or first of April, 1991. When she was eight weeks pregnant, the Mother told the Father she was pregnant. The Father wanted to get married. The Mother rejected this offer. When the Mother was approximately nine and one-half weeks pregnant, they ceased having a relationship altogether. The Father next saw the Mother briefly at his place of business when she was four to seven or eight months pregnant.

No meaningful conversation took place at that time. Their next encounter was in late June, 1992, when the Mother went to see the Father and told him of the birth of the Child and her placing the Child for adoption with the Petitioner. The Father retained counsel and filed his Motion in the sixth month of the Child's life and approximately thirteen months after being advised of the pregnancy.

The Court finds the Father abandoned the Child herein in that his efforts were only marginal efforts that do not evince a settled purpose to assume all parental duties. It would be ludicrous to assume the Mother and Father commenced a sexual relationship for the purpose of procreation and parenting. In this case, we have a Father and Mother in what appears to be recreational sex. The Mother gets pregnant, tells the Father who proposes marriage to the Mother. One and one-half weeks later, they part company on a permanent basis. The Father testified he continued to try to see the Mother, saw the Mother once several months into the pregnancy, assumed she had had an abortion and took no further steps to assist with the Mother's medical needs, expenses or well being. He has never seen the Child nor incurred any expense in regard to her.

This Court finds the above facts are sufficient to demonstrate, by clear and convincing evidence, the abandonment of the Child by the Father.

The Adoptive Parents were notified of the birth of the Child immediately. Within a very few days they picked the Child up at the hospital and commenced their parenting duties. The Adoptive Parents are quite capable as such and the Child has never known any other parents. The Court finds susbstantial bonding has taken place between the Child and Adoptive Parents and that the manifest best interest of the Child are served by the Child remaining with the Adoptive Parents on a permanent basis.

It would appear the bonding of the Child to the Adoptive Parents may also be considered on the issue of abandonment although the Court's decision herein is based on conduct by the Father. The case of In the Matter of the Adoption of Doe, 543 So.2d 741 (Fla. 1989), U.S. Cert. denied 110 S.Ct. 405, the the Florida Supreme Court considered a case involving the bonding of a baby with adoptive parents. In that case, at the time the putative father had filed his acknowledgement of paternity, the Child had only been with the adoptive parents for a few days. At that point, bonding was minimal. The Court stated that bonding

subsequent to the acknowledgement of paternity was not a significant consideration in that case, but pointed out:

> "However, this does not mean that the best interests of the Child as evidenced by bonding to the adoptive parents is not relevant under other circumstances. For instance, there may well be circumstances where a natural Father does not acknowledge or declare a parental interest in the Child until after the Child has been with the adoptive parents for a significant period of time during which substantial bonding has occurred. In such a case, bonding would be a material consideration on the issue of abandonment. The Child's well being is the raison d'etre for determining whether a Child has been abandoned by a parent or parents..... Abandonment..... is a civil proceeding intended to serve the best interests of the Child."

The Court then stated that Federal Case Law has "emphasized the paramount in the welfare of Children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed." Id. Lehr v. Robertson, 463 U.S. 248, 257, 103 S.Ct. 2985, 2991, 77 L.ed. 2nd 614 (1983). As stated earlier, this Court finds it manifestly in the best interest of the Child to remain with the Adoptive Parents.

All of the foregoing findings herein are made by clear and convincing evidence. In evaluating

the testimony of the witnesses, this Court has considered the criteria set forth in Florida Standard Jury Instructions 2.2 (Civil Cases).

Upon consideration of the foregoing, it is

ORDERED that this Court's Order on Father's Motion to Vacate Final Judgment of Termination of Parental Rights entered July 30, 1992 be and the same is hereby vacated and set aside. It is further

ORDERED that the Motion to Vacate Final Judgement of Termination of Parental Rights, filed by the Natural Father, Nelson Rivera Berrios, be and the same is hereby **denied.**

ORDERED at Orlando, Orange County, Florida this 19th day of August, 1992.

CHARLES N. PRATHER-CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail or Hand Delivery this 14th day of July, 1992, to: Barry S. Apfelbaum, Esquire, Attorney for Natural Father, 3206 South Conway Road, Orlando, Florida, 32806; Thomas R. Mooney, Esquire, Attorney for the Adoption Centre, Inc., Meyers, Mooney, Schott & Meyers, 17 South Lake Avenue, Orlando, Florida, 32801; Ms. Carolyn Gutierrez, 624 Malloy Street, Orlando, Florida, 32803, and to; Heidi T. Vonder Heidi, Attorney for Adoptive Parents, 1521 Mount Vernon Street, Orlando, Florida, 32803, Frank E. Merrick, Esquire, 326 N. Ferncreek Avenue, Orlando, Florida, 32803.

Melissa Goodwin
Judicial Assistant

CLERK CIRCUIT COURT ORANGE COUNTY FLORIDA

STATE OF FLORIDA, COUNTY OF ORANGE
I HEREBY CERTIFY, that the above and foregoing is a true copy of the original filed in this office,
FRAN CARLTON, Clerk of the Circuit Court and County Court,
By: L. Drew
Deputy Clerk
Dated: 8-21-92