

FILED

SID J. WHITE

MAY 5 1995

CLERK, SUPREME COURT
By Barry
Chief Deputy Clerk

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

THOMAS A. STEFANOS and
BRIGITTE B. STEFANOS,

Petitioners

Case No. 85,248

vs.

NELSON RIVERA-BERRIOS,

Respondent.

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

RESPONDENT'S INITIAL BRIEF ON THE MERITS

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TEXT AND OTHER AUTHORITY

Chapter 39, Florida Statutes	3, 4
Chapter 63, Florida Statutes	3, 4
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SUMMARY OF ARGUMENT

This Court's decision in Matter of ADOPTION OF DOE, 543 So. 2d 741 (Fla. 1989), created a previously unrecognized basis for a finding of abandonment on the part of an unwed father in an adoption proceeding. That is, the idea that abandonment can be found on the basis of conduct occurring prior to the birth of a child. As a result of that decision, legal principles tangentially related to the issue decided in DOE must be reviewed, and if necessary, redefined. One of these principles is now before this Court

The principle that allows a parent whose parental rights have been terminated to seek adoption of his child has never been questioned. The trial court, when deciding whether to grant a petition for adoption, is always guided by a determination the child's best interests. In a given case, at the time the determination is made, it may be in the child's best interests to reside permanently in the care and custody of its biological parent. In such a case, the implication being that whatever reason caused the parent to lose his parental rights no longer exists at the time of determination of the adoption petition, the Court should not be precluded to consider that person as a prospective adoptive parent.

Before DOE, the above situation typically occurred when a parent loses custody of his child because of abandonment, neglect, or abuse, ultimately loses his parental rights, and then later seeks to adopt the child. The termination of parental rights would be based on events occurring between birth and the date of the Termination of Parental Rights (TPR) hearing. The adoption petition would be determined on the basis of circumstances which occurred thereafter. In the instant case, TPR was based on events occurring between conception and birth, and the adoption petition will be determined on circumstances which occurred thereafter.

The anticipated evidence of bonding between the child and the prospective adoptive parents may be difficult for Respondent to overcome, but there is no legal basis for prohibiting him from attempting to do so.

ARGUMENT

POINT I: THE DOCTRINES OF RES JUDICATA AND ESTOPPEL BY JUDGMENT DO NOT PRECLUDE RESPONDENT'S ADOPTION EFFORTS

The issues in a termination of parental rights proceeding under Ch. 39, Florida Statutes, are not identical to those in an adoption proceeding under Ch. 63, Florida Statutes. Therefore, the findings of the trial court which resulted in termination of Respondent's parental rights are not res judicata as to the child's best interests in regard to adoption. Similarly, the matters litigated in the TPR proceeding involved facts occurring prior to the child's birth, while the matters litigated in the adoption proceeding will involve facts occurring since birth. Therefore, estoppel by judgment does not lie. *GREEN v. STATE, DEPT. OF HEALTH, ETC.*, 412 So. 2d 413 (3rd DCA 1982); *IN INTEREST OF T.G.T.*, 433 So. 2d 11 (1st DCA, 1983).

POINT II: STRICT CONSTRUCTION OF FLORIDA ADOPTION STATUTES INDICATES THAT RESPONDENT BE PERMITTED TO SEEK ADOPTION OF HIS CHILD

Any person may be adopted. Florida Statutes, Sec. 63.042 (1).

An unmarried adult, including the birth parent of the person to be adopted, is eligible to adopt. Florida Statutes, Sec. 63.042 (2) (C). Nowhere in the adoption statute is a provision which prohibits a birth parent from seeking adoption of his child, under any circumstances.

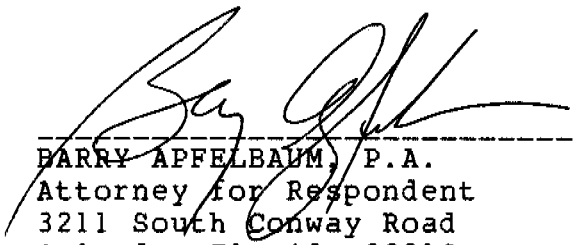
POINT III: SOUND PUBLIC POLICY DICTATES THAT RESPONDENT BE PERMITTED TO SEEK ADOPTION

Respondent initially asserted his parental rights immediately upon learning that he was in fact a parent, at a time when the child was barely a few months old. The lengthy delay in reaching a final adjudication of this matter is due largely to the election on the part of the Adoption Centre, Inc., to proceed initially under Chapter 39, F.S., rather than directly under Chapter 63, F.S. In any event, the ultimate question remains whether it is in the child's best interests to reside permanently as the daughter of Petitioners or Respondents. Respondent should be allowed to present evidence of Petitioner's fitness or lack thereof, the advantages of allowing the child to be raised in an ethnic and cultural environment consistent with her genetic makeup, and the potential harm that may occur when she learns that the people who raised her fought against her birth father's efforts to do so.

CONCLUSIONS

The certified question should be answered in the affirmative.

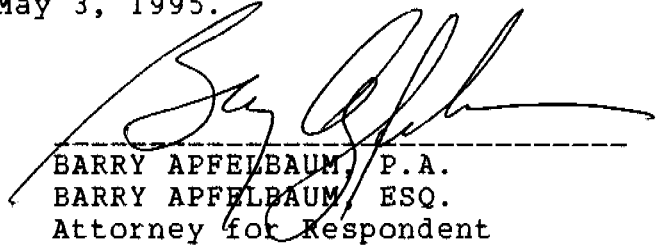
Respectfully submitted this 3rd day of MAY, 1995.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing was mailed to HEIDI TAUSCHER, ESQ. Attorney for Appellant, 1521 Mt. Vernon St., Orlando, FL. 32803 on May 3, 1995.



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