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SUPREME COURT OF FLORIDA

TARA DANIEL,

Petitioner,

vs.

MICHAEL S. DANIEL,

Respondent.
_____/

CASE NO. 89,363

Second DCA No. 95-04573

RESPONDENT'S ANSWER BRIEF

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INTRODUCTORY STATEMENT

The Petitioner, TARA DANIEL, will be referred to as the natural mother or the Petitioner. The Respondent, MICHAEL S. DANIEL, will be referred to as the legal father or the Respondent.

Designations to the Record will be referred to as (R-) followed by the appropriate page number.

Designations to the Appendix will be referred to as (A-) followed by the appropriate page number.

STATEMENT OF THE FACTS AND THE CASE

THE CASE

A Final Judgment of Dissolution of Marriage was entered by the trial Court on November 8, 1995 dissolving the marriage between the parties. (R-135-142). That Final Judgment was appealed to the Second District Court of Appeals. (R-143-148). The Second District filed their Opinion on October 18, 1996, reversing the trial Court in part. (A-1-6).

The Second District in their Opinion also certified to this Court the following question as being of great public importance:

> **"IS THE PRESUMPTION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY, AND THE BIRTH CERTIFICATE REMAINS UNCHANGED?"**

Thereafter on November 7, 1996, the Petitioner filed a Notice to Invoke Discretionary Jurisdiction stating:

> "Notice is given that Appellee, TARA DANIEL, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered October 18, 1996. The decision passes on a question certified to be of great public importance."

No briefs were filed by the Petitioner with regard to jurisdiction pursuant to Florida Rule

of Appellate Procedure 9.120(d).[1] Thereafter this Court entered its Order Postponing Decision on Jurisdiction and Briefing Schedule, dated November 26, 1996, requiring a Brief on the merits on or before December 23, 1996. The Brief filed by the Petitioner was not limited to the merits of the certified question, but attempts to reargue all of the issues that had been before the Second District Court of Appeals. The Brief does not allege conflict or any other basis for expanding the jurisdiction of this Court beyond the certified question. Therefore, the Respondent's Brief will be limited to the merits of the certified question and if this Court feels that other issues should be briefed, the Respondent asks leave of Court to file a Supplemental Brief on those issues. [2]

THE FACTS

The facts before this Court are essentially undisputed and are contained within the findings of fact made by the trial court in paragraphs 3 and 4 of the Final Judgment.(R-138-142). The parties were married to each other on December 26, 1992. At the time of the parties' marriage, the Husband knew that the Wife was pregnant with a child of another man. It was stipulated by the parties that MICHAEL DANIEL is not the natural

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[1] No briefs on jurisdiction would be required pursuant to Florida Rule of Appellate Procedure 9.120(d) if the Petitioner concedes that the only issue before the Court is the certified question.

[2] The District Court reversed the trial Court's decision requiring the Respondent, MICHAEL DANIEL, to pay support for CIARA DANIEL, after his dissolution of marriage from the Petitioner. "Here since the Husband is neither the child's natural nor adopted father and he has not contracted for her care and support, he has no duty to pay child support upon the dissolution of marriage."(A-3)

father of the child. Furthermore the Court specifically found:

> "The Husband herein, MICHAEL DANIEL, did not agree to adopt CIARA DANIEL; did not agree to support her after the parties herein were divorced; did not contract for her support; nor do any facts exist which would require him to pay support under the doctrine of equitable estoppel. He did, however, bond with the child, love her and supported her voluntarily during the time that the parties were together."

After CIARA's birth in March of 1993, the parties lived together only until August of 1993 at which time they separated. They got back together briefly thereafter and their final separation was in November of 1993.(Final Judgment, page 2, paragraph 4)(R-138-142). A Guardian Ad Litem was appointed by the Court for the minor child.(R-58). The Guardian Ad Litem's report was offered into evidence. (R-58). The Guardian Ad Litem identifies the natural father of CIARA and recognized that he was regularly employed and capable of paying support as evidenced by the fact that he is currently supporting a four month old daughter and also supports his girlfriend's child by a prior marriage.(R-58). The trial court found that the Respondent herein was obligated to pay support for CIARA DANIEL on the following basis:

> "It is the specific finding of this Court that the Supreme Court case of Privette v. Privette, 617 So.2d. 305, (Fla. 1993) changes the law in Florida: 'only a natural or adopted parent has a duty of support to a minor child.' It is the finding of this Court that the presumption of legitimacy imposed upon a legal father (the husband of the child's mother at the time of the child's birth) also implies a duty of support even after a dissolution of the parties' marriage. It is the belief of this Court that support follows legitimacy and to find otherwise would leave the mother in the lurch by having to make a decision of support vs. legitimacy."

It is important to note that:

NEITHER PARTY CHALLENGED THE LEGITIMACY OF THE CHILD DURING THE PROCEEDING.

SUMMARY OF ARGUMENT

The Second District chooses what question to certify, not the litigants. The Petitioner apparently seeks review of the entire case, not just the certified question. There is no conflict alleged nor a Brief submitted on the jurisdiction of this Court to consider matters other than what was certified by the Second District. It is respectfully submitted by the Respondent that the sole issue before the Court is the certified question.

It is not the position of either the Petitioner or the Respondent that their dissolution of marriage had any effect whatsoever on the legitimacy of the child. The child was born during a lawful marriage and is legitimate. The parties to a divorce cannot change that by stipulation.

ARGUMENT

Only the District Court of Appeals, not the litigants, has the authority to certify a question to this Court to be of great public importance. (F.R.A.P. 9.030(2)(a)(v)) The issue certified by the Second District Court of Appeals is as follows:

> **"IS THE PRESUMPTION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND, BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY AND THE BIRTH CERTIFICATE REMAINS UNCHANGED?"**

Although the Petitioner herein seeks to reargue the entire merits of the matter before the Second District and not just the merits of the certified question, they fail to allege any conflict or other basis for this Court's jurisdiction. To the contrary, every District in the State of Florida is in accord with this Court's ruling with regard to the support issue. Alpert v. Alpert, 415 So.2d. 818, (2nd DCA 1982); Portuondo v. Portuondo, 570 So.2d. 1338, (3rd DCA 1990), review denied 581 So.2d. 166, (Fla. 1991); Swain v. Swain, 567 So.2d. 1058, (Fla. 5th DCA 1990); Bostwick v. Bostwick, 346 So.2d. 150, (Fla. 1st DCA 1977); Taylor v. Taylor, 279 So.2d. 364, (Fla. 4th DCA 1973).

Therefore, the Respondent will limit his argument to the merits of the certified question.

Neither the Petitioner nor the Respondent have ever taken the position that their dissolution of marriage had any effect whatsoever on the legitimacy of the child. Their

stipulation before the trial Court, that the Respondent herein was not the natural father of the child, was simply a recitation of fact and created no issues with regard to legitimacy. As correctly stated by the District Court:

"Only one person can be the biological father of a child."

The legal concept of legitimacy does not address the identity of the natural father. To the contrary, all that is required is that the mother be married at the time of the child's birth.

As stated by Judge Whatley in the Second District Court's opinion:

> "Paternity and legitimacy are related concepts, but nonetheless separate and distinct concepts."

Paternity deals with determining fatherhood while legitimacy deals with compliance with the law: "born to legally married parents". The American Heritage College Dictionary, 775 (3d ed. 1993). It is undisputed herein that the Petitioner and Respondent were married to each other at the time that CIARA was born. There is no claim that their marriage was illegal.

> "A child born or conceived during a lawful marriage is a legitimate child. Matter of adoption of Baby James Doe,572 So.2d. 986,(1st DCA 1990)."

> "In Florida, an illegitimate child is one both conceived and born at a time its mother is not lawfully married..." Lopez v. Lopez, 627 So.2d. 108, (1st DCA 1993); Dennis v. Department of H.R.S., 566 So.2d. 1374, (5th DCA 1990).

The laws dealing with legitimacy have evolved for the purpose of protecting the innocent children who have had no choice in their fate.

> "We start from the premise that illegitimate children are not 'non-persons'. They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." Levy v. Louisiana, 391 US 68, 20 L.Ed.2d. 436 (1968).

CIARA DANIEL was born during the lawful marriage of the Petitioner and Respondent and was thus born legitimate. That status cannot be changed by a mere stipulation of the parties.

CONCLUSION

It is respectfully requested that this Court answer the certified question as follows:

THE PRESUMPTION OF LEGITIMACY IS NOT OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND, BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY AND THE BIRTH CERTIFICATE REMAINS UNCHANGED.

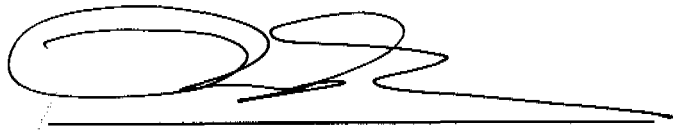
Respectfully submitted,

PETER N. MEROS
Attorney for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Carl T. Boake, Esquire, P.O. Box 60, St. Petersburg, FL 33731, and that the original and seven copies of the foregoing Brief has been mailed to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida, this 9th day of January, 1997.

MEROS, SMITH & OLNEY, P.A.



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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MICHAEL S. DANIEL,

Appellant,

v.

TARA DANIEL,

Appellee.

CASE NO. 95-04573

Opinion filed October 18, 1996.

Appeal from the Circuit Court for Pinellas County; Philip Federico, Judge.

Peter N. Meros, St. Petersburg, for Appellant.

Carl T. Boake and James A. Obeso, St. Petersburg, for Appellee.

WHATLEY, Judge.

The husband, Michael S. Daniel, challenges that part of the final judgment of dissolution of marriage awarding the wife, Tara Daniel, child support for a child who is not biologically his, but who was born during the course of the marriage. At the time of the parties' marriage, the husband knew the wife was pregnant with the child of another man. In the dissolution proceeding, the parties stipulated that the husband was not the

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biological father of the child. The parties separated after eleven months of marriage.

Pursuant to Department of Rehabilitative Services v. Privette, 617 So. 2d 305 (Fla. 1993), the trial court appointed a guardian ad litem to represent the interests of the child and made the biological father a party to the proceedings.[1] In the final judgment of dissolution, the trial court determined that the husband had not contracted for the child's support and that equitable estoppel did not apply so as to compel him to pay child support. Consistent with the guardian ad litem's report, the trial court found that although both the husband and the biological father had the ability to pay child support, the husband was "better able" to provide such support and the "best interest" of the child was served by ordering the husband to pay child support.

The husband contends that Privette does not control these facts and that the applicable rule of law is stated in Albert v. Albert, 415 So. 2d 818 (Fla. 2d DCA 1982), review denied, 424 So. 2d 760 (Fla. 1983). We agree. In Albert, this court announced, "We hold that a person has no legal duty to provide support for a minor child who is neither his natural nor his adopted child and for whose care and support he has not contracted." 415 So. 2d at 820. See also Portuondo v.

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[1] The biological father only participated to the extent that his deposition was taken by the guardian ad litem.

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Portuondo, 570 So. 2d 1338 (Fla. 3d DCA 1990), review denied, 581 So. 2d 166 (Fla. 1991); Swain v. Swain, 567 So. 2d 1058 (Fla. 5th DCA 1990); Bostwick v. Bostwick, 346 So. 2d 150 (Fla. 1st DCA 1977); Taylor v. Taylor, 279 So. 2d 364 (Fla. 4th DCA 1973). Here, since the husband is neither the child's natural nor adopted father, and he has not contracted for her care and support, he has no duty to pay child support upon the dissolution of the marriage.

We conclude that Privette is not applicable to the present case. The broad language of Privette has made it difficult for trial judges to know when to conduct a Privette hearing. Privette centered on litigation brought by HRS seeking to compel a putative father to pay child support. Privette was a case of contested paternity involving blood tests. In Robinson v. Department of Revenue, 661 So. 2d 363 (Fla. 1st DCA 1995), the First District found the scope of Privette limited to cases involving (a) children who face the threat of being declared illegitimate and (b) "legal fathers" who face the threat of losing parental rights.[2] We concur with Robinson but also conclude Privette has an even narrower focus.[3] We conclude

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[2] Department of Rehabilitative Services v. Privette, 617 So. 2d 305, 308 (Fla. 1993), held that legal fathers should not lose their parental rights without notice and opportunity to be heard.

[3] Kimberly G. Montanari, Does the Presumption Of Legitimacy Actually Protect the Best Interests of the Child?, 24 Stetson L. Rev. 809 (Summer 1995).

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Privette does not apply unless the criteria set forth in Robinson are present and the matter[4] involves contested paternity with the request for blood tests or similar genetic testing.

Because the above concerns are not present in this case, Privette does not apply. First, paternity was not contested. The parties stipulated that the husband was not the biological father. second, this case did not involve a legal father who faced the threat of losing parental rights without notice and opportunity to be heard. Third, the child's legitimacy was not at issue. See Robinson. In Matter of Adoption of Baby James Doe, 572 So. 2d 986, 988 (Fla. 1st DCA 1990), the First District states the well-settled rule that: "A child born or conceived during a lawful marriage is a legitimate child." Because the child in this case was born during the lawful marriage of the husband and the wife, the child was thus born legitimate. In addition, no party to the dissolution of marriage action raised the issue of legitimacy or challenged the child's status as being legitimate. The husband affirmatively acknowledges this matter. Further, the child's birth certificate remains unchallenged and unchanged. In Florida, a birth certificate can be changed only pursuant to a court order. See

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[4] Alchin v. Alchin, 667 So. 2d 477 (Fla. 2d DCA 1996), states that even though Department of Health and Rehabilitative Services v. Privette 617 So. 2d 305 (Fla. 1993), was a paternity action, its principles apply equally in dissolution of marriage proceedings.

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Fla. Admin. Code R. 10D-49.017; Jones v. State, Dep't Of Health and Rehabilitative Services, 409 So. 2d 1120 (Fla. 1st DCA 1982). we conclude that despite this court's holding that the legal father has no duty to pay child support, the child remains legitimate.

We believe confusion has arisen in the law because of a failure to distinguish between paternity and legitimacy. The presumption of legitimacy is one of the strongest rebuttable presumptions known in the law. See Albert; Matter of Adoption of Baby James Doe. In dicta, Albert addressed this presumption of legitimacy and stated: "However, when all parties to the action agreed upon the identity of the natural father and that the appellant was not the natural father, this presumption was overcome." 415 So. 2d at 820. The presumption that was overcome in Albert was not the presumption of legitimacy, but the presumption of paternity. See Prater v. Prater, 491 So. 2d 1280 (Fla. 5th DCA 1986).

The American Heritage Colleae Dictionary 1001 (3d ed. 1993), defines paternity as "the state of being a father; fatherhood. . . . a woman attempting to establish that a particular man is the father of her child . . . ." Only one person can be the biological father of a child. The American Heritage College Dictionary 775 (3d ed. 1993), defines legitimate as "being in compliance with the law; lawful. . . . Born to

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legally married parents." Paternity and legitimacy are related concepts, but nonetheless separate and distinct concepts.

Based on the foregoing, we certify the following question as being of great public importance:

> "IS THE PRESUMPTION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY, AND THE BIRTH CERTIFICATE REMAINS UNCHANGED?"

Accordingly, we reverse and remand to the triai court for proceedings consistent with this opinion.

Reversed and remanded; question certified.

SCHOONOVER, A.C.J., and PARKER, J., Concur.