IN THE SUPREME COURT OF FLORIDA

CHARLENE RICHARDSON,

Appellant,

v. CASE NO.: 94,810

ADRIENNE E. RICHARDSON,

Appellee.
_____/

APPELLANT'S REPLY BRIEF

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ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA AND FROM THE FIRST DISTRICT COURT OF APPEAL

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ARGUMENT

(1) HARMONIZING § 61.13(7) AND THE PRIVACY INTEREST

In between the date of the District Court of Appeal opinion in our case and the hearing of this appeal to the Supreme Court, the District Court of Appeal rendered the opinion of S.G. v. C.S.G., 24 Fla.L.Weekly D258 (Fla. 1st DCA January 21, 1999) (referred to in Appellee's Answer Brief). The holding in that opinion supports the suggestion we made in our Initial Brief. In S.G. v. C.S.G., the trial court had found that for the father to have custody would not be detrimental to the child's welfare. The District Court found, accordingly, that the grandmother could not prevail in a custody dispute, even with the express "best interests" language of the Statute.

However, the District Court specifically found that the Statute, without being wholly stricken on constitutional grounds, could still be properly utilized to award custody to a grandparent where the child had previously resided with that grandparent in a stable relationship and where "harm to the child or parental unfitness has been established" (at bottom of p. D259).

The First District panel specifically recognized the limitations of Beagle[1] and Von Eiff[2], but then found that § 61.13(7), Fla.Stat. (1995), can be interpreted "in harmony with the

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[1]Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996).

[2]Von Eiff v. Azricri, 23 Fla.L.Weekly S583 (Fla. November 12, 1998).

privacy provision". As that opinion suggests, § 61.13(7) can and must be read in conjunction with Re: Guardianship of D.A. McW., 460 So.2d 368 (Fla. 1984). Once the two are read in conjunction, there is no conflict with the Beagle or Von Eiff opinions.

The S.G. v. C.S.G. opinion also addressed the significant differences between visitation under Chapter 752, and grandparent custody under § 61.13(7):

> Furthermore, grandparent custody, especially when such custody has been in effect for some time, is a matter with more far-reaching implications than grandparent visitation, because custody often creates a bond not forged simply by visitation.

D.A. McW. was a significant landmark opinion on the standards to be utilized in evaluating competing custody claims of a grandparent and a parent. Some of the facts are remarkably similar to the instant case. Comparing the similar and contrasting the dissimilar facts (from D.A. McW. and the instant cause) is an instructive exercise.

In D.A. McW., the District Court (and Supreme Court) reversed a grandparent custody award. There, the child had resided with the grandparent since birth (as in our case), and the trial court relied heavily on that fact. However, in stark contrast to our facts, the father (Mr. McWhite) had absolutely no showing of unfitness and no danger of harm to the child, and thus, the District Court and the Supreme Court found that he (McWhite) should have custody.

In our case, the trial court made multiple specific findings directly related to the mother's unfitness. Among them were: that

the mother's medical and mental health history and condition coupled with significant stress and/or alcohol endangers the child (p. 45 of Order on Petitions to Modify found at Tab 2 of the Appendix of Appellant's Initial Brief on the Merits), that the mother had been involved in violent, uncontrollable outbursts possibly related to alcohol abuse (p. 45), that the child had been continually exposed to destructive relationships and dangerous circumstances (p. 45) and that the facts presented to the court had created "an unacceptably high risk of endangerment to the child". (Other harm/unfitness findings will be discussed later).

The trial court never used the phrase "unfit" because, under the Statute and existing case law, there was no requirement that he do so.

(2) HARM TO THE CHILD

The Appellee mother argues that she has "never harmed her child". To the extent that there was no evidence the mother beat her child or sexually abused her child, this allegation is true. However, the analysis cannot end there.

The mother (and the District Court in the opinion giving rise to this appeal) choose to ignore all of the uncontroverted facts regarding violent men, her own violent behavior, her mental problems, her alcohol abuse, the poor choice of inappropriate or dangerous care givers and the harm to the child's education. The mother simply makes the blanket assertion that she "has not harmed" her child.

The mother's lack of awareness of the shortcomings of her lifestyle (and their danger to her child) is almost frightening. In light of the specific findings of the trial court, how can she in good faith argue (at p. 20 of her Answer Brief): "the mother's fitness has never been an issue, until now, and in fact it is basically a smoke-screen to this Court"?

We must point out that there is no categorical evidence (other than the mother's denial) that this child was not exposed to the stabbing, to the bloody driveway, and to the police cars and crime scene tape from the incident involving Mr. Hubert Morris, Jr. (see p. 2 of Exhibit O-14 at Tab 1 of the Appendix and the trial court's Order on Petitions to Modify at p. 21). Remember that neither the grandparents nor the child's father knew of this incident until two years after the fact when they obtained the HRS Child Protective records on the very eve of trial. As a result, the child psychologist who evaluated the child prior to trial made no inquiries or findings with regard to this incident when he met with the child and performed his evaluation. The mere fact that all of the parties (including your Appellant) choose at this late stage to not rip off the scab and cross-examine the child about what she saw and heard that night (and the next morning) simply confirms that we do not wish to cause the child additional trauma by re-visiting such an incident.

We know, at least, from the case worker's notes at the time that the child was exposed to the immediate aftermath of the bloody assault and that it caused the case worker some serious concern

(see p. 2, Exhibit O-14 at Tab 1 of the Appendix). The mother admitted to the child and family case worker that the child began having difficulty sleeping, and was sleepwalking, after the incident (see notes of case worker at Exhibit O-6 at Tab 1 of the Appendix). The mother admitted under questioning from her own attorney that on the night of the stabbing her daughter had slept on the couch in the living room where the stabber, the victim and another woman were drinking in the adjoining room (p. 69 trial transcript, mother's testimony, see Tab 2 of Appendix). The mother knew "he was drunk, when he came over I had to leave for work" (p. 69 trial transcript, lines 2-3, see Tab 2 of Appendix).

The mother had previously indicated (p. 15 trial transcript, see Tab 2 of Appendix) that she had not revealed the stabbing incident to the father or grandparents, but that "if it had affected her" (line 20, see Tab 2 of Appendix) . . . "I would have said something" (line 22, see Tab 2 of Appendix).

The stabbing incident was apparently followed by another incident shortly thereafter, because the mother's next statement at trial was "if I felt she was in danger, <u>which I eventually did</u> and let Charlene and Raymond watch her again" (emphasis supplied) (at p. 15, lines 22-24, Tab 2 of Appendix). This is corroborated by the Child Protective worker's notation that Adrienne confirmed placing the child with the grandparents (see Exhibit O-8, Protective Services Termination Summary at Tab 1 of the Appendix).

Eighteen days after the stabbing incident the case worker's notes indicate "Adrienne hanging with a rough crowd. Hope things

settle at home". (See case worker's notes 9/29/94 at Exhibit O-6 at Tab 1 of Appendix).

The mother admitted to some of her episodic violent behavior, including during the year prior to her relocation to North Carolina (trial testimony). In addition, the trial court received the documentation from the University police reports (found at composite Exhibit M, at pp. M-46 through M-62, at Tab 3 of the Appendix). After a September 11, 1996 confrontation with University police officers, she apologized in a letter, explained that she had "chased" her "tension and fear away with Miller Lite Ice last night". More disturbing is the reference in the letter to "Joe" (the individual she testified she had stopped seeing months earlier) coming over "to kill me or eventually kill[s] himself".

We are not surprised, candidly, that the mother continues to fail to see the potential for harm to her daughter. Her subjective interest in the case would limit her ability to be objective on that issue.

The trial court focused on the pattern of these relationships with violent men as a solid, predictable indicator of disastrous future results for the child if the child were allowed to go back to live with the mother, rather than the grandparents.

The Appellate law of this State has made it abundantly clear that the trial courts need not wait until an actual disaster occurs involving the child, but may act in advance of such a disaster to

protect a child when there is clear evidence that such harm is likely to result. For example, in discussing "prospective abuse", Judge Sharp of the Fifth District wrote:

> To require him to actually suffer sexual abuse before permitting the State to intervene would be absurd and especially cruel to this or any vulnerable child.

Palmer v. Dept. of Health and Rehabilitative Services, 547 So.2d 981 (Fla. 5th DCA 1989).

Lastly, the trial court found (p. 46 of Order on Petitions to Modify) based upon credible evidence (more thoroughly discussed in the Statement of the Case and Facts in Appellant's Initial Brief) that the child's schooling had been harmed by the mother's move and by the mother's approach to the child's education after that move.

(3) MOTHER'S (FACTUAL) DISPUTE OVER LENGTH OF TIME CHILD LIVED WITH GRANDMOTHER

The mother's Brief makes the statement (at pp. 8-9):

> The mother did not delegate or in any other form authorize the grandparents to raise her child, in fact, the mother in the instant case has fought strenuously with the grandparents for custody of her daughter since the mother's relocation of her daughter to North Carolina, on December 14th, 1996.

We would concede that the mother has indeed fought strenuously since that move, but that the overwhelming evidence presented to the trial court (and adopted by factual findings of the trial court) is that the mother did indeed delegate the raising of the child to the grandparents. Consider the following paragraph from a protracted question asked by the trial court of the child psychologist (p. 26, trial testimony of Michael L. DeMaria, found at Tab 3 of Appendix to Appellant's Initial Brief):

> Apparently, from the time these parties, while they were married, birthed this child, they engaged in a routine in which they permitted the child to remain for long periods of time during the week while they did their thing, whatever that thing was, schooling, work, whatever it is, and permitted the child to stay with the paternal grandparents, such that a number of significant events in the child's early development were accomplished with the grandparents acting as de facto parents.

The psychologist's response, after noting the "secondary bond" with the grandparents, included the language "and it needs to be stated that it is a fairly close second bond in terms of its -- because of them being there during so many crucial milestones".

What type of milestones were the court and psychologist referring to? Toilet training; the child's Christmas play at age 4; all of the pediatric care and shots; losing her first tooth; all medications; learning to swim; age 4-5 pre-school; kindergarten graduation; first day of first grade; all parent/teacher conferences; beginner's reading materials, age 4-6; ballet; gymnastics; child's first library card; first soccer team, age 5; learning to swim (including YMCA); church children's choir performances; and clothing for six years (see Trial Exhibits A-1 through A-22; B-1 through B-93; C-1 through C-67; D-1 through D-9; E-1 through E-80; and G-1 through G-174).

<u>As found by the trial court, the mother was absent from almost all of these events!</u> (See trial court Order pp. 31-33.) The school teachers never saw the mother (p. 32 of trial court Order).

In our Initial Brief on the Merits, we noted the trial court finding that the child had resided, at a minimum, with the grandparents a total of 45 months (53 percent of her life), and we

cited to the portions of the trial court's Order where those findings were made.

Appellee disagrees, re-creates the facts, and ignores the trial court's findings.

In fact, the trial court's findings as to the extent of the grandparents' involvement were conservative. The trial court received evidence, without objection from any party, showing that the child was in the actual care of the grandparents from February 1990 (age two months) all the way through until the child was not returned from Christmas vacation in North Carolina at age six years.

We specifically refer you to trial Exhibits J, K and L (Exhibit J being a three page composite entitled J-1, J-2 and J-3), all documents signed by the mother (see Tab 4 of the Appendix).

The mother suggests that the grandparents were simply watching the child "temporarily" while she pursued her education.

In point of fact, the mother had named them as "temporary guardians" of her child when the child was two months old (Exhibit J-1) by a special power of attorney, which was then renewed a year later (Exhibit J-2), again in 1995 (Exhibit J-3) and then by a more complete "agreement" signed by the mother when the child was five years old (Exhibit L-1).

We are talking here not about whether or not the mother effectively (as a matter of law) surrendered all her parental rights by signing these various documents. Rather, the emphasis is on factually establishing the type of waiver contemplated in Spence

v. Stewart, 705 So.2d 996 (Fla. 4th DCA 1998). The mother was absent, the grandparents were not. The evidence of the events she missed was the proof of her absence; the signed documents merely corroborate her official consent.

The Appellee mother chooses to focus on the last eighteen months when the grandparents paid for her to attend the University of West Florida (rather than the prior four years). She posits her educational efforts as the excuse for leaving the child with the grandparents. This is perhaps ill-advised. In reality, the mother never made serious attempts to complete her college requirements (she was asked to leave by the University after a number of violent outbursts, run-ins with the campus police, and problems with the felon who continued to visit her at the dormitory) (see trial court Order pp. 23-25).

The mother suggests that during the eighteen months the child was with her "every weekend", when in fact the mother was living in single dormitory housing where she could not have the child (see Trial Exhibits M-31, 32 at Tab 3), did not have the child every weekend, and saw the child infrequently at best, missing soccer games and almost all other extracurricular events.

(4) "LIGHT SWITCH" VS. COMMON SENSE OF § 61.13(7)

One can recognize the legal principle that the Florida Constitutional right of privacy encompasses a parent's right to raise a child as he or she sees fit, while at the same time making

a common sense logical limitation of that right when it might conflict with the safety and welfare of the children of that parent.

The "privacy" right of a parent to be a parent is not a light switch which can be flipped on and off at will. The inherent genius of § 61.13(7), Fla.Stat. (1995), is that it recognizes those circumstances where a parent may have turned their back on the right (and responsibility) of raising a child and delegated that responsibility to a grandparent for an extended time period (in this case, the child's entire life). Once this has occurred (as in this type of case), the State's authority to protect a child certainly should be compelling enough to overcome the parent's "right".

(5) RECENT TRIAL COURT PROCEEDING

Page 21 of Appellee's Brief merits special attention, in alleging that:

> the trial court on February 18, 1999 offered the Appellant additional time to actually show danger or harm was an issue before entering an Order returning the child to her mother, the Appellant could not and did not (sic).

As the trial court's February 19, 1999 Order clearly shows, nothing was held but a "status conference" where the court heard argument regarding the applicable law. No evidence was solicited and indeed none would have been allowed at such a status conference. The trial court recognized the District Court of Appeal's mandate and ordered the return of the child. The mother's suggestion that there is a newer fact finding by the trial court

negating her dangerous tendencies is incorrect.

CONCLUSION

This case provides an excellent vehicle for the Court to make clear (especially for the guidance of all of the trial courts in the State) that protecting a child is still an appropriate laudable and legal goal for trial courts to strive to achieve. Indeed, one could make the argument that the District Court opinion is a respectful expression of frustration at uncertainty which has been created by Beagle[3] and Von Eiff[4].

This suggestion is not intended as criticism of either opinion, nor is this appeal an attempt to overrule the important findings of Beagle and Von Eiff "through the backdoor".

Rather, the trial courts (and the District Courts) need for this Court to answer the question:

> Given the overwhelming emphasis placed on parents' rights, when and how can the trial courts recognize and protect a child's "rights" to a safe home and the stability of a consistent environment of family nurturing and care?

We ask that the District Court of Appeal opinion be reversed, and that the trial court ruling be reinstated under either of the options set forth more particularly in the conclusion of the Appellant's Initial Brief on the Merits.

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[3]Beagle v. Beagle, 678 So.2d 1271 (Fla. 1996).

[4]Von Eiff v. Azricri, 23 Fla.L.Weekly S583 (Fla. November 12, 1998).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief has been furnished to Adrienne E. Richardson, 259 Furman Rd, #209, Boone, NC 28607, by regular U.S. Mail, on this the 18th day of March, 1999.

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APPENDIX

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