D.A. 10/6/97



**THE SUPREME COURT OF FLORIDA**

CASE NO. 90,071
DCA NO. 95-308

GERI FINLEY,

Appellant/Petitioner,

vs.

DENNIS SCOTT,

Appellee/Respondent.

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# BRIEF OF THE FLORIDA CHAPTER, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS AS AMICUS CURIAE

FLORIDA CHAPTER,
AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
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## SUMMARY OF THE ARGUMENT

Pursuant to F.S. § 61.30(1)(a), the child support guideline schedule in F.S. 61.30(6) presumptively establishes the amount of support the court shall award. From this amount, the court may deviate upward or downward, based on the relevant factors set forth in § 61.30(1)(a) and § 61.30( 1 1), where the court finds that awarding the guideline amount would have an unjust or inappropriate result. The trial court has broad discretion as to these fact finding issues. In determining an award of child support, the court should consider the needs of the child, age, station in life, standard of living, and the financial status and ability of each parent, § 6 1.30(1)(a). The good fortune of the payor should be factored into the support award, The difference between the child's needs and the guideline amount should not "automatically" be awarded as good fortune child support.

The statute does not provide authority for the creation of a good fortune trust. In appropriate circumstances, the court may require an accounting of support under § 6 1.13(1)(a) or may place the money under the control of another, where supported by the facts of the case. The award should be limited to that which relates to the child's needs and the court should not provide for future unspecified needs.

F.S. § 61.13(1)(a) and 61.14 provide the court a remedy for changes in the child's needs or the payor's ability to pay. The proper remedy for future changes in the child's needs is modification. Modification is supported by the statute while a good fortune trust is not.

## ARGUMENT

### POINT ONE

**THE DISTRICT COURT DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DECISION TO DEVIATE DOWNWARD FROM THE CHILD SUPPORT GUIDELINE SCHEDULE AMOUNT AFTER CONSIDERING ALL RELEVANT FACTORS SET FORTH IN THE STATUTE AND FINDING THAT THE GUIDELINE AMOUNT WOULD BE UNJUST AND INAPPROPRIATE UNDER THE FACTS OF THE CASE**

We agree that the "application" of the child support guidelines is mandatory. However, we do not agree that the trial court is required to award the guideline amount in all cases, except where extraordinary needs of the child are demonstrated. As set forth in F.S. § 61.30(1)(a) (1993), the child support guideline amount . . . "presumptively establishes" the amount the trier of fact shall order as child support in an initial proceeding. In other words, the trier of fact begins with a presumptively established amount provided by the guideline schedule in F.S. 61.30(6) (1993). The statute then provides:

> 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 in life, standard of living, and the financial status and ability of each parent. The trier of fact may order payment of child support in an amount which varies more than 5% from such guideline amount only upon a written finding or a specific finding on the record explaining why ordering payment of the guideline amount would be unjust or inappropriate, F.S. 61.30(1)(a). (*Emphasis added).*

Although the guidelines are mandatory, the trial court's discretion has not been removed. It is within the trial court's discretion to hear all of the evidence, weigh the evidence and determine appropriate child support based on all of the relevant factors found in 61.30(1)(a) and 61.30(11), which amount may or may not exceed the base guideline amount.

Appellant submits that the legislature rejected the notion that the courts consider the needs of the child, with the exception of extraordinary needs, set out in F.S.§ 61.30(11). This goes against the plain language of the statute. In fact, § 61.30(1)(a) specifically states that the needs of the child are to be considered by the trier of fact in deciding the amount of child support. If the legislature intended child support to be based solely on the income of the parties, as suggested by the Appellant, it would not have provided the trier of fact with the ability to deviate based on the child's needs, age, station in life, standard of living and the financial status and ability of each parent. Child support guidelines need not be automatically applied, and a trial court should consider both the needs of the child and the overall financial circumstances of the parties. 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. 1 st DCA 1991); Short v. Short, 577 So.2d 723 (Fla. 2d DCA 1991). The factors set forth in § 61.30(11) allow a trial court to further adjust the minimum child support award, or either or both parent's share of the minimum award based upon various considerations. This scope of inquiry encompasses much more than simply extraordinary needs.

In the present case, the trial court considered the monetary needs of the twenty-two month old child, based on the financial affidavits filed by the custodial parent, the age of the child and the financial status and ability of the parents. Most of the trial court's twenty page opinion is devoted to it's rationale for deviating downward from the child support guideline schedule. For example, the trial court found that the custodial parent was not candid with the court regarding her employment, her sources and amounts of income or her spending of past child support payments and that many of her expenditures could not be substantiated by the evidence. The trial court found that

the application of the unlimited guideline schedule in the amount sought to be imposed by the custodial parent in this action may, in fact, be unconstitutional as applied to the facts of this action. The trial court further found that the application of the guideline amount caused the non-custodial parent to support the custodial parent and her other child, for whom he has no legal obligation, and that it created "involuntary servitude" for the payor. Most importantly, the trial court found that the amount of support under the guidelines, had no economic nexus to the bona fide needs of the minor child and that an appropriate lifestyle, consistent with the child's standard of living, could be provided for substantially less money.

It is doubtful the legislature, in creating the child support guideline schedule, intended for a custodial parent in a paternity action to receive approximately $8,000.00 a month more in child support than the child's actual needs. This is the precise reason the legislature enabled the trial court to deviate from guideline support that would be unjust or inappropriate. It is conceivable that a custodial parent could establish the basis for receiving $10,000.00 a month in child support. However, the evidence must support such a finding and in this case, it does not. Accordingly, in Finley v. Scott, 687 So.2d 338 (Fla. 5th DCA 1997), the trial court properly deviated from the guideline amount.

The Appellant argues Boyt v. Romanov, 664 So.2d 995 (Fla. 2d DCA 1995) as support for the position that it is required to apply the guideline amount to determine the appropriate amount of child support.' This was not the holding of the 2nd DCA in Boyt although it may have been implied by dicta. The Appellate Court's holding in Boyt, approved the use of a good fortune trust on a case-

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'In other words, it was required that the guideline amount be used and that because it was the guideline amount, in and of itself, made it the appropriate amount.

by-case basis and deferred to the discretion of the trial court in awarding the guideline amount. Id. At 995. Although the court did not directly address the issue of whether the statutory child support guideline amount was "required," one could reasonably infer that the 2nd DCA would agree to automatically awarding the guideline amount, but place the amount over and above the child's actual needs into a good fortune trust. This concept, as suggested by the Appellant, fails to take into consideration, the relevant factors set forth in F.S. § 61.30(1)(a) or 61.30(11). The 2nd DCA, in Boyt, also appears to recognize the statutory authority to deviate. In a footnote the court stated "We recognize that the strict application of the guidelines to extraordinary incomes can lead to an absurd result."Id. at 998. Likewise, an award of child support equal to a strict application of the guidelines in Finley would lead to an absurd result.

This Court in Miller v. Schou, 616 So.2d 436 (Fla. 1993) recognized that the needs of the child are only one of several factors to be considered in determining an appropriate amount of support, and that the determination of "need" in awarding child support takes into account more than just the basic necessities of survival. Id at 483. The Court explained further that:

> The child of a multimillionaire would be entitled to share in that standard of living; for example to attend private school or to participate in expensive extracurricular activities and would accordingly be entitled to a greater award of child support to provide for these items, even though provision for such items would not be ordered in a different case. Id. at 438.

The Court went further to limit the above explanation and said:

> Of course, we do not mean to imply that the child of a multimillionaire should be awarded enough support to be driven to school each day in a chauffeured limousine. The point of financial disclosure is not to ensure that the child of a wealthy parent will own a Rolls Royce, but rather to ensure that the trial court will have enough information to allow it to make an informed decision as to the extent of the parent's good fortune and the corresponding extent of the child's right to share in the good fortune. The child is only entitled to share in the good fortune of his parent consistent

with an appropriate lifestyle, Id.

We would submit that the child in Finley, if provided $10,000.00 a month could be driven to school every day in a chauffeured limousine and still have plenty for living expenses, half of which could be saved for the Rolls Royce. The Court in Miller appeared to be placing limitations on the child's right to share in the good fortune of the parent, to keep support within the realm of reasonableness.

The trial court in Finley appeared to place these same limitations on it's support award. The court in Finely, found that the guideline amount was above and beyond any conceivable need of the child and applied this Court's opinion in Miller, when it said:

> The Florida Supreme Court has recently stressed that: "a child is only entitled to share in the good fortune of his parent consistent with an appropriate lifestyle," Miller v. Schou, 616 So.2d 436,439 (Fla. 1993). This Court finds that an appropriate lifestyle can be achieved in this action without the application of the unlimited percentage application of F.S. § 61.30.

The child in Finley, is too young to require private school or expensive extracurricular activities. Moreover, she had no extraordinary needs. The trial court has the authority to allow for any foreseeable needs. If the court creates a "good fortune trust" for future expenses, it must presume the custodial parent will fail in his duty to support his child in the future. Or are we assuming that a professional athlete will not have the same financial ability to provide support, once he surpasses the height of his/her athletic career?

Justice McDonald sums it up in his concurring opinion in Miller, and with which we agree, that children have no right to the property of their parent(s). Their right is to be supported. The sharing in a parent's good fortune can only relate to a higher standard of living, which include food, shelter, clothing education, and recreation. Id. at 439. This higher standard of living must still have

a rational relationship to the actual needs of the child.

## POINT TWO

**THE DISTRICT COURT CORRECTLY FOUND THAT THE TRIAL COURT ERRED BY IMPOSING A GOOD FORTUNE TRUST WHERE SUCH A VEHICLE IS NOT PROVIDED FOR IN THE STATUTE.**

A good fortune "guardianship" trust is not necessary and not provided for by the statute. In rare situations, the court may determine it is necessary to safeguard the future support of the minor child. For example, the court may have concerns that a particular payor will not pay in the future[2] or the court may have concerns that the payee parent may use the funds for his or her own needs. F.S. § 61.13(1)(a) states:

> The court initially entering a child support order shall also have continuing jurisdiction to require the obligee to report to the court on terms prescribed by the court regarding the disposition of the child support payments.

Although the statute does not provide for a "trust," the statute appears to allow the court to describe the "terms" upon which the obligee is to report to the court. A trust should be used sparingly, if at all, where it is supported by the facts of the case. A trust should not be used because the child support guideline amount is greater than the child's needs. This rationale is not supported by the statute.

If the Finley court found this case one of the rare exceptions which would warrant a guardianship trust, payment of $3,000.00 a month is excessive and unjustifiable. Under this scenario, the trust balance would exceed $500,000.00, if paid until the child reaches the age of eighteen. What conceivable child related expense is the court anticipating? There is no rational relationship to the good fortune child support in Finley and the needs of the child.

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[2]For example, where the payor parent refused to pay during the pendency of the proceedings although he had the ability to pay.

There is no provision in the law that would allow the $500,000.00 to be returned to the payor if it were not used for the support of the minor child. Assuming the $500,000.00 is not used for support of the minor child, the child will receive the money when she turns eighteen. Is this not equivalent to the child sharing in her parent's estate? This was not the intent of the legislature.

Moreover, if the child's needs change, the statute allows a custodial parent to request a modification of child support under § 6 1.13(1)(a) and 6 1.14, which states:

> The court initially entering an order requiring one or both parents to make child support payments shall have continuing jurisdiction after the entry of the initial order to modify the amount and terms and conditions of the child support payments when the modification is found necessary by the court in the best interest of the child, when the child reaches majority, or when there is a substantial change in the circumstances or the parties.

Some court's have said that the money in the good fortune trust should be used for future unspecified needs of the child. For instance, in Boyt, the court said "such a fund, of course, can relate to a child's special needs during minority." Id. at 999. Either the child has special needs or the child does not. If the child has special needs, that expense should be factored into the current child support and if the payor parent has the ability to pay for these special needs, sufficient support should be paid to the custodial parent, not placed in a trust. If there are no special needs, why save money for needs that do not exist? If and when special needs do exist, the child support should be modified pursuant to § 6 1.13(1)(a) and 6 1.14, if the payor has the financial ability to meet the needs.

The payment of good fortune child support into a trust violates this Court's ruling that a divorced parent should not be legally required to save for his/her child's postmajority college expenses as a married parent is not legally obligated to do so. Grapin v. Grapin, 450 So.2d 853 (Fla. 1984). It is doubtful that the custodial parent will use all or even most of the money in the trust. The

Appellee in Finley already pays for private school for his other minor child and this is only $4,000.00 a year. In Finley, the Appellee is required to set aside $3,000.00 as month, or $36,000.00 a year. Assuming that most of the $3,000.00 a month is not spent, the Appellee is funding a savings account for the child's postmajority. There is very little difference, if any, between funding this trust account and setting aside funds for college.

There is authority within the statute to provide for the child's needs, extraordinary needs, foreseeable needs and the accountability of the custodial parent. There is also statutory authority to consider the standard of living and financial abilities of the parents. Moreover, there is authority to provide for modification of support based on changes in the child's needs and the payor's ability to pay. The remedy is already there. The statute does not provide for a "good fortune trust" and the 5th DCA in Finley was correct in reversing this portion of the trial court's holding.

## CONCLUSION

WHEREFORE, the American Academy of Matrimonial Lawyers, Florida Chapter, as Amicus Curiae, respectfully requests this Honorable Court affirm the holding of the Fifth District Court of Appeal.

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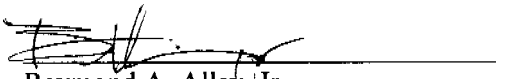

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief has been furnished by United States mail to MICHAEL R. WALSH, ESQUIRE, 326 North Fern Creek Avenue, Orlando, Florida 32803-5498; HARRY H. MORALL, II, ESQUIRE and JANE CAREY, Moral1 & Carey, 905 W. Colonial Drive, Orlando, Florida 32804 this 2nd day of August, 1997.

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