OA 10-6-97

087

IN THE SUPREME COURT OF FLORIDA

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JUL 16 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

GERI E. FINLEY,

Petitioner/Appellant,

vs.

DENNIS SCOTT,

Respondent/Appellee.

CASE NO. 90,071

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# INITIAL BRIEF OF AMICUS CURIAE STATE OF FLORIDA, DEPARTMENT OF REVENUE

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An Appeal From The District Court Of Appeal, Fifth District

Case No. 95-308


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FLORIDA SUPREME COURT CASES



### FLORIDA DISTRICT COURT OF APPEAL CASES



### FLORIDA STATUTES



### LAWS OF FLORIDA



### OTHER AUTHORITY

## PRELIMINARY STATEMENT

The petitioner, Geri E. Finley, shall be referred to as the mother.

The respondent, Dennis Scott, shall be referred to as the father.

The Department of Revenue shall be referred to as DOR.

The Department files this amicus brief as the State agency statutorily mandated to to run Florida's child support enforcement program. Accordingly, although DOR in general supports the position of the petition, DOR's position is primarily to address the overall public policy aspects of this matter, rather than the individual merits of this case.

## STATEMENT OF THE CASE AND FACTS

DOR adopts the petitioner's statement of the case and facts.

## SUMMARY OF ARGUNENT

Pursuant to Section 61.30, F.S., the Florida Legislature has established a statutory scheme for establishing child support obligations. In the present action, the Fifth District Court of Appeal failed to follow the statutory scheme. Instead, the district court erroneously based its decision on a "needs of the child" test. This test looks only to the "needs" and "standard of living" of a child as established by the primary residential parent in order to determine a child support amount that deviates from the presumptive guideline amount. By doing so, the district court fails to consider the best interests of the child, and instead relegates the child to a lower economic standard of living.

Trial court's should have discretion in determining child support awards as long as such discretion is exercised within the statutory confines of the child support guidelines statute. Furthermore, included in the trial court's discretion should be the "good fortune" doctrine discussed in Miller v. Schou, 616 So.2d 436 (Fla. 1993).

## ARGUMENT

### THE DISTRICT COURT ERRED BY ESTABLISHING A NEEDS AND BTANDARD OF LIVING BASED TEST IN LIEU OF THE APPLICATION OF THE STATUTORY REQUIREMENTS OF SECTION 61.30, P.S.

Section 61.30, F.S. (1995) governs the determination of child support amounts in Florida. This case concerns the application of the appropriate principles of law in determining child support when there is a greater than 5% deviation of the child support guidelines. This issue is even more specifically applicable to those cases in which the deviation is based on the "needs" and "standard of living" of the child as opposed to some other specific statutory provision for a deviation.

The district court speaks in terms of the "appropriate standard of living" if the deviation of the child support amount is based on the child' needs. The problem arises in determining that appropriate standard of living. As the district court stated:

> This points out the problem inherent in custody cases, particularly those involving out of wedlock children, that since the father has no obligation to support the mother the child's standard of living must necessarily be influenced by the circumstances of the custodial parent.

Finley v. Scott, 687 So.2d 338 (Fla. 5th DCA 1997).

In order to analyze the issue it is appropriate to begin with a consideration of the Florida child support guidelines. Section 61.30, F.S. (1995).

### HISTORY OF FLORIDA CHILD SUPPORT GUIDELINES

The Florida child support guidelines have undergone an

evolution since their original enactment. Initially, the application of the guidelines was not mandatory, nor was there any presumption that the guideline amount was conclusive as the amount of child support. Section 61.30(1), F.S. (1988) Neither did the guidelines apply to parents with a combined net income in excess of $50,000.00. Id. However, this changed in subsequent years.

1989: Section 61.30 was amended to provide that the amount set forth under the guidelines presumptively establishes the child support amount. Ch. 89-183, § 5, Laws of Fla. This amendment also spoke to deviations from the guideline amount.

> (l)(a) The child support guideline amount as determined by this section presumptively establishes the amount the trier of fact shall order as child support in an initial proceeding for such support or in a proceeding for modification of an existing order for such support, whether the proceeding arises under this or another chapter. The trier of fact may order payment of child support in an amount different from such guideline amount upon a written finding, or a specific finding on the record, explaining why ordering payment of such guideline amount would be unjust or inappropriate.

Ch. 89-183, § 5, Laws of Fla. The language that the trier of fact "may" use the guidelines to establish child support was also deleted.

1991: Section 61.30 was again amended to increase the coverage of the guidelines from a combined income of $50,000.00 per year to a maximum combined income of $100,800.00. ch. 91-246, § 5, Laws of Fla. The statute stated that the guidelines would not apply to parents with a combined net income in excess of

$100,800.00 per year. Instead, such persons would be subject to a case by case review for determining the child support amount. Section 61.30(1)(b)2., F.S. (1991)

1992: The statute was amended to delete the "cap" limitation of the guidelines based on the maximum combined income of $100,800.00. Ch. 92-138, § 11, Laws of Fla. Therefore, since 1992 there has not been a combined income cap or ceiling with regard to the application of the guidelines.

1993: Section 61.30(1)(a) was amended to provide that "the trier of fact may order payment of child support which varies, plus or minus 5 percent, from the guideline amount." Ch. 93-208, § 2, Laws of Fla. This provided the trial court the discretion to deviate from the guidelines no more or no less than 5% from the presumptive guideline amount without having to make any specific findings for such a deviation. The statute also was amended to provide that any deviation of a child support amount "which varies more than 5 percent" from the guideline amount could be made "only upon a written finding, or a specific finding on the record, explaining why ordering payment of such guideline amount would be unjust or inappropriate." Ch. 93-208, § 2, Laws of Fla. the statute was further amended to provide:

> For combined monthly available income greater than the amount set out in the above schedules, the obligation shall be the minimum amount of support provided by the guidelines plus the following percentages multiplied by the amount of income over $10,000.00
>
> | Child or Children | | | | | |
> |---|---|---|---|---|---|
> | One | Two | Three | Four | Five | Six |
> | 5.0% | 7.5% | 9.%5 | 11.0% | 12.0% | 12.5% |

Ch. 93-208, § 2, **Laws of Fla.**

1994: The 1994 amendment to the statute added the following language (identified below **by capital letters), such that section 61.30(1)(a)** read:

> The child support guideline amount as determined by this section presumptively establishes the amount the trier of fact shall order as child support in **an** initial proceeding for such support or in **a** proceeding for modification of an existing order for such support, whether the proceeding arises under this or another chapter. The trier of fact, 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, may order payment of child support which varies, plus or minus 5 percent, from the guideline amount. The trier of fact may order payment of child support in an amount which varies more than 5 percent from such guideline amount only upon a written finding, or a specific finding on the record, explaining why ordering payment of such guideline amount would be unjust or inappropriate.

**Ch. 94-204, § 2, Laws of Fla.**

1996: The final amendment to the statute pertinent to the issue on appeal occurred in 1996. Ch. 96-305, § 3, Laws of Fla. The amendment moved the location of the language that **was** added in 1994, so that the statute now reads:

> The child support guideline amount as determined by this section presumptively establishes the amount the trier of fact shall order as child support in an initial proceeding for such support or in a proceeding for modification of an existing order for such support, whether the proceeding arises under this or another chapter. The trier of fact may order payment of child support which varies, plus or minus 5 percent, 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 percent from such guideline amount only upon a written finding, or a specific finding on the record, explaining why ordering payment of such guideline amount would be unjust or inappropriate.

Ch. 96-305, § 3, Laws of Fla. DOR contends that this change, although subtle, was significant, The intent of the legislature was to clarify that plus or minus 5% deviations from the guideline amount were not intended to be common occurrences.

Section 61.30(1)(a) was not amended in 1997.

The history of the various amendments clarifies the legislature's intent. The statute evolved from a non-presumptive, non-mandatory provision with an applicability limitation based on combined income cap to one that is clearly presumptive and mandatory in nature. No longer is there a limitation on the income groups to which the statute applies.

APPLICATION OF GUIDELINES

The foregoing history of the statute brings us to this case. "The child support guidelines are not "guidelines" in the true sense." Boyt v. Romanow, 664 So.2d 995, 997 (Fla 2d DCA 1995). Instead, the guidelines are clearly mandatory, and provide a support schedule designed to meet the minimum needs of a child with relation to the parent's combined income level. Id.

The child support amount established by the guidelines is presumptively correct. Neal v. Meek, 591 So.2d 1044 (Fla. 1st DCA 1991). It is the amount the trier of fact shall order as child support. Section 61.30(1)(a), F.s. (1995). The guidelines are

"mandatory and must be followed in order to achieve stability and uniformity in the area of child support." Dept. of Health and Rehabilitative Services v. Schwass, 622 So.2d 578, 579 (Fla. 5th DCA 1993).

In the instant case, it is clear that under the guidelines the father would be required to pay $10,000.00 per month for the support of the parties' minor daughter. This amount is presumptively correct.

However, DOR recognizes that after the presumptive amount of child support is determined, "The trier of fact may order payment of child support which varies, plus or minus 5 percent, from the guideline amount, after considering all relevant facts, including the needs of the child or children, age, station in life, standard of living, and the financial status and ability of each parent." Section 61.30(1)(a), F.S. (1995) Accordingly, the trier of fact does have discretion to deviate from the presumptive guideline amount in certain circumstances, and if there is competent, substantial evidence to justify the deviation.

For the purposes of the holding of the district court below, the question arises as to how the "needs" and "standard of living" of a child are determined. In other words, how is the district court's "needs" and "standard of living" test to be applied. Furthermore, there also exists the application of the "good fortune" doctrine discussed by this Court in Miller v. Schou, 618 So.2d 436 (Fla. 1993).

The **Finley** court recognized that "[t]here is apparent disagreement as to who should choose the family's standard of living -- the judge (or panel of judges) or the parents." **Finley v. Scott**, 687 So.2d 338, 340 (Fla. 5th DCA 1997). On this question, the **Finley** court concluded:

> . ..unless the child is being deprived of necessities, that the proper decision maker in this regard is the custodial parent (or both parents if they can work together) and not the court... We believe that setting the appropriate standard of living for one's family should be left to that family because although the amount of finances available may influence, even limit, the standard of living chosen, many parents use factors other than finances to determine the standard appropriate for their family...

**Id.**, 687 So.2d at page 340.

The **Finley** court further concluded that it is the "actual needs" of the child that govern. "We hold that the award should be limited to the amount needed to currently support the child in the appropriate standard of living..." **Id.**, 687 So.2d 344. In reaching its holding, the **Finley** court also rejected the concept of "good fortune" child support discussed in **Miller** v. S c - , supra.

DOR contends that the **Finley** court's "needs" and "standard of living" test fundamentally limits the presumptive nature of the guidelines and the discretion of the trial court, and ultimately results in a substantially greater deviation then should occur under the guidelines. Furthermore, by its outright rejection of the "good fortune" doctrine, the **Finley** court has disposed of an important means of allowing for the betterment of children beyond

the district court's constraining "needs" and "standard of living" test.

As discussed by Judge Sharp in his dissent, "The crux of the difficulty is settling on whose standard of living determines the "needs" of this child." Finley, supra at page 345. Judge Sharp went on to recognize the problem with establishing a child's "needs" and "standard of living" by looking solely to the standard of living established by the primary residential parent.

> In this case, the mother is raising the child on a much lower standard of living than would be established by the father, if the child were living at his current lifestyle of $266,926.00 gross income per month. He could well afford, for example, a full time nanny, housekeepers, international travel, residence in a mansion with high attendant expenses, and transportation in expensive automobiles - a portion of which could be allocated to this child. These expenses could easily equate to the $5,000.00 per month found appropriate by the trial court.
>
> However, the mother is not able, in this case, to live at that standard of living. She must provide for herself and her other two children. They cannot benefit from the child support paid for this child, although the mother tried to do so, and has been properly reprimanded by the trial court for that effort. At her standard of living, the trial court found that only $2,000.00 was actually being spent on this child. However, if the father's child support obligations are limited to this level, the child will not share in her father's much higher standard of living and lifestyle. Clearly the "needs" of this child should not be solely based on what the mother can afford to spend on her, consistent with the mother's much lower standard of living. That would also be inequitable.

Id., 687 So.2d at page 345.

Not only would it be inequitable, the district court's majority opinion also does not consider the best interests of the minor child. By limiting the inquiry into the needs and standard of living established by a substantially lower income earning parent, the child will not be able to partake in a potentially enhanced lifestyle such as through attendance at private schools, participation in extra-curricular activities, or residing in a better neighborhood. In effect, under the district court's opinion, a lower income child is potentially doomed to continue a standard of living that limits her opportunities in life; even though the payor parent has the clear ability to do better for the child.

Furthermore, if the district court's decision is the law of Florida, substantially disparate child support orders could once again become the norm in Florida. The following example illustrates the disparity that can exist.

Obligor's net monthly income: $8000.00
Obligee's net monthly net income: $700.00 (approximately min. wage)

Obligor's percentage: 92%

Combined net monthly income: $8700.00

Presumed need of one child: $1345.00

Obligor's share of presumed need: $1345.00 x 92% = $1236.00

In the instant action, the father earns 25 to 30 times more than the obligor in the above example, but at $2000.00 per month he only pays approximately .62 times more in child support. Many such scenarios can be demonstrated.

Instead of a presumption that the guideline amount is correct, there appears to be an implicit presumption that when a wealthy obligor is involved the amount of child support presumed by the guidelines is not rationally related to the actual needs and standard of living of the child. The district court cited Dyas v. Dyas, 683 So.2d 971 (Ala. Civ. App. 1995) in its discussion of the application of the guidelines to high incomes. The Dyas decision appears to stand for the proposition that "[w]hen the combined adjusted gross income exceeds the uppermost limits of the child support schedule, the amount of child support award must be rationally related to the reasonable and necessary needs of the child, taking into account the lifestyle to which the child was accustomed and the standard of living the child enjoyed..." Id. 683 So.2d 971. Certainly, this "needs" and "standard of living" rationale cannot be the law in Florida.

Judge Griffin also expressed his concern regarding the apparent dilution of the presumptive nature of the child support guidelines.

> Perhaps most startling about the majority decision is the determination that guidelines are "merely a rebuttable presumption of the child's need." If a guidelines child support amount is subject to reversal as a matter of law, as in this case, because the quantum of evidence offered was deemed sufficient to rebut the presumption that the child "needed" a guidelines amount of support, it necessarily follows that any guidelines child support award in Florida would be open to the same attack on the same quantum of evidence. Whether the income on which the support award is based is $200,000 per month, $20,00 per month or $2,000 per month, the principle is the same. The principle appears to be that if the payor of support using

> such "proof" as was found to be conclusive in this case, can show that the child does not have an "actual day-to-day need" in an amount as great as the guidelines support figure, then, as a matter of law, the lower court must reduce support to the amount of actual "need." The court doesn't even have the discretion, seemingly conferred by section 61.30, to deviate from the guidelines in any amount other than this "actual day-to-day need" amount. This decision could have a dramatic effect on the quantity and nature of child support litigation...

Finley, supra at page 350-351.

As previously stated, the district court also rejected the "good fortune" doctrine discussed by this Court in Schou, supra. In doing so, the district court has limited, if not extinguished, the inherent discretion of the trial court. This Court should reaffirm the "good fortune" doctrine. Although the district court referred to this doctrine as a "support-plus" doctrine, or creating a "slush fund', it actually does neither. Rather it recognizes "[t]hat the support to be paid for a child of divorced parents or unmarried parents should be commensurate with the economic and social circumstances of the parties..." Finley, supra at page 350.

The trial court should have discretion to deviate from the presumptive guideline amount based on extraordinary circumstances, when there exists substantial, competent evidence to support the deviation. The Finley court has moved away dramatically from the statutory scheme in favor of the "needs of the child" test. However, the Florida Legislature has determined public policy by enacting Section 61.30, and the statutory scheme must be followed.

> Although courts do not involve themselves in decisions concerning how much money to allocate for the support of children in intact families, the

> reality of divorce and unwed births has foisted this duty on the courts. Some device has to be used, and the one settled upon by the legislature is a system of guidelines based principally on disposable income. As of 1993, the legislature has determined that child support awards for high income individuals will no longer be handled outside the guidelines, but brought within them, meanwhile vesting the trial court with discretion to deviate for good reason...

Finley, supra at page 350.

Accordingly, the Finley decision should be reversed, and this matter remanded to the trial court to reinstate the $5000.00 child support amount. If there is an issue as to the specific reasons of the trial court for the deviation, then this matter should be remanded to the trial court to articulate those reasons,

## CONCLUSION

Wherefore, DOR respectfully requests this Honorable Court reverse the district court's decision, and remand this matter to reinstate the amount of child support originally ordered.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JANE CAREY, ESQUIRE, 905, West Colonial Drive, Orlando, Florida 32804, MICHAEL WALSH, ESQUIRE, 326 North Fern Creek Avenue, Orlando, Florida 32803-5498, and BARBARA ARD, ESQUIRE, Assistant Attorney General, Office of the Attorney General, 2002 North Lois Avenue, Tampa, Florida 33607, this 15th day of July, 1997.

WILLIAM H. BRANCH, ESQUIRE

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