ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 90.07.1

District Court of Appeal, Fifth District
Case No.: 95-308

GERI E. FINLEY
Appellant,
vs.
DENNIS SCOTT,
Appellee

AN APPEAL FROM THE DISTRICT
COURT OF APPEAL, FIFTH DISTRICT

APPELLANTS INITIAL BRIEF

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STATEMENTS OF THE CASE AND FACTS

The Appellant filed a complaint to establish paternity against the then putative father on September 13, 1993 (RI-2). A motion for temporary relief was filed on September 17, 1993 (R14-15), followed by an amended complaint on September 20, 1993 (R16-18). On December 12, 1993, a hearing was held to determine temporary child support and the child support guidelines were presented as evidence by the appellant (R62). On January 24, 1994, the Court entered a temporary order adjudicating paternity based on HLA results, awarding temporary primary responsibility for and residential custody of minor child to the mother, and ordering temporary child support to be paid to the mother in the amount of $5,000.00 per month (R95-98).

A final hearing was held on December 1, 1994 (R189). In the final judgement (R232-251) the court held that 1) The Appellant would receive $5,000 .OO per month as child support, (which is less than the amount imposed by F.S.6130(6)). 2) That 3,000.00 of the amount would be paid to a guardianship established by the father, 3) That the father would be required to provide health insurance for the benefit of the minor child and a decreasing term life insurance policy insuring the life of the father, 4) That the mother application for retroactive child support was denied. The final judgement was appealed to the Fifth District Court of Appeal. An opinion was rendered on February 7, 1997, holding that the child support award be limited to the amount needed to currently support the child in an appropriate standard of living and not to provide a future, unspecified use.

The Fifth District Court of Appeals upheld the trial courts deviation from statutory child support guidelines. It is that opinion which is the subject of the Notice for Discretionary Review which was filed February 26, 1997.

In this Appeal, the Appellant shall be referred to as Mother or the Appellant and the Appellee shall be referred to as the Father. All references to the record shall be proceeded by "R" in parenthesis. All references to transcripts of proceedings shall be proceeded by "T" in parenthesis.

SUMMARY OF ARGUMENT

The Florida Legislature has established guidelines for child support cases in this State. The Supreme Court of Florida and appellate courts have held that these guidelines are mandatory. The Fifth District Court of Appeal erred in affirming the decision of the trial court.

The Courts have also ruled that a parent may be entitled to retroactive child support from the time of the filing of the action, Appellant asserts that her complaint was timely filed and seeks such retroactive payment. Finally, no statute or case law provides for child support payments to be encumbered in separate trust accounts or guardianship. The law has designated those funds to be paid directly to the custodial parent for the benefit of the child.

ARGUMENT I

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN NOT AWARDING THE MONTHLY CHILD SUPPORT AMOUNT AS DETERMINED BY THE STATUTORY GUIDELINES.

A, FEDERAL LAW MANDATES THAT STATES ESTABLISH AND ADHERE TO CHILD SUPPORT GUIDELINES.

In 1984, Congress passed the Child Support Enforcement Amendments(CSEA), mandating that a state must create a mathematical formula for courts to use at their discretion when awarding child support, as a condition to receive Federal Aid to Families with Dependent Children (AFDC). This was in response to the enormous burden that was placed on the general public as custodial parents were forced to rely on AFDC, due to the inadequate child support awards determined by the courts. A study spotlighting the inadequacy of the case-by-case approach revealed that in 1983, noncustodial parents owed $10 billion, of which only $7 billion was actually paid. See, I. Garfinkel and D. Oellerich, Noncustodial fathers' ability to pay child support, Demography 26:219-33 (May 1989). The study goes further to explain that if the two most widely used guidelines were applied in 1983, noncustodial parents would have owed between $25 and $32 billion in child support. Id.

Unfortunately, the CSEA was not as effective as Congress hoped, and in 1988 was amended to require that guidelines be presumptive, allowing deviations only if the court justified its departure in writing. See, Robert G. Williams, An Overview of Child Support Guidelines in the United States, in CHILD SUPPORT GUIDELINES: THE NEXT

GENERATION 1 (Margaret Campbell Haynes ed., 1994). The federal government requires states to establish one set of guidelines for setting and modifying child support awards. Sec. 45 C.F.R. 302.56 (a). The state guidelines must consider all earnings and income of the absent parent; be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and provide for the child(ren)'s health care needs, through health insurance coverage or other means. Sec. 45 C.F. R. 302.56(c). The federal government wanted support orders to be more consistent with economic evidence of child rearing costs, assure equitable and comparable treatment of cases, and be efficiently adjudicated. Robert G. Williams. An Overview of Child Support Guidelines in the United States, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 1 (Margaret Campbell Haynes ed., 1994).

In compliance with the federal requirements, Florida has adopted a set of guidelines that are based on the Income Shares Formula, that is currently used by thirty-three other states. This formula is based on the assumption that children should receive a portion of both of their parents' income, regardless of whether the parent's live together or not. The chart found in sec. 61.30(6) is based on the average consumer spending on behalf of children by a two-parent family of the same level of combined income and the same number of children, excluding expenditures on child care, extraordinary medical costs, or health insurance. The guidelines consider the gross income of both parents to obtain the support obligation, then each parent is assigned their proportional share. Sec. 61.30.

In 1993, section 61.13, Florida Statutes (1993), was amended to clarify that the child support guidelines are mandatory. See, Final Bill Analysis & Economic Impact Statement of the House of Representative Committee on Judiciary to CS/HB 707 (1993). The legislature also amended section 61.30, Florida Statutes (1993), in response to cases where courts held that the child support guidelines were not to be applied automatically. Huff v. Huff, 556 So.2d 537 (Fla 4th DCA 1990); Todesco v. Todesco, 583 So.2d 774 (Fla 4th DCA 1991); Anaya v. Anaya, 591 So.2d 1125 (Fla. 3d DCA 1992); Trudell v. Williams, 593 So.2d 328 (Fla. 2d DCA 1992) ("The child support guidelines, as helpful as they may be to an overburdened court, should not be automatically applied; the court should consider both the needs of the child and the overall financial circumstances of the parties.") By rejecting the aforementioned cases, the legislature rejected the notion that the courts consider the needs of the child, with the exception of extraordinary needs, which are set out in section 61.30 (1 l), Florida Statutes (1993). Section 61.30(1)(a), Florida Statutes, (1993) authorizes the courts to vary no more than five percent, up or down, from the guidelines upon a written finding on the record, explaining why ordering payment of guideline amount would be unjust or inappropriate. However, as courts determine what is just, appropriate, and equitable, they must take into consideration the best interests of the child. 45 C.F.R. Sec. 302.56 (3)(g).

The legislature also amended section 61.30 (1993), Florida Statutes to conform to the federal guidelines' requirement that there be no cap on the application of the guidelines, by increasing the maximum combined monthly income in the schedule to

$100,000 and to add that combined incomes greater than $100,000 shall be obligated to pay the minimum amount of support provided by the schedule plus a percentage multiplied by the amount of income over $100,000. Chapter 93-208, 2 at 1603, Laws of Florida. That the legislature added the percentages to the statute anticipating that some children would and should be entitled to more than a monthly amount as provided by the schedule.

Section 61.30, Florida Statutes, (1993), is clear and unambiguous, therefore courts do not have to interpret much upon its reading. Not only is the statute unambiguous, but the legislature made clear its intent that child support guidelines were mandatory, in their final bill analysis. The Fifth District Court of Appeal did not follow the lead of the Second District Court of Appeal referring to the bill analysis in Boyt v. Romanov, So.2d 9 9 5 (Fla. 2d DCA 1995) (holding that chapter 61.30, Florida Statutes, (1993) is mandatory). In Boyt, the noncustodial father, in a paternity action, argued that if the three year old child with no disabilities actual needs were $1,500 per month, then he should not be required to pay the guideline amount of $2,654.09. Id. The Second DCA agreed with the trial court's conclusion that it was required to apply guidelines to determine the appropriate amount of child support, and rejected the father's argument as being without merit. Id.

The Fifth District Court of Appeal in Department of Health and Rehabilitative Services v. Schwass, 622 So.2d 579 (1993), held that the child support order was to be consistent with the statutory guidelines. In Schwass, the former wife sought reversal of an Order of Support requiring the former husband to only pay $108 per month, when the

statutory guidelines required him to pay $190.62 per month, for one child. Id. The trial court entered a written order explaining that it deviated from guidelines because it disagreed with the deductions from gross income permitted by statute and because of the former husband's attempt to rehabilitate himself from a drug problem. Id. at 580. In that opinion, the Fifth District Court of Appeal ruled that the guidelines were "mandatory and must be followed in order to achieve stability and uniformity in the area of child support." Id. [citing Neal v. Meek, 591 So.2d 1044 (Fla. 1st DCA 1991)]. The court would not allow a deviation from the guidelines for a recovering drug addict father, who was making a noble attempt to change and improve his life, holding "public policy requires that parents who are financially able, support their children. Id.

In the instant case, the noncustodial father would be required to pay $10,011 per month based on the guidelines. The father argued that the guidelines were unconstitutional, and that the mother did not show the need for $10,011. The trial court only awarded the child $5,000 per month, of which $3,000 were to be placed into a guardianship, leaving the child $2,000 per month to live. The trial court's only explanation for its deviation from the guidelines was that $5,000 was more reasonable by his standard. (Emphasis added). The arguments the Fifth District Court of Appeal used in Schwass also apply in the instant case. Nevertheless, in the instant case, the appellate court held that the award of child support should be limited to the amount needed to currently support the child in an appropriate standard of living. Thereby, affirming the trial court's determination that $2,000 was enough to adequately support the child, which is $8,011 less than the

guideline amount, without a written finding, or specific finding in the record, explaining why ordering payment of guidelines amount would be unjust or inappropriate. See, Section 61.30 (l)(a), Florida Statutes, (1993). This section has not been used to justify downward deviations when the noncustodial father feels the child support guideline amount is too high. See. Boyt, supra.

The distinctions between the instant case and Schwass, is that the child in Schwass was legitimate with a father that grossed $1,065 per month; while the child in the instant case was born out of wedlock to a father with a gross income of over $200,000 per month. The Florida Legislature has not violated federal guidelines by creating a different set of guidelinesformillionairesorillegitimatechildren. 45 C.F.R. 302.56 (a). The Fifth District Court of Appeal is violating the federal guidelines and the intent of the Florida Legislature in its application of section 61.30, Florida Statutes, in the instant case, and its application violates the federal and state equal protection laws as well. See, North v. State, 65 So.2d 77 (1953), cert. granted 74 S.Ct. 108, affirmed 74 S.Ct. 376, ("Equality before law and uniformity as to person, place, practice and procedure are essential to proper administration of justice.").

B. THE APPELLATE COURT ERRED IN RULING THAT THE CHILD'S STANDARD OF LIVING MUST BE INFLUENCED BY THE CIRCUMSTANCES OF THE CUSTODIAL PARENT.

Justice Sharp, dissenting in the instant case, pointed out that "the crux of the difficulty is settling on whose standard of living determines the needs of this child." Fortunately, this Honorable Court has already addressed the issue. In Miller v. Schou, 616 So. 2d 436 (Fla. S. Ct. 1993) the noncustodial father, an anesthesiologist, did not want to provide financial information to his ex-wife in order to determine the appropriate amount of child support. This successful anesthesiologist was willing to pay $3,000 per month for the child's needs. Id. at 436. However, this Court stated that the needs of the child was only one factor to be considered. Id. This Court also noted that the amount of support would be drastically different if the father made two hundred thousand dollars a year or ten million dollars a year. Id. This Court recognized that the child of a multimillionaire is entitled to share in that **appropriate** standard of living, and would therefore be entitled to a greater award of child support. Id. Finally, this Court held that the child is only entitled to share in the good fortune of her parent consistent with an **appropriate** lifestyle. Id. Therefore, it is vital that the **court** rule as to what is the **appropriate** lifestyle for the minor child in the instant case, consistent with Miller v. Schoy supra.

In the instant case, the father lives a lavish lifestyle, with an elegant home, a luxury automobile, and expensive clothing and jewelry. (T154-155 & T165-166) This is not a case where the father **earns** millions of dollars, but lives a meager lifestyle. The child would live a much different lifestyle if the father were the custodial parent Throughout the

opinion and the dissents, the mother is being attacked for purchasing an automobile and paying off credit cards with funds from the child support. How can the young child share in the lifestyle of her father if her mother cannot spend child support money on some of the same items the child would enjoy if she was with her father? The mother would not qualify to purchase a home with bad credit. Nor can a child enjoy an automobile, unless her custodial parent drives it.

Although the intended use of child support is to support the minor child, the reality is that everyone in the household will benefit. To ensure that the minor child has a place to live and food to eat while in the custody of the mother, the father ensures that the mother and her other children have a place to live and food to eat. Is the court suggesting that the mother in the instant case treat her children differently because they have different fathers? Should the appellee's daughter eat steaks, while her siblings eat hot dogs? Should electricity only flow through the room of the appellee's daughter? The appellee was aware of the appellant's financial condition, and of her other daughters before his daughterwasconceived. If the appellee did not want the appellant and her two daughters to share in his good fortune, then he should not have conceived a child with appellant; or he could have sought custody of his daughter. The burden of this reality should fall on the appellee, and not his innocent minor child.

Neither the trial court, nor the Fifth District Court of Appeal considered the best interest of the child in the instant case. Both courts are of the opinion that this child,

whose father lives the lifestyle of the rich and famous, has to live at a standard substantially below that of her father, because her mother is unable to live at the same standard. This sentiment would lead to bad public policy in Florida. Florida is home to many millionaires; professional athletes, television and movie stars, recording artists, theme park executives, and other professionals. Florida, like the rest of the country, has many women and children that require state assistance just to live at poverty level. This public policy would suggest to wealthy men to conceive children with poverty-stricken women to keep child support payments low.

ARGUMENT II

CHAPTER 61, FLORIDA STATUTES, DOES NOT GIVE COURTS THE AUTHORITY TO CREATE TRUSTS WITH CHILD SUPPORT MONIES.

The appellant agrees with the Fifth District Court of Appeal reversing the trial court's order to place $3,000 into a guardianship for the minor child. However, the appellant does not follow the reasoning the appellate court used to support their holding. The Fifth District Court rejects the ruling in Boyt v. Romanow, by interpreting Miller v. Schou, 664 So. 2d 995 (Fla. 2d DCA 1995). In Boyt, the trial court determined the father's support obligation, based on the guidelines, to be $2,654.09 per month. 664 So.2d 995 (Fla. 2d DCA 1995). However, the court determined that only $1,500 was "reasonable and necessary to meet the child's needs." Id. Thereby leaving $1,154 as good furtune support. Id. (defining "good fortune" as the difference between the guideline amount and the actual amount the court determines the child needs). The Second District Court of Appeal agreed that the court could establish a trust account for child support with sufficient detail and direction, if the custodial parent did not submit an acceptable plan. Id at 996. The appellant contends that with the Second District Court of Appeal's ruling is not authorized by case law or statute.

The Second District Court of Appeal incorrectly interpreted Section 61.13(1)(a), Florida Statutes, as giving authority to create a trust with child support. Id. Section 61.13(1)(a), Florida Statutes, 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.

This section authorizes the court to order that the custodial parent give an accounting to the court. See, e.g. Department of Health & Rehabilitative Services v. Trovillo, 516 So.2d 1145 (Fla. 5th DCA 1987)(holding that section 61 .13(l)(a) authorizes the trial court to require the custodial parent to make a quarterly accounting to the court as to the expenditure of child support payments). The Second District Court of Appeal uses Nash v. Mule, 846, SW. 2d 803 (Tenn. 1993) a Tennessee case, to illustrate that the creation of a trust can be mandated by the court. Boyt at 996, [*846 S.W.2d 803 (Tenn. 1993)]. However, it fails to mention that the Tennessee child support guidelines has an explicit provision for the use of trusts in cases involving high income parents, where the net income of the obligor exceeds $6,250.00 per month. See, Tenn. Comp. R. 8 Regs. Ch 1240-2-4-.04(2)(a). If Florida courts want to create trusts with child support, then they need to lobby the legislature to amend section 61.13(1)(a), Florida Statutes. The Florida Constitution does not allow the judicial branch of government to make law See, e.g., In Re Advisorv Opinion to Govenor, 276 So.2d 25 (1973); White v. Johnson, 59 So.2d 532 (1952); Brown v. State, 358 So.2d 12 (1978) ("The State Constitution requires a certain precision defined by the Legislature, not legislation articulated by the judiciary.")

The Fifth District Court of Appeal in Cames v. Revels, 534 So.2d 900 (Fla. 5th DCA 1988), held that it was an abuse of the Courts discretion to order a divorced father to deposit $350.00 of child support each month in a trust account until the child reached majority, only to be withdrawn upon order of the Court. It also rejected the idea of creating a trust in the instant case. Due to the opposing opinions on the issue of creating child

support trusts among the Florida appellate courts, there are currently two laws.

Florida courts do not have the "inherent power" to place child support into a trust. The child support guidelines do not recognize "good fortune" support. This is a term created by the Second District Court of Appeal. See, Boyt, 664 So.2d 995. The appellate court assumed that the trial court has the duty to determine the needs of the child. We reject that assumption. Because the child support guidelines are mandatory, there is no need for the court to determine need. Courts only have to determine extraordinary needs, that would allow a deviation from guidelines. See, section 61.30(11), Florida Statutes. The legislature makes no distinction between low support payments and high support payments.

ARGUMENT III

THE APPELLATE COURT ERRED BY NOT AWARDING RETROACTIVE CHILD SUPPORT

Florida case law has recognized the authority of the trial court to award retroactive child support. Coleman v. Mackey, 424 So.2d 170 (Fla. 3d DCA 1983); Neal v. Meek, 591 So.2d 1044 (Fla. 1 st DCA 1991); Mason v. Reiter, 564 So.2d 142 (Fla. 3rd DCA 1990). Retroactive reimbursement of child support is based upon the child's needs and the parent's ability to pay. Richards v. Ryan, 655 So.2d 1184 (Fla. 1 st DCA 1995). The child support guidelines have established the needs of the child in such cases and the record, via the guideline worksheet (R200) provides evidence of the Father's ability to pay.

It is well established that the parent of a legitimate child may obtain support from the time of filing of the action seeking support. Warren v. Warren, 306 So.2d 197 (Fla. 1st DCA1974). It is also now established law that the rights of illegitimate children are to be considered on an equal basis with the rights of legitimate children. DHRS v. West, 378 So.2d 1220 (Fla. 1979). Therefore, if the support for legitimate children may be awarded retroactively to the time of filing, there can be no disparate treatment of illegitimate children under the equal protection of the law.

The appellate courts have different opinions regarding retroactive child support. The Fifth District Court of Appeal has characterized retroactive support as simply reimbursement to a third party. See, Valdes v. Lambert, 568 So.2d 117 (Fla. 5th DCA

1990); Williams v. Johnson 584 So.2d 90 (Fla. 5th DCA 1991) ("[r]etroactive recovery of child support must be based upon the theory of reimbursing (the mother) for the monies that she expended to support the child during this period of time."). However, the First District Court of Appeal refused to adopt the reimbursement theory of the Fifth District. See, Fowhand v. Piper, 611 So.2d 1308 (Fla 1st DCA 1992).

In Fowhand, the father appealed the trial courts order requiring him to pay retroactive child support from the child's date of birth, because actual support was provided by third persons and there was no evidence of the amount of support provided by the mother or of the past needs of the child. Id. The appellate court affirmed the trial court's order requiring father to pay retroactive based upon the minor child's need for support since the date of birth and the father's ability to contribute during that time. The appellate court reasoned that a mother's need to seek assistance form her mother to provide for the sustenance of the child indicates the need for support in the past. Id. at 1312.

In the instant case, the mother had to depend upon her mother to adequately support the child. (T54). The father, a professional basketball player, had the ability to pay support at the time the child was born, which was evidenced by the $19,670 the trial court gave appellee credit for. The monthly child support based upon the guidelines would be $lO,Ol 1. (R200). The appellant seeks retroactive support from the date of the birth of the child consistent with the child support guidelines and the father's demonstrated ability to pay.

CONCLUSION

In light of the foregoing authority, the Appellant respectfully requests this Court to enter reversing the order of the Appellate Court as to the objected matter and ordering a decision in line with statutory and legal authority.

CERTIFICATE OF SERVICE

I HEREBY that a true and correct copy of the foregoing has been furnished by U.S. Mail to MICHAEL WALSH, ESQUIRE, 326 North Fern Creek Avenue, Orlando, Florida 32803 on this 11 day of July, 1997.

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