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' REPLY BRIEF ON THE MERITS

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ARGUMENT

I. COLLATERAL ESTOPPEL/ESTOPPEL BY JUDGMENT DOES PRECLUDE THE RESPONDENT FROM SEEKING ADOPTION UNDER THE FACTS OF THIS CASE.

By failing to demonstrate any interest in the child until thirteen months after being advised of the pregnancy and six months after her birth, the Respondent created the unique procedural posture of this case. Thereafter, rather than filing an adoption action in his own right, the Respondent filed a motion with the Juvenile Court to vacate the order terminating his parental rights, subsequently filing a motion to intervene in the adoption action. The Adoption Judge stayed the case while the Juvenile Judge held an evidentiary hearing concerning the Respondent's challenge to the order permanently terminating his parental rights.

Unlike either the Green case or T.G.T. case cited in Respondent's Answer Brief, the Respondent was permitted to present evidence concerning the termination of his parental rights and subsequent efforts at rehabilitation before the Juvenile Court during a stay granted in the pending third party adoption proceeding. Green v. State Department of Health and Rehabilitative Services, 412 So. 2d 413 (Fla. 3d DCA 1982); In the Interest of T.G.T., 433 So. 2d 11 (Fla. 1st DCA 1983). In contrast to Green and T.G.T., the Respondent biological father was able to present all evidence available to him through the date of this evidentiary hearing. Unlike Green and T.G.T., the Respondent attempted to prove that the termination of parental rights order should be vacated in an attempt to defeat the child's adoption by prospective

parents to whom she had substantially bonded as a result of the Respondent's abandonment of her. See In the Matter of 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).

After hearing all of the evidence, the Juvenile Court found that the biological father never evinced a resolute or settled purpose to assume his parental duties. The court went on to make the finding that it was in the best interests of the child to "remain with the adoptive parents on a permanent basis." Based upon these findings, the Juvenile Judge refused to vacate the order terminating the Respondent's parental rights. The Adoption Court further stayed its proceedings, permitting the Respondent to fully appeal the Juvenile Court's order.

Only after appellate affirmation of the Juvenile Court's order, the Adoption Court agreed to hear the Petitioners' petition for adoption. Upon the Respondent's motion to intervene, the Adoption Court properly regarded the Respondent as a stranger to the proceeding and his consent as not required under law. The Judge noted the Juvenile Court's determination, citing Collateral Estoppel and Estoppel by Judgment as reasons why the Respondent could not re-litigate the issue regarding his failure to meet any of the five criteria (identical under Florida Statute Section 39.462(1)(a)(2) and Section 63.062(1)(b) (Supp. 1992)) prior to the Petitioners' filing of the adoption petition. In the Interest of A.J.B., 548 So. 2d 906, 908 (Fla. 1st DCA 1989).

Collateral Estoppel/Estoppel by Judgment requires that the Juvenile Court's adjudication of the material issues bind the parties in all subsequent proceedings, regardless of whether there is identity between the causes of action. Burleigh House Condominium, Inc. v. Buchwald, 368 So. 2d 1316 (Fla. 3d DCA 1979). The principles of Collateral Estoppel/Estoppel by Judgment require that the Adoption Court preclude the Respondent from re-litigating the issue of his abandonment of the child and the determination that the child's best interests require her to remain permanently with her adoptive parents because these determinations were made by the Juvenile Judge based upon clear and convincing evidence existing as of its July 23, 1992 hearing date. The Respondent was unable to show that (1) he had ever married the mother, (2) adopted the child, (3) filed written acknowledgement of paternity with the Department of Health and Rehabilitative Services, (4) been court-determined to be the child's father or (5) provided consistent support to the child or her mother up through the July 23, 1992 juvenile hearing. Florida Statute Section 39.462(1)(a)(2) (Supp. 1992). Because the petition for adoption was filed prior to that date, it has been fully adjudicated that the Respondent failed to meet any of these five criteria [which are also required for his consent to the adoption under Florida Statute Section 63.062(1)(b) (Supp. 1992)] prior to the filing of the Petitioners' adoption petition, as required under law. In the Interest of A.J.B., 548 So. 2d 906, 908 (Fla. 1st DCA 1989). Collateral Estoppel/Estoppel

by Judgment precludes the Respondent from re-litigating in the pending adoption proceedings the legal and factual determinations concurrently made by the Juvenile Court based upon clear and convincing evidence which affirms the permanent 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).

The unique procedural posture of this case precludes a situation in which the issues decided by the Juvenile Court were any different from those that had to be considered in the pending adoption proceeding. In the Juvenile action, the Respondent was unable to prove that he had taken any action manifesting his substantial concern for the welfare of his illegitimate child prior to and over twenty days after the filing of an adoption petition by the Petitioners. For this reason, he cannot possibly prove now that he met the identical criteria under the Adoption Statute prior to the filing of the Petitioners' adoption petition, as required under law. 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).

Collateral Estoppel/Estoppel by Judgment requires that the determinations of the Juvenile Court concerning the Respondent's utter failure to assume his parental responsibilities through July 23, 1992 be honored by the Adoption Court and not be re-litigated.

The social policy concerns of promoting judicial economy, assuring certainty of result and ensuring respect for the judgments already rendered by the Orange County Circuit Court also mandate against re-litigation of these issues. John Alden Life Insurance Company v. Cavendes, 591 F. Supp. 362 (S.D. Fla. 1984). The adoptive parents' reliance upon the order permanently terminating the Respondent's parental rights and committing the child to the adoption agency should not be undermined, especially after substantial bonding has occurred between the adoptive parents and the child. The Green and T.G.T. decisions must not be read to permit abandoning biological parents to intervene in third party adoption actions and initiate custody battles in an attempt to prove rehabilitation after the abandoned child has substantially bonded with the adoptive parents. As pointed out in the Thompson case, to reopen the issues surrounding the biological father's rights would be to wrench the word "permanent" from its intended meaning under both the court order and Florida Statute Section 39.469(2)(b) (1991). Thompson v. Department of Health and Rehabilitative Services, 353 So. 2d 197, 198 (Fla. 3d DCA 1977).

II. STRICT CONSTRUCTION OF THE ADOPTION STATUTES REQUIRES THAT THE BEST INTERESTS OF THE CHILD BE THE GUIDING CONCERN OF THE COURT AFTER TERMINATION OF BIOLOGICAL PARENTS' PARENTAL RIGHTS AND DOES NOT PROVIDE AN ABANDONING BIOLOGICAL PARENT THE RIGHT OF REHABILITATION AFTER THE FILING OF A THIRD PARTY ADOPTION PETITION.

The Adoption Statutes must be strictly construed because the right to adoption does not exist under the common law. 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 63.022(2)(1) (Supp. 1992) requires 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). Further, the Adoption Statutes are clear that no consent is required from an unwed father who has not met any of the five criteria of Florida Statute Section 63.062(1)(b) (Supp. 1992). Florida case law explicitly indicates that the biological father must meet one of these criteria prior to the filing of an adoption petition by third parties. 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).

There is no requirement under the Florida Adoption Statutes that a biological parent whose parental rights have been permanently terminated be permitted to contest a third party adoption of the child nor to adopt the child in his/her own right. Neither do the Florida Adoption Statutes provide for the rehabilitation of the parental rights of an abandoning, biological

parent. Upon permanent termination of the biological parents' rights and commitment of the child to an adoption agency, only the consent of the adoption agency is required to finalize the adoption. Florida Statute Section 63.062(4) (Supp. 1992).

Based upon the foregoing, this Court has held 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, 543 So. 2d 741, 746 (Fla. 1989), U.S. cert. denied 493 U.S. 964, 110 S. Ct. 405, 107 L. Ed. 2d 371 (1989). Not only does strict construction of the Adoption Statutes prevent an abandoning biological father from exercising control by withholding his consent, but the United States Supreme Court has emphasized that a biological father is not accorded a constitutionally protected liberty interest in his child unless he "comes forward to participate in 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. Mohammad, 441 U.S. 380, 392, 99 S. Ct. 1760, 1768, 60 L. Ed. 2d 297 (1979); same determination by this Court in Kendrick v. Everheart, 390 So. 2d 53, 60 (Fla. 1980). The Respondent has never supported or participated in the rearing of this child.

Strict construction of the Adoption Statutes requires that the best interests of the child be the court's primary concern 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 (1994); Florida Statute Section 63.022(2)(l) (Supp. 1992). As reflected in the Juvenile Court order, the best interests of the child in this case require that she remain permanently in the custody of her adoptive parents. Certainly no one can argue that it is in the best interests of this 3 1/2 year old child to be wrenched from the stable, two-parent family that has cared for her since her birth to be placed with a stranger who has already been adjudicated to have abandoned her. It is in the child's best interests to remain with the adoptive parents who have loved her, financially and emotionally supported her, and provided her with a stable home. In fact, both the United States Supreme Court and this Court have recognized that the child and the adoptive parents have a constitutional liberty interest in preserving 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).

The United States Supreme Court stated, "Biological relationships are not exclusive to determination of the existence of family ... [but] 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. 816, 843-844, 97 S. Ct. 2094, 2109-2110, 53 L. Ed. 2d 14 (1977). The

Florida courts have also recognized that the basis for protection of the family relationship is based upon the strong emotional connection arising from the family members' intimate daily association, as opposed to a blood 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 strict contrast, the United States Supreme Court and Florida Supreme Court have held that a biological father has no constitutionally protected interest in a child whom he has abandoned. Lehr v. Robertson, 463 U.S. 248, 258, 103 S. Ct. 2985, 2991, 77 L. Ed. 2d 614 (1983); Kendrick v. Everheart, 390 So. 2d 53, 60 (Fla. 1980). Due to the unique procedural posture of this case, the biological father's failure to meet any of the five criteria necessary to require his consent and his abandonment of the child were considered by the Juvenile Court during the pendency of the adoption proceeding, based upon the biological father's motion to vacate the order permanently terminating his parental rights. The Juvenile Court specifically found that the biological father had failed to meet any of these five criteria (which are the same identical five criteria for notice under Florida Statute Section 39.462(1)(a)(2) (Supp. 1992) and for consent under Florida Statute Section 63.062(1)(b) (Supp.1992)) and had "abandoned the child in that his efforts were only marginal efforts that do not evince a settled purpose to assume all parental duties." The Juvenile Judge made his findings based upon "clear and convincing

evidence", which included all evidence and facts presented by the biological father through the date of the July 23, 1992 evidentiary hearing.

The best interests of the child require that the court prevent the biological father from re-litigating the issues surrounding the permanent termination of his parental rights and thereby prevent him from delaying the child's adoption into 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.

III. SOUND PUBLIC POLICY PRECLUDES AN ABANDONING BIOLOGICAL FATHER WHOSE PARENTAL RIGHTS HAVE BEEN PERMANENTLY TERMINATED BY COURT ORDER TO MOUNT INEXHAUSTIBLE CHALLENGES TO JUDICIAL RECOGNITION OF THE FAMILY BOND EXISTING BETWEEN THE CHILD AND HER ADOPTIVE PARENTS.

Under the unique procedural posture of this case, the parental rights of the Respondent were permanently terminated by court order based upon clear and convincing evidence that he failed to demonstrate a settled purpose to assume his parental duties existing through the date of the filing of the adoption petition. The court order was also based upon clear and convincing evidence of substantial bonding between the child and her adoptive parents such that the court determined it was in the child's best interests to remain permanently with her adoptive parents. Under these circumstances, sound public policy precludes the biological father from attempting to undermine the adoption by proving parental rehabilitation. The Florida Adoption Statutes are clear that the biological father's consent is not required under such

circumstances and do not provide for parental rehabilitation. Rather, the Florida Statutes are clear that orders terminating parental rights are permanent and that once a child is placed with a licensed child-placing agency for a subsequent adoption, only the consent of that agency is required to finalize the adoption. Florida Statute Section 39.47(1) (1991) and Florida Statute Section 63.062(4) (Supp. 1992).

Sound public policy supports the institution of adoption as an alternative to provide abandoned/illegitimate children with stable, loving two-parent homes. In protecting the rights of children, our society should not allow an abandoning biological father to veto a natural mother's decision to place her child for adoption. Further, he must not be allowed to mount a custody battle against prospective adoptive parents substantially bonded to the child, especially when the bonding occurred as a result of his abandonment. Public policy dictates that this Court end this biological father's legal maneuvering to gain custody of a child whom he abandoned and has never seen.

Despite Respondent's allegations, the denial of his motion to intervene does not revolve around the Petitioners' fitness to adopt, but rather the Respondent's lack of standing to intervene in the adoption proceeding. See Kendrick v. Everheart, 390 So. 2d 53, 60 (Fla. 1980). The public policy interests of preserving the substantial bonding of the child and her family more than outweighs the biological father's desire that the child be raised in an ethnic cultural environment consistent with her genetic makeup.

Both of the adoptive parents have repeatedly testified to their commitment and efforts to expose the child to and encourage her appreciation of her Latin heritage. The Respondent's suggestion that the child cannot be exposed to her heritage without being raised in a Latin family is divisive, repugnant and violative of the equal protection clause of both the U.S. and Florida Constitutions. U.S. CONST. amend. 14, § 1; FLA. CONST. art. I, § 2. For this reason, the Florida Administrative Code Rule 10 M-8.005(1) on adoption specifically states that "no child shall be prevented from being placed with an adoptive family because the child's ethnic, racial and religious heritage is not the same as that of the adoptive family." As recognized by both the Florida Supreme Court and this Court, as well as in the Florida Administrative Code, family relationships are rooted in deep, loving and interdependent family relationships and not in blood ties. Smith v. Organization of Foster Families, 431 U.S. 816, 843-844, 97 S. Ct. 2094, 2109-2110, 53 L. Ed. 2d 14 (1977); Department of Health and Rehabilitative Services v. Privette, 617 So. 2d 305, 307-309 (Fla. 1993); In re Adoption of Minor Child, 593 So. 2d 185, 189 (Fla. 1991). The Respondent's concern about potential harm to the child must be considered in light of the certain emotional trauma which would result if the child is forcibly separated from the adoptive family to whom she has bonded. Bennett v. Jeffries, 40 NY 2d 543, 356 NE 2d 277 (1976), affirmed 399 NY 2d 697 (1977).

Sound public policy requires that this Court protect the substantial family bonding between the child and her adoptive

parents. Further, the Court must support the reliance of both the natural mother and the adoptive parents upon the permanent termination of the abandoning biological father's parental rights, which underlies placement of the child with the Petitioners at the time of her birth. Upon termination of his parental rights based on clear and convincing evidence of his abandonment, Respondent became as much a stranger to the adoption proceedings as he is to the child. The Court must protect this child from the ill-advised legal attempts of the Respondent to remove her from the care of the only family she has known.

CONCLUSION

For the reasons stated herein, Petitioners Thomas A. Stefanos and Brigitte B. Stefanos, 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 Adoption Court Judge's Order denying Respondent's Motion to Intervene.

Respectfully submitted this 25th day of May, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 25th day of May, 1995 to: BARRY APFELBAUM, Esquire, 3211 South Conway Road, Orlando, Florida 32812.

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