O/A - 10-6-97 8-22 CA7

THE SUPREME COURT OF FLORIDA

CASE NO. 90,071

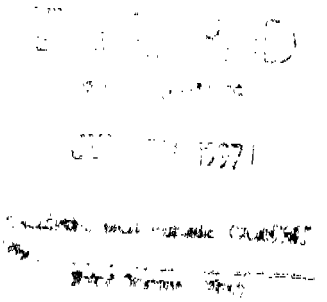
GERI FINLEY,

Appellant/Petitioner,

vs.

DENNIS SCOTT,

Appellee/Respondent.



APPEAL FROM THE DISTRICT COURT OF APPEALS, FIFTH DISTRICT

Case No. 95-308

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Respondent has filed and served with his Brief an Appendix, Rule 9.220, Fla.R.App.P.

STATEMENT OF CASE

Petitioner commenced a paternity action on September 13, 1993. Although employed, she filed as an indigent (R 1-10). Subsequently, she amended her Complaint (R 16-18).

She immediately sought temporary relief for the minor child, [redacted] born on [redacted] (R 14-15).

HLA testing took place on October 1, 1993, and the results were filed on November 24, 1993, establishing that Respondent was the biological father of the minor child (R 22-26).

Petitioner filed a Memorandum of Law as to an amendment to F.S. 61.30(6), which took effect on July 1, 1993. The statutory change removed any maximum level of support to be paid under the guidelines and set a percentage of combined parental income in excess of $10,000 per month, with no limitation whatsoever in amount (R 30-43 and 45-5 1). Respondent similarly filed a Memorandum of Law (R 52-55).

On December 20, a hearing was held, at which time the court awarded temporary attorney's fees and costs (R 56 and SO). A second hearing was held two days later as to temporary child support,

At that time, Petitioner introduced a financial affidavit establishing total monthly living expenses of $2,128 for herself, [redacted] and another daughter living with her. Deducting her earned employment income, she showed a monthly deficit of $1,761.13 (R 5). Nevertheless, in accordance with the amendment to F.S. 61.30(6), Petitioner sought monthly child support of $8,242 (R 62-63 and 200).

Respondent proved by use of the deposition of Petitioner that since the birth of the minor child, and for a period of ten months, he had paid to her a total of $19,670, or an average of $1,967 per month. He urged the court that this was more than sufficient to offset Petitioner's admitted monthly deficit, even assuming that Petitioner continued to refrain from full-time employment (R 58).

The lower court, in a detailed order, departed from the suggested child support guideline computation and made specific findings. It ordered that effective February 1, 1994, temporary child support would be paid directly to Petitioner by Respondent in the amount of $5,000 per month (R 95-98).

On March 4, 1994, Respondent sought to amend his Answer and, by doing so, to assert that F.S. 61.30, as recently amended, was unconstitutional on its face and as applied to the facts of this action. The Motion to Amend was granted, and an Amended Answer was deemed filed (R 134-135 and 140-143).

In preparation for trial, Respondent sought a second deposition from Petitioner and, pursuant to Rule 1.310(b)(5), Fla.R.Civ.P., requested that she bring with her certain financial information, as well as data verifying the expenditures made from the temporary child support that he was paying.

Petitioner failed to produce the documents at deposition and, accordingly, Respondent filed a Motion to Compel (R 1701-173). The trial court ordered the production to be made within fourteen days (R 176- 177) and, furthermore, ordered Petitioner to furnish within the same period of time a penny-for-penny accounting of all expenditures she had made with the temporary child support paid. The latter Order was entered November 14, 1994 (R 179-1 80).

When no discovery was forthcoming after the expiration of the fourteen days, Respondent moved for sanctions (R 180-182).

A non-jury trial was held on December 1, 1994 (R 188- 190), and Petitioner offered into evidence an Amended Child Support Guideline Worksheet claiming by the statutory amendment an entitlement to child support of $10,011 per month' (Petitioner's Exhibit 2, R 203, and Respondent's Amended Financial Affidavit).

Respondent introduced into evidence five exhibits:

The first was the most recent Financial Affidavit of Petitioner (Respondent's Exhibit 1, R 204-207).

The second was a Financial Affidavit initially filed by Petitioner in September 1993 (Respondent's Exhibit 2, R 209-212).

Exhibit 3 consisted of certain statements as to a banking account of Petitioner at Navy Orlando Federal Credit Union and reflecting substantial monthly deposits made by her to it during 1994 (R 213-222).

Exhibit 4 was the same summary of previous payments made by Respondent to Petitioner prior to the first temporary hearing and since the birth of the child (R 223).

The last exhibit was the accounting which the court required of Petitioner establishing how she had spent the $5,000 in temporary child support that she had been receiving since February 1, 1994 (R 224-23 1).

At the conclusion of the non-jury trial, Judge Miller took the case under

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'Petitioner testified at trial that she had saved $12,000 from the child support she received under the temporary support Order during the past ten months (TR 24-25, 40-41, Exhibit 1, R 204-207, page 4). The Final Judgment ordered her to transfer the savings account to Margaret M. Quarantello as guardian of the property (paragraph 9 of the Final Judgment, R 250). Instead, Petitioner used the money for other purposes (Appellee's Appendix 6 and 7).

advisement and ordered counsel for each side to submit proposed Final Judgments.

On December 3 1, 1994, the trial court entered a detailed twenty-page Final Judgment of Paternity (R 232-25 1). In it, he devoted numerous fact finding paragraphs as to why he chose to depart and vary from the amended child support guidelines.

Judge Miller also specifically found that imposition of the unlimited guideline payment schedule, as contained in the amendment to F.S. 61.30(6), may be unconstitutional on its face, or at least as applied to the facts of this action, and, accordingly, decided to disregard it (R 237-239).

Furthermore, the trial court concurred with the probate judge who, in a separately filed action had established a guardianship for the minor child with the designation of a professional guardian of the property, rather than Petitioner, and prompted by a finding that the same was necessary for the use and benefit of [redacted] and as to the child support to be paid by Respondent (R 232-234).

By the Final Judgment, Respondent was ordered to pay directly to Petitioner the sum of $2,000 per month commencing January 1, 1995 (R 247-248). Additionally, he was ordered to pay to Margaret M. Quarantello, the Guardian of the property, the sum of $3,000 per month to be held for the future use and benefit of [redacted] (R 247-251).

Incident to such child support awards, Respondent was also ordered to maintain health insurance, pay all unreimbursed medical, dental, drug, prescription, optical, orthodontic expenses, and associated expenses or insurance deductibles and carry term insurance as security for child support and in declining amounts (R 247-250).

Petitioner's claim for retroactive child support to the date of birth was denied, and

specific reasons for failing to grant such relief are supported in the record (paragraph 40, R 246, and paragraph 8, R 250).

Dissatisfied with not having received the full amount of child support claimed, Petitioner filed a Notice of Appeal on January 26, 1995 (R 252-273). Respondent then filed a Notice of Cross-Appeal as to the court's requirement that he pay $3,000 per month to the Guardian of the property of the minor child to be used as a savings account and reinvested for her future welfare and well-being (R 273-293).

In a 6-to-3 decision of the Fifth District on February 7,1997, Finley v. Scott, 687 So. 2d 338 (Fla. 5th DCA 1997), the Fifth District affirmed the award of $2,000 per month as direct child support to be paid to the Petitioner by the Respondent. As to the $3,000 to be paid by Respondent to the Guardian, the District Court reversed. In doing so, it specifically found that the $3,000 per month "good fortune" award had no support in the record since it bore no reasonable relationship whatsoever to safeguarding the present or foreseeable future lifestyle of the minor child and that as to future increases in child support when needed, F. S. 6 1.14 was a viable remedy.

STATEMENT OF THE FACTS

Petitioner is twenty-nine years of age and has attended three years of college (TR 60-6 1).

While still in high school, she gave birth to a daughter, [redacted] (TR 63-64), The child presently lives off and on with Petitioner's mother or her aunt, but Petitioner does not regularly contribute to her support (TR 63-65).

Six years later, Petitioner gave birth to a second daughter, [redacted] who is now six and one-half, presently lives with Petitioner, and she receives $160 per month support from her father, [redacted] (TR 66-67).

Petitioner met Respondent at a nightclub sometime in 1991; thereafter, they saw one another on an interim basis and established a regular sexual relationship. After a year and one-half of such intimacy, Petitioner became pregnant with [redacted] (TR 67-68 and 187-188). At no time did Petitioner and Respondent reside together or establish any standard of living together.

After the child's birth, Respondent contributed substantially toward the support of both Petitioner and the minor child (TR 69-72 and Respondent's Exhibit 4, R 223).

At the time she commenced this action, Petitioner was employed as a receptionist at her attorney's office, working approximately twenty to twenty-five hours per week (TR 3 1 and 67-68).

In December 1993, Petitioner began to make plans to attend college as a regular day-time student and obtain a degree. Thus, she became unemployed. Later, she changed her mind but, nevertheless, failed to resume employment, either on a full- or part-time basis (TR 74-

79).

Shortly before trial, by an Amended Financial Affidavit, Petitioner sought to represent that she now was employed as a sales person at Jacobson's in Longwood Village and also as a nail technician in Orlando, However, on cross-examination, she admitted that she was not in fact working as a nail technician and then reluctantly acknowledged that she had been paid only the total sum of $261.36 by Jacobson's

In the Final Judgment, the trial court found that the only other source of earned income received by Petitioner since the entry of the temporary child support Order was an additional sum of $177.22 paid to her by AccuStaff, as a temporary clerical employee (Respondent's Exhibit 1, R 204-207, TR 97-99, paragraph 13, R 236, and paragraph 20, R 238).

While Petitioner could not explain the inaccuracy in her representation of $909 per month as present employment net income, she did admit to pre-September 1993 net earnings as a nail technician of between $350 to $500 per week. In the Final Judgment, the trial court made a finding of fact to this effect (TR 62-67, 99-101, and paragraph 36, R 244).

A complete reading of Petitioner's testimony clearly demonstrates that her answers were at best confusing, evasive, and very incomplete. For example, when faced with a fair question as to the origin of substantial deposits but in irregular amounts made by her to the one banking account that she maintained during 1994, and how these monies could be reconciled with the only earned income that she reported for that year-$177 and $261 respectively-she claimed that she was in fact "self-employed" (TR 102).

Moreover, adding to the cloudiness of such financial circumstances, Petitioner at one point admitted that during some months of 1994, the child support check was not even

deposited into the banking account or, if deposited, was less than the face amount of $5,000 (TR 105-109, 113 and 117).

Also, when quizzed as to such large deposits admittedly unrelated to either earned income or child support, Petitioner was at a loss to explain the source of the same, except to allude to the fact that such monies may have been "gifts" (TR 103-106 and 107-108), or "doing different other things . . . for different people" (TR 113-117). Petitioner's reasoning is indeed difficult to follow, especially in tracing reported income as against unreported income or in squaring the deposits which are related or unrelated to child support.

In accordance with a court order requiring an accounting for temporary child support received, Petitioner could not reconcile the receipt of child support with the substantial credit card debts she had been paying, as well as her large automobile and insurance expenses (Respondent's Exhibit 5, R 224-23 1, and TR 118-136). Moreover, Petitioner readily conceded that she had no receipts or other documents for purported child support expenditures listed on her affidavit (TR 129, 135-137, 145, and 147-149).

Adding to the frustration, Petitioner, although the subject of a trial Notice to Produce, Rule 1.410(b), Fla.R.Civ.P., failed to bring her 1991, 1992, and 1993 federal income tax returns, or any bills of sale, contracts, receipts, memoranda, or other writings reflecting purchases for the minor child from September 1, 1993, to date, or credit card statements or credit card receipts for child support purchases (TR 137-139, 149-149).

Although claiming that it cost $5,173.25 per month for support as to her [redacted]

[redacted]nd the minor child,[2] Petitioner neglected to include a weekly expense of $200 which she says is applicable to a nanny who works Monday through Friday and cleans, washes dishes, keeps house, and does laundry, as well as looks after [redacted] (TR 101 and 142-143). It is interesting to note that Petitioner, who neither goes to school, nor works full-time, could not explain why she has any need for a "nanny" or "housekeeper" in the first place!

Respondent is a professional athlete. He is negotiating for a new contract with the Orlando Magic and, if the same is not forthcoming, then he may be traded or picked up as a free agent (TR 185-186).

He has a son, [redacted] who resides with his mother in [redacted] Respondent pays support of $1,800 per month plus private schooling of $4,000 per year (TR 175 and 176 and R 203, Respondent's Financial Affidavit and Interrogatories of December 14, 1993, and Amended Financial Affidavit of November 10, 1994, as sealed).

While [redacted] travels with his father, and he takes him shopping, he does not regularly send him spending money (TR 176-180).

Respondent, in discussing his relationship with Petitioner, testified that he specifically told her that he already had a son out of wedlock which was occasioned by an accident in high school with his sweetheart, and that since she had two children from two different fathers, it would not be in their respective best interests for her to get pregnant. He emphasized that Petitioner represented to him that she was using birth control, and he was never unaware that she had discontinued it (TR 189-181).

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[2] At trial, Appellant testified that the day-to-day living expenses for [redacted] totaled approximately $2,500 per month, thus allowing her to save an additional $2,500 per month for the minor child (TR 91-95).

Since the birth of [redacted] Respondent noted that there was a marked difference in the standard of living experienced by Petitioner. He especially observed the same when he saw her at social gatherings and noted her new clothes, Ford Explorer truck, and cellular telephone (TR 188-189 and 192-193).

In making its awards, the trial court specifically commented upon Petitioner's lack of candor and believability and made certain specific determinations with reference to the same. Furthermore, a specific finding of fact was made that Petitioner used child support money for her own personal benefit. Moreover, said the court, she had not either fully, completely, nor truthfully verified the expenditures made from some $50,000 in temporary child support that she had received from Respondent (paragraphs 11 through 22 and 29 through 36, R 235-239 and 241-244).

SUMMARY OF ARGUMENT

The Final Judgment is replete with well-reasoned explanations as to why the trial court chose to depart from applying the percentage application of combined parental income in excess of $10,000 per month and which would have been computed to be over $10,000 per month for the support of a twenty-two month old child.

In entering these findings of fact, the trial court accurately cited the trial evidence and the reasonable inferences arising from it.

Point One should be affirmed, and the District Court opinion approved.

Under Point Two, the requirement that Respondent pay to the guardian of the property $3,000 per month to be placed in a guardianship savings account has no support in the record.

There is no reason stated in the Final Judgment, nor made on the record, as to why such a savings account is necessary, and the evidence in its entirety supports the view that there is no residential, health, religious, recreational, or educational exigency of the minor child which is not otherwise being paid from the direct monthly support of Respondent to Petitioner or from Petitioner's own sources of income and in accordance with her reciprocal parental responsibility.

Furthermore, since a married parent cannot be legally required to save $3,000 per month for a minor child, or any other amount, Respondent suggests that it is a constitutional violation to require an unmarried parent to do so.

The aftirmance of this judicially imposed obligation cannot be squared with established *stare decisis* prohibiting an adult child from seeking post-majority support from a parent or having a judicial award made which would circumvent this principle of law or act as

a substitute for it.

Lastly, the long-term consequence of establishing such a savings plan is to permit the minor child to become an indirect business partner of her father and be entitled to an "economic windfall" upon majority. Also, it is well to consider that the distribution and receipt of such monies will unconstitutionally discriminate against other eighteen year old adults who are not fortunate enough to be recipients of such a judicial award.

Even if this Court were to fashion a rationale for creating a guardianship trust or savings account device for future "good fortune child support awards," this Court should, nevertheless, affirm the decision of the District Court as to this point of law and approve its decision based upon the record evidence in this appeal,

Point Three, relative to the trial court's failure to award retroactive child support to Petitioner to the date of the filing of her Complaint, should likewise be affirmed because the record supports a finding that in the twenty-two month life of this child, Respondent has paid for her support almost $70,000.

ARGUMENT

POINT ONE

THE DISTRICT COURT DID NOT ERR IN AFFIRMING THE FAILURE OF THE TRIAL COURT TO AWARD TO PETITIONER THE FULL AMOUNT OF MONTHLY CHILD SUPPORT DETERMINED AND COMPUTED BY AN APPLICATION OF THE FLORIDA CHILD SUPPORT GUIDELINE SCHEDULE.

Petitioner contends under this Point that when this action was tried in December 1994, the trial court had no discretion other than to award to her the full amount established by an application of the amended Florida Child Support Guidelines, F.S. 61.30(6), to the combined monthly parental income of the parents and which totaled in excess of $10,000 per month for a twenty-two month old minor child. She maintained this position in the District Court and continues to do so.

The child support guidelines were enacted by the legislature effective July 1, 1987. Two years later, a legislative amendment provided that a trial judge may depart from the guidelines and enter either an initial or modified child support order in differing amounts, provided that written fmdings of fact supporting the same were made or specific reasons entered on the record. Effective October 1, 1993, no written findings or specific reasons need be given if the trial court chose only to vary by 5%, either way, as to the amount determined by a computation of the child support guideline payment schedule.

Child support guidelines need not be applied automatically, and a trial court is always free to adjust the amount established by them if good and valid reasons exist, Hillman v. Hillman, 567 So. 2d 1066 (Fla. 2d DCA 1990), Huff v. Huff, 556 So. 2d 537 (Fla. 4th DCA 1990), Todesco v. Todesco, 583 So. 2d 774 (Fla. 4th DCA 1991), Touchstone v. Touchstone, 579

So. 2d 826 (Fla. 1st DCA 1991), Short v. Short, 577 So. 2d 723 (Fla. 2d DCA 1991), and Reynolds v. Reynolds, 668 So. 2d 245 (Fla. 1 st DCA 1996).

If the Petitioner is correct that there are no limits as to how much a parent should legally be obligated to spend on a child, then how can she explain the second sentence of F.S. 61.30(1)(a) which states:

> . . . The trier of fact may order payment of child support which varies, plus or minus 5%, from the guideline amount after considering all relevant factors, including the needs of the child or children, age, station, standard of living, and financial status and ability of each parent.

Why are these factors then necessary? Should not the trial court entertain evidence from both parents upon a challenge to the scheduled guideline amount as to these statutory factors and make a decision after weighing them? Are not these factors always subsumed into any reasonable child support award in high income cases using the guidelines only as a reference point in making mathematical additions to or subtractions from the scheduled payment? Should this not be a rule of law as to percentage plus cases like this one?

Another interesting question to be asked at this point is that if a trial court can require a custodial parent to report to the court regarding the disposition of child support payments, F.S. 61.13(1)(a), doesn't the court have the same discretion to explore the itemized expenses proposed by that parent for the minor child and in keeping with what that parent represents to the court to be a comfortable and appropriate standard of living for him or her?[3]

[3] The parent with whom the minor child resides is the one who makes the day-to-day decisions with reference to the present and future lifestyle of the minor child in his or her care. Further, he or she has personal and intimate knowledge of the plans and goals for the minor child and, accordingly, is the one best equipped to offer evidence as to an appropriate and comfortable standard of living for the minor child. Requiring the custodial parent to shoulder this burden of proof is not an onerous task and one which the courts traditionally required a custodial parent to bear even before the enactment of the child support guidelines. It would appear that where the parties had never resided together and, thus, establish a standard of living, the positioning of the burden of proof in this manner is the only logical choice.

Doesn't the trial court have the ultimate responsibility to either accept or reject the proposed budget submitted by the requesting parent?

Judge Miller carefully evaluated the $10,000 per month child support claim requested by Petitioner. In so doing, he likewise considered the counter-arguments of Respondent, including the unconstitutionality of the child support guidelines in general and its application to the facts of this action in particular. He then decided to depart from the guideline amounts, F.S. 61.30(1)(a), and, in doing so, devoted twenty-seven paragraphs in the Final Judgment detailing his reasons (paragraphs 11 through 37, R 235-245).

If anyone has even a scintilla of doubt as to the trial court's election to award less than the monthly child support as provided for in the guidelines, one only has to review the record and look at the factual patterns which developed during the ten-month period that Petitioner acted as trustee for the payment of $50,000 of temporary child support received by her.

Despite the foregoing, Petitioner suggests that the case of Department of Health and Rehabilitative Services v. Schwass, 622 So. 2d 578 (Fla. 5th DCA 1983), establishes a "per se" rule of law in this state requiring a trial court to strictly abide by the mathematical determinations resulting from an application of the child support guidelines, and that a failure to do so is, *ipso facto*, an abuse of judicial discretion.

Respondent submits that this decision does not stand for this proposition of law at all but merely reaffirms the discretion of the trial judge to deviate from the guideline amounts, if fair and equitable reasons exist for doing so, and these are clearly stated in the record or court order being appealed.

Equally misplaced is Petitioner's reliance upon Miller v. Schou, 616 So. 2d 436

(Fla. 1993) (A-3). Although this decision concludes that a child is entitled to share in the good fortune of his parents, it does not hold that, in making such awards, the trial court must approve either unnecessary or extravagant monthly expenditures or those inuring to the private financial aggrandizement of the custodial parent. Rather, child support awards should be the result of an analysis of the bona fide or actual needs of the child and with a comparable view toward an appropriate and comfortable lifestyle for him or her.

Lastly, it should be noted that all three of the dissenting judges of the Fifth District rejected Petitioner's argument as to this point of law. Each of them found that the trial judge was not bound to blindly apply the guideline schedule amount sought by her and which may, thus, lead to an unintended and unreasonable result, Finley, supra (at 345, 348, and 350).

Alternatively, under this point of law, Petitioner urges that the *en banc* opinion of the Fifth District also improperly rejected an award of full guideline child support to her because it was influenced by her lifestyle and economic circumstances. In reality, what the Petitioner is saying is that an award of $10,011 per month would have been reasonable if it were based upon the hypothesis that the standard of living applicable to the minor child in this action[4] was that of the non-residential parent, Dennis Scott, rather than the custodial parent, Geri Finley, In reaching this conclusion, the Petitioner, however, completely overlooks the element of need implicit in any child support award. She would now, however, urge this Court to review future awards only by comparing the post-judgment financial circumstances of each of the parents. This result, according to the Petitioner, is justified because the receiving parent is in the role of the

[4]This is the position of Judge Sharp in her dissent, Finley, supra, at 345 and 346. Respondent submits that it requires a judge to decide cases not on the facts at hand but rather on merely speculation and guesswork.

residential custodian of the minor child, as well as the fact that the obligor can well afford it, and the child support guidelines say so!

In Jane Doe VI v. Richard Rowe VI, 736 P. 2d 448 (Hawaii Ct, App. 1987), it was held that an award of child support should not be determined on the basis of the non-custodial parent's standard of living. It is to be made for the child's current needs based upon an appropriate standard of living. It is not for the purpose of saving portions of it for future use. Also, the court warned that trial judges must be cognizant of the fact that "to raise [the mother's] standard of living through the vehicle of child support would constitute the imposition of an unauthorized obligation on the part of the father toward the mother," citing with approval, Kathy G.J. v. Arnold D., 501 N.Y.S. 2d 58 (1986), cert. den., 107 S. Ct. 927 (1987).

Additionally, it should be remembered that child support payments are not to be windfalls, but rather are designed to provide adequate support for the upbringing of a child, Marriage of Bush, 547 N.E. 2d 590 (Ill. App. 3d 1989), and Marriage of Patterson, 920 P. 2d 450 (Kan. Ct. App. 1996).

Another side of Petitioner's argument has to do with what she perceives to be an apparent erosion of the presumption of correctness as to scheduled guideline child support awards. She contends, as did Judge Griffin in her dissent,[5] that such presumptive awards may now be easily overcome by the obligor challenging them by proof that the child actually "needs less." Respondent submits that the majority view is not quite that simplistic, nor are Florida trial judges quite that naive!

Respondent reads the majority opinion as saying that the residential custodial

[5] Finley, supra, at 350 and 351.

parent must, once guideline support is challenged by the obligor, be prepared to establish by credible evidence that the present and proposed standard of living for the minor child, as well as existing and reasonably foreseeable needs compatible with an appropriate and comfortable lifestyle for him or her are possible only by the trial judge approving the scheduled payments without any sort of deviation downward,

By this analysis, the trial court is then placed in a position to immediately evaluate the statutory factors enumerated in F.S. 61.30(1)(a) and accurately assess them in an initial or modified award. These would include within the formula the provable components of: present living and special financial needs, reasonably foreseeable financial needs, the present and proposed standard of living of the child, and lastly, and most important of all, a practical and common sense approach to supplying the minor child with an appropriate and comfortable lifestyle in keeping with the combined financial resources of the parents.

Respondent submits that trial judges live in the real world! They will clearly understand a judicial directive from this Court mandating that they exercise their judicial discretion as suggested under this point of law.

POINT TWO

THE DISTRICT COURT CORRECTLY FOUND THAT THE TRIAL COURT ERRED BY ORDERING THAT RESPONDENT PAY THE SUM OF $3,000 PER MONTH AS CHILD SUPPORT TO THE GUARDIAN OF THE PROPERTY AND TO BE PLACED IN A GUARDIANSHIP SAVINGS ACCOUNT AND ALSO THAT NO SAVINGS, TRUST, OR GUARDIANSHIP ACCOUNT IS NECESSARY WHEN PAYMENTS TO THEM BY THE RESPONDENT WOULD BE IN EXCESS OF THE REASONABLE AND BONA FIDE NEEDS OF THE MINOR CHILD AT AN ESTABLISHED STANDARD OF LIVING AND AS INITIALLY DETERMINED BY THE TRIAL COURT IN ITS FINDINGS OF FACT.

Petitioner agrees with Respondent that the trial court erred in establishing a guardianship savings account.[6] The disagreement, of course, pertains to the level of child support to be paid by Respondent for the minor child,

Implicit in the extensive findings of fact made by the trial judge is the conclusion that the sum of $2,000 is a reasonable monthly parental contribution to be made by Respondent for the support of his daughter and in addition to his obligation to pay health insurance, all medical, dental, drug and prescription expenses, and carry life insurance as security. It is also assumed that the trial court's reasoning extended to the net take-home earnings of Petitioner as an experienced nail technician and her reciprocal duty to contribute to the support of the minor child from this source of income.

Respondent submits that the $3,000 per month award, or even any other lower

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[6] It should be noted that the majority opinion does not specifically reject the use of a guardianship trust or savings account in cases where good cause has been shown such as the custodial parent's squandering the child support money or not properly accounting for its use, Finley, at 344. This acknowledgment, Respondent suggests, is one of the reasons that Finley does not either expressly or directly conflict with Boyt. The Fifth District declined the use of this mechanism, while the Second District approved it. The difference is not with the rationale, but when the remedy is to be employed.

separate award, would have no support in the record since the trial evidence did not reflect a present, special, individual, or financial need for the minor child which was not otherwise subsumed in the $2,000 direct monthly support being paid to Petitioner or, alternatively, which cannot be defrayed by her from her own sources of income.

Finally, the Final Judgment proposes no ascertainable standard nor enumerates any factors to be used in evaluating when and how the $36,000 per year contribution, or any other lower amounts, would be used for the future benefit of the minor child.

It is important to note that the direct child support award made to Petitioner constituted almost 100% of all living needs for her and members of her household as reflected by her initial Financial Affidavit and was within $500 of the monthly figure she testified at trial she was presently spending for the minor child (R 5 and TR 91-95).[7]

The $2,000 per month award to Petitioner is consistent with other Florida cases holding that the support and lifestyle needs of a minor child of high income parents can adequately and properly be addressed with levels less than the presumptive amounts set forth in the child support guidelines. Irvin v. Seals, 676 So. 2d 436, 437 (Fla. 2d DCA 1996) (J. Parker concurring specially) (needs of child of professional football player were "more than adequately met" by monthly child support of $2,000); (A-5); Boyt, 664 So. 2d at 998 ($1,500 per month for a three-year old child takes into consideration the "extras" needed by a child of affluent parents); Mason v. Reiter, 564 So. 2d 142, 144 (Fla. 3d DCA 1990) ($2,000 in monthly child support reasonable for twenty-nine month old child of famous entertainer),

[7]Respondent acknowledges that many of the needs of the unmarried mother and others residing with her are includable in the $2,000 per month direct payment ordered by the lower court. These expenses are reasonably related to the minor child's support and are, therefore, unobjectionable.

No child born in wedlock is entitled to the benefit of a savings account from his or her parent. Why then, Respondent asks, should the law permit such a result for a child born out of wedlock and by virtue of a Final Judgment of Paternity? Does not the equal protection clause of the United States Constitution and the Florida Constitution protect a parent in such an instance?

In its Final Judgment, the trial court noted that it deviated from the unlimited percentage application of the child support guideline schedule because, failure to do so, would unconstitutionally deprive a parent of his right to income or property or make the minor child or other parent a business partner of the payor-obligor parent (paragraphs 24 and 25, R 238-239). Given that premise, did not the trial court, by creating the $3,000 per month guardianship savings account, actually perpetrate the very constitutional error that it first sought to prevent? Would not it do so even if the amounts were lowered? Is this to be a precedent for future cases when the direct child support award includes and relates to all present and reasonably foreseeable support needs or expenses?

While Carnes v. Revels, 534 So. 2d 900 (Fla. 5th DCA 1988), may be distinguishable factually because Respondent actually has the financial ability to fund the savings account, is such a judicially imposed obligation really any different than being legally required to save for a child's future college education or to pay for college expenses after the attainment of majority? Grapin v. Grapin, 450 So. 2d 853 (Fla. 1984), Kern v. Kern, 360 So. 2d 482 (Fla. 4th DCA 1978), Napier v. Napier, 422 So. 2d 1070 (Fla. 2d DCA 1982), and McAtee v. McAtee, 585 So. 2d 424 (Fla. 1st DCA 1991). Again, isn't this analogous to an unmarried or divorced parent being required to pay $3,000 per month, or any other sum, for that matter, for a future

savings for a child, when a married parent would have no such legal duty? Owens v. Owens, 415 So. 2d 855 (Fla. 5th DCA 1982) (Judge Cowart dissenting at 857-858).

Judge Goshorn, in his dissent, would, however, approve of the trust concept and the contribution of monthly amounts into such a fund for the future care and maintenance of a minor child.[8] He brushed away any counter-argument made by Respondent that this remedy renders impotent the existing child support modification statutes, F.S. 61.13(1)(a), F.S. 61.30(1)(a), and F.S. 61.14, and he further ignored the suggestion that such monthly contributions are unjustified because they require an obligor to support a minor child after majority. He cites as supporting authority Bovt v. Romanow, 664 So. 2d 995 (Fla. 2d DCA 1995), which relied upon Nash v. Mulle, 846 S.W. 2d 803 (Tenn. 1993) (A 8).

In approving the award of a trust fund established during a child's minority and to be spent after majority for a college education, the Tennessee Supreme Court noted that its child support guideline statute expressly sanctioned the use of a "educational or other trust funds" in actions where the net income of the obligor exceeds $6,250 per month (at 807). Given these facts then, it is not difficult to understand why the Tennessee Court concluded that this trust was not a impermissible award of post-majority support.

On the other hand, the law of this state is not the same as the law of Tennessee. Accordingly, the Second District, in Boyt, incorrectly cited Florida law when it suggested the precedential value of Nash as establishing that the creation of a trust or guardianship account to be used in the future may not be, in sum and substance, an award of post-majority support. Nothing could be further from the truth!

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[8] Finley, supra, at 346-350.

Looked at another way, if it is legally impermissible to create an "insurance estate" for a minor child upon the death of the obligor-parent, Riley v. Riley, 13 1 So. 2d 490 (Fla. 1st DCA 1961), Higgins v. Higgins, 348 So. 2d 48 (Fla. 1st DCA 1977), Pvle v. Pyle, 375 So. 2d 1088 (Fla. 1st DCA 1979), and Trager v. Trager, 541 So. 2d 148 (Fla. 4th DCA 1989), is it not just as illegal to deprive a parent of his labor as translated into monthly earnings by permitting the minor child who, upon the attainment of majority and then being a sui juris adult, from having the entire principal amount and all accumulated interest distributed to him or her? F.S. 744.53 1, and Wells v. Wells, 523 So. 2d 170 (Fla. 1st DCA 1988).

The foregoing, therefore, poses serious public policy questions:

Should this be the law of the state of Florida? Are there no moral limits to what a state can order an obligor parent to spend for the benefit of the child? Is it excessive intervention on the part of the state to go well beyond insuring a child's basic welfare? In determining how far to intervene in a paternity case, should the state observe the same restraint it exercises in dealing with intact families? Should it have a consistent *stare decisis* in insuring that children involved in paternity cases do not receive more in the way of financial relief, i.e., trust funds or savings accounts or awards of post-majority support then do children of dissolution of marriage actions or, for that matter, children of an intact marriage? Since these matters affect all citizens of this state, do they have the right to first be heard before a decision is made? Are these matters for legislative rather than judicial resolution?

Complicating the matter further, once the $3,000, or any other sum is paid monthly or to a guardian of the property, there is no law or statute requiring its return to Respondent, and the only manner in which restitution could be made is by the death of the minor child and

intestate succession, F.S. 732.101 and 732.103,[9] since she is incompetent to make a will before majority, F.S. 732.501.

Similar problems would arise if the court were to require the creation of a trust or savings account with another as trustee.

Clearly, a monthly savings plan in whatever form does not speak to the present support needs of the minor child in this action. Furthermore, there is nothing in the record advancing any specific reason for its existence, much less a standard to guide its future use or how the same may impact upon a future child support modification action.

With all candor, the decision made by Judge Miller as to this area of the Final Judgment is not substantiated by the trial evidence or the reasonable inferences arising from it. As such, it is contrary to the rule of "reasonableness" and, thus, constituted an abuse of factual and legal discretion, Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) (at 1203). The District Court opinion as to this point should thus be approved and adopted by this Court.

[9]Even then, only one-half of the principal and accumulated interest would pass to Respondent. The remaining one-half would pass to Petitioner.

POINT THREE

THE TRIAL COURT DID NOT ERR IN FAILING TO AWARD PETITIONER CHILD SUPPORT RETROACTIVE TO THE TIME OF THE FILING OF HER COMPLAINT TO ESTABLISH PATERNITY.

Petitioner complains that the trial court denied an award of retroactive child support to her, and that the same was affirmed on appeal, based upon the impermissible constitutional premise that the minor child was born out of wedlock, rather than to a traditional married couple. Nothing is further from the truth.

The Final Judgment made a specific finding that between the time of the child's birth and the hearing on temporary child support, Respondent voluntarily paid the sum of $19,670, or an average of $1,967 per month, in support.

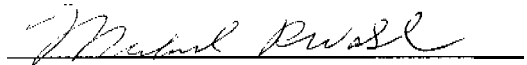
Alternatively, the Final Judgment cites the fact that Respondent also paid up to the date of the non-jury trial an extra $50,000 in temporary child support which could be viewed either as an additional offset or as compensation for the claim of retroactive child support made by Petitioner (paragraph 40, R 246, paragraph 8, R 250 and 223, and TR 117-118).

CONCLUSION

The majority opinion, written by Judge Harris, reflects careful preparation and a close study of the record on appeal. Points One, Two and Three should be affirmed by this Court, and the District Court opinion approved in its entirety.

If this Court, by chance, were to differ with the District Court as to the use of a guardianship savings or trust account for "good fortune child support awards" as to future cases, then, nevertheless, this Court should still affirm denial of a guardianship savings account as to this action.

Respectfully submitted,



MICHAEL R. WALSH, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail, postage prepaid, to HARRY H. MORALL, II, ESQUIRE, 905 West Colonial Drive, Orlando, Florida 32804, and by express mail to JOSEPH R. BOYD, ESQUIRE, 1407 Piedmont Drive East, Tallahassee, Florida 323 12, CHRISS WALKER, ESQUIRE, Post Office Box 8030, Tallahassee, Florida 32301, BARBARA A. ARD, Attorney-at-Law, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607, and to RAYMOND A. ALLEY, JR., ESQUIRE, 805 West Azeele Street, Tampa, Florida 33606, this 28th day of July, 1997.

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