IN THE SUPREME COURT OF FLORIDA

MICHAEL ANDERSON,	)	
	)	**Fla. S.Ct. Case No. 00-59**
Petitioner,	)	
	)	
	)	2nd DCA Case No. 98-04452
	)	
CATHY ANDERSON,	)	
	)	
Respondent.	)	
	)	

AMICUS CURIAE BRIEF OF THE SOLICITOR GENERAL ON BEHALF OF THE ATTORNEY GENERAL AND THE STATE OF FLORIDA

On a Petition for Discretionary Review of a Decision of the District Court of Appeal, Second District, Certified to be in Conflict with a Decision of Another District Court of Appeal

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CERTIFICATION OF TYPE SIZE AND STYLE

In compliance with Fla. R. App. P. 9.210(a)(2) and this Court's Administrative Order dated July 13, 1998, the undersigned certifies that the type size and style used in this brief is 12-point Courier New.

INTEREST OF AMICUS CURIAE

The Attorney General and the State of Florida have a direct interest in the outcome of this case because it implicates important state and public interests, namely the financial well-being of one of the State's most precious resources – its children. It is the duty of the Attorney General to identify and, where appropriate, participate in litigation to protect state and public interests. See State ex. rel. Shevin v. Yarborough, 257 So.2d 891, 894-98 (Fla. 1972) (Ervin, J., specially concurring); see also § 16.01(4)-(5), Fla. Stat.

The Court's decision in this case also has the potential to affect pending child support enforcement ("CSE") litigation involving the Department of Revenue ("DOR") around the State. In fact, another case pending before the Court, D.F. v. Department of Revenue (Case no. 96,288), involves the same issue as the one raised in this case. The Attorney General, in his role as "chief state legal officer", Art. IV, § 4(c), Fla. Const., serves as legal counsel to DOR in a substantial number of its CSE cases.

The Solicitor General, on behalf of the Attorney General and the State of Florida, appears in this case as *amicus curiae* to urge the Court to reaffirm that, when factually supported, principles of res judicata and equitable estoppel continue to apply in cases where a marital father seeks to avoid his obligation to support a child born to his wife during marriage.

SUMMARY OF THE ARGUMENT

This case presents the issue of when and under what circumstances a husband can avoid his legal obligations and responsibilities to a child born during the marriage by challenging the paternity/legitimacy of the child. This issue implicates two competing legal principles and social policies: (1) the common law presumptions of legitimacy and paternity of a child born in wedlock, and (2) the "well-settled rule of law" that "a person has no legal duty to provide support for a minor child that is neither his natural nor adopted child and for whose care and support he has not contracted." Daniel v. Daniel, 695 So.2d 1253 (Fla. 1997). While some district courts have struggled to harmonize these competing principles, the Solicitor General submits that principles of res judicata and estoppel should be applied to promote stability and finality in child support cases, while preserving a husband's right to challenge his support obligation to a child that is not biologically his own.

A child born to a married woman during a valid marriage is presumed to be legitimate and the wife's husband is presumed to be the child's biological and "legal" father. These presumptions are rebuttable and this Court has long recognized the right of a husband (i.e., marital father) to contest the paternity and legitimacy of a child born to his wife during marriage. Recent

advances in blood typing and DNA testing have made it easier to overcome the presumption of paternity and, as a result, there has been an increase in cases in which a marital father is seeking to litigate the paternity of a child born to his wife during their marriage.

The issue of paternity/legitimacy is most appropriately raised during the dissolution proceeding where the child support obligation is established. But, as in the case sub judice, it is often not raised at that time. Instead, the marital father raises the issue "offensively" as a ground to obtain relief from his support obligation in the final judgment of dissolution or "defensively" in response to an action to enforce the child support obligation.

The district courts have struggled in their efforts to harmonize the competing principles identified above in light of Daniel. The Second District in the case sub judice[1] and in several other recent decisions has continued to apply principles of res judicata and estoppel to bar marital fathers from re-litigating the paternity issue where that issue was or could have been litigated in the dissolution proceeding. The Fifth District, in DeRico v. Wilson, 714 So.2d 623 (Fla. 5th DCA 1998), applied Daniel to afford a marital father relief from his support obligation, simply upon proof that the child is not biologically

[1] Anderson v. Anderson, 746 So.2d 525 (Fla. 2nd DCA 1999).

his and without expressly considering principles of estoppel or res judicata. The Fourth District, in two post-Daniel decisions,[2] has taken somewhat of a middle ground but has also not directly addressed the application of res judicata or equitable estoppel.

The Solicitor General submits that the Second District's approach better harmonizes the competing policies identified above than does the approach followed in DeRico which appears to treat the "well-settled rule of law" in Daniel as a per SE rule. Accordingly, the Solicitor General submits that the Court should approve the Second District's decision in the case sub judice and reaffirm that principles of res judicata and estoppel may, when factually supported, bar a marital father from (re-)litigating the paternity/legitimacy of a child born during his marriage in an effort to avoid his legal obligation to support the child. The Court should also specifically clarify and limit the circumstances under which a marital father can obtain relief from the support obligation more than 1 year after entry of the final judgment of dissolution under Fla. Fam. L. R. P. 12.540 and Fla. R. Civ. P. 1.540(b).

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[2] Gantt v. Gantt, 716 So.2d 846 (Fla. 4th DCA 1998); Lefler v. Lefler, 722 So.2d 941 (Fla. 4th DCA 1998).

ARGUMENT

I.

PRINCIPLES OF RES JUDICATA AND EQUITABLE ESTOPPEL BAR A MARITAL FATHER FROM SEEKING TO AVOID HIS LEGAL SUPPORT OBLIGATION BY CONTESTING THE PATERNITY OF A CHILD BORN DURING HIS MARRIAGE WHERE HE FAILED TO CONTEST PATERNITY AT THE DISSOLUTION PROCEEDING IN WHICH THE SUPPORT OBLIGATION WAS ESTABLISHED.

A child born to a married woman is presumed to be legitimate and the wife's husband is presumed to be the child's father. This presumption is implicated in this case. While the presumption is rebuttable, this Court has referred to it as one of the strongest presumptions known to the law. See Eldgride v. Eldridge, 16 So.2d 163, 163-64 (Fla. 1944). However, recent scientific advances in blood typing and DNA testing have made it easier for a marital father to overcome the presumption and may explain the increased number of cases in which marital fathers are contesting the paternity of children born during marriage. Cf. Altenbernd, Quasi-Marital Children: The Common Law Failure in *Privette* and *Daniel* Calls for Statutory Reform, 26 Fla. St. U. L. Rev. 219, 227-28, 258 (Winter 1999) [hereinafter Altenbernd Article]; Lefler V. Lefler, 722 So.2d 941, 943 (Fla. 4th DCA 1998) (Klein, J., concurring specially). See also Appendix (including a survey of the post-Daniel cases involving this issue).

This Court has considered a number of cases over the years

which involve the legal rights of children born during a valid marriage but not fathered by their mother's husband. See, e.g., Eldridge, 16 So.2d at 163-64 (husband had the right to raise the issue of legitimacy in the dissolution proceeding, but his evidence was insufficient to overcome the strong presumption of legitimacy of children born to his wife during marriage); Kennelly v. Davis, 221 So.2d 415 (Fla. 1969) (married woman could not bring a paternity action against the reputed father of a child born during her marriage to another man); Gammon v. Cobb, 335 So.2d 261 (Fla. 1976) (receding from Kennelly and authorizing married woman to bring paternity action against the reputed father of a child born during her marriage to another man); Knauer v. Barnett, 360 So.2d 399 (Fla. 1978) (prohibiting heirs from contesting the legitimacy of another child acknowledged by their father to be biologically his, a fact which he later disavowed); Theis v. City of Miami, 564 So.2d 117 (Fla. 1990) (city could not deny death benefits to the child of the decedent since the decedent was married to the child's mother at the time of his birth, even though the mother conceded that the child was fathered by a man other than the decedent); Dept. of Health & Rehab. Svcs. v. Privette, 617 So.2d 305 (Fla. 1993) (best interests of the child must be considered prior to ordering a blood test of the reputed father of a child born to a married woman but not fathered by her husband); Daniel v. Daniel, 695

So.2d 1253 (Fla. 1997) (former husband not obligated to support a child that born to his wife during marriage where the parties stipulated was not biologically his). Aside from Daniel, none of those cases involved a marital father seeking to avoid his support obligation; and, the factual circumstances in Daniel are distinguishable from those in the case sub judice and those in DeRico v. Wilson, 714 So.2d 623 (Fla. 5th DCA 1998). The district courts, however, considered cases prior to Daniel involving factual circumstances almost identical to those in this case and, as discussed below, those decisions are instructive in resolving the issues in this case.

A. The Child Support Obligation is For the Benefit of the Child, and There is No Per SE Rule Entitling a Marital Father to Relief from His Support Obligation upon Proof That a Child Is Not Biologically His.

In a slightly different context, the Court has noted that "[t]he obligation of support is for the benefit of the child." Gammon, 335 So.2d at 267; see also Sacks v. Sacks, 267 So.2d 73, 75 (Fla. 1972)("The child's welfare is paramount [in support cases]."). As in the case sub judice, this fact is often obscured by the dispute between the mother and the marital father. See Sacks, 267 So.2d at 75 ("The [district court] allowed the question of legitimacy to obscure the true issue before the Court; that is, the child."); Gammon, 335 So.2d at 265 (noting that "innocent child" is the real party in interest in child support cases). In Marshall v. Marshall, 386 So.2d 11

(Fla. 5th DCA), rev. denied, 392 So.2d 1377 (Fla. 1980), the court concisely stated this point:

> The conclusions of the trial judge, as well as the arguments of the parties, evidence a basic misconception of the issue involved. Both the parties and the judge viewed this proceeding as a contest between the husband and the wife. However, the real party in interest is the child. In matters of custody and support, the best interests of the child must control. For this reason, we feel that the trial judge erred in finding that the husband was under no duty of support and thus we reverse.
>
> . . . .
>
> As noted above, the paramount concern is for the welfare of the child. The husband is presumed to have known the legal consequences of his actions. Since parents are legally obligated to support their minor children, the husband accepted this support obligation by acknowledging paternity. A change in parenthood should not be taken lightly nor should the "parent" be able to so easily divest himself of all responsibility upon the termination of the marriage. . . . .

Id. at 12.

Petitioner's brief in the case sub judice focuses on the penal nature of the child support obligation on Petitioner (Pet. Br. at 15, 18) and the alleged fraudulent conduct of the mother (Pet. Br. at passim). This approach, while seemingly consistent with the approach of the majority in DeRico, cf. DeRico, 714 So.2d at 626 (Harris, J., dissenting) (suggesting that the majority did not consider the determination of paternity implicit in the final judgment of dissolution res judicata due to the wife's fraud, even though the trial court made the factual

determination that fraud did not occur), misses the point discussed in Marshall. If not for that reason alone, DeRico should be disapproved.

Daniel was this Court's first opportunity to consider the marital father's obligation, if any, to support a child born to his wife during marriage but which he did not father. This may explain why no Florida Supreme Court case was cited as authority for the "well-settled rule of law" applied in Daniel. See Daniel, 695 So.2d at 1254 (citing district court opinions which, in turn, cite each other and Am.Jur.2d).

Petitioner and the DeRico majority seem to treat this "well-settled rule of law" as a per SE rule – i.e., a marital father has no obligation to support a child that is not biologically his, period. See Pet. Br. at 6, 12, 13; Derico, 714 So.2d at 624. This interpretation of Daniel is inconsistent with the decision itself as well as the district court decisions which predated Daniel in which paternity of a child born during marriage was disputed and the marital father was seeking to avoid his support obligation.

In Daniel, the man knew at the time he married his wife that she was pregnant with the child of another man. See Daniel, 695 So.2d at 1254. The child was born 3 months after the parties were married, and the husband and wife separated approximately 8 months thereafter. Id. At the dissolution proceeding, the

parties stipulated that the husband was not the child's biological father.[3] Id. The trial court applied a Privette-based "best interests" analysis and, in the final judgment of dissolution, ordered the husband to pay child support. The Second District reversed, and this Court subsequently approved that decision. Id.

In approving the Second District's decision, this Court cited the "well-settled rule of law" that "a person has no legal duty to provide support for a minor child who is neither his natural nor his adopted child and for whose support he has not contracted." Id. This is not a per SE rule. Immediately after the string citation following the rule, the Court acknowledges that the rule has exceptions:

> While the courts must be ever vigilant to protect our children, we do not find the circumstances of this case justify a deviation from this established rule of law or present an exception to its application.

Id. The Court did not specify the circumstances that might justify a deviation from the rule. The stipulated facts and procedural posture of Daniel made it unnecessary to consider principles of res judicata or equitable estoppel; however, the factual circumstances which would support the application of those principles would also seem to justify a deviation from the

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[3] The parents' stipulation went to the issue of paternity not support. This is a fine, but important distinction because the parents cannot stipulate away the child's right to support. See, e.g., L.S.H. v. P.L.H., 739 So.2d 1264 (Fla. 2nd DCA 1999).

rule applied in Daniel. Prior district court decisions provide guidance on this point.

For example, in Wade v. Wade, 536 So.2d 1158 (Fla. 1st DCA 1988), the court imposed a child support obligation on the husband notwithstanding the fact the parties stipulated that the child born during their marriage was not fathered by the husband. The court focused on the facts that husband acted as if he was the child's father (e.g., signed his birth certificate, presented him for baptism), held himself out to be the child's father, and developed a close father-son relationship with the child. Id. at 1159. Based upon those facts, the court held that the father was estopped from disavowing paternity and, hence, avoiding his support obligation. Id. at 1160 ("Because of the former husband's representations, the child was induced to believe the former husband is his father, and he was deprived for a nine-year period of a potential action against the putative father for support."); see also Marshall, 386 So.2d at 12 (husband was estopped from denying paternity of his 5 year old child where he signed the child's birth certificate as father and acted accordingly, even though parties stipulated that the husband was not the child's biological father).

Notwithstanding this prior case law which suggests the parameters of the exception to the "well-settled rule" in Daniel, the district courts have struggled in their application of

Daniel. That struggle resulted in the conflict that was certified in the case sub judice and in D.F. v. Department of Revenue, 736 So.2d 782 (Fla. 2nd DCA 1999), review granted Fla. S.Ct. Case No. 96,288. For ease of reference, included in the Appendix is a chart which summarizes the key facts and holdings of the district court cases in which Daniel was applied or distinguished. From this chart, it can be seen that DeRico is the only case in which Daniel has been applied as if it established a per SE rule. In the other cases, the court determined whether the father was barred from (re-)litigating the issue of paternity, and if not, the court considered (or remanded to the trial court to consider) whether based upon the particular facts of the case the father should be afforded relief from his support obligation.

B. The Second District's Approach in the Case Sub Judice Is Consistent with Well-established Precedent.

A close reading of the cases cited in support of the "well-settled rule of law" in Daniel suggest that the rule may be altogether inapplicable in cases such as the one sub judice. Specifically, where the marital father knew (or had reason to question) that a child born during marriage was not biologically his but he failed to contest paternity in the dissolution proceeding, principles of res judicata and equitable estoppel bar him from contesting paternity in a subsequent proceeding.

Three of the five cases cited as support of the "well-

established rule of law" in Daniel involved circumstances in which the parties stipulated that the marital father was not the biological father of a child born during marriage. See Albert v. Albert, 415 So.2d 818 (Fla. 2nd DCA 1982), rev. denied, 424 So.2d 760 (Fla. 1983) (wife 8 months pregnant with the child of another man at time of the parties' marriage and wife failed to prove that husband contracted to support the child); Swain v. Swain, 567 So.2d 1058 (Fla. 5th DCA 1990) (child born 5 years prior to marriage and parties stipulated that the husband was not the biological father); Taylor v. Taylor, 279 So.2d 364 (Fla. 4th DCA 1973) (wife 4½ months pregnant with another man's child at the time of the parties' marriage and parties stipulated that the former husband was not the biological father). The fourth case involved a child from a previous marriage. See Portunado v. Portunado, 570 So.2d 1338 (Fla. 3rd DCA 1990), rev. denied, 581 So.2d 166 (Fla. 1991). Only Bostwick v. Bostwick, 346 So.2d 150 (Fla. 1st DCA 1977), involved a circumstance in which the issue of paternity was disputed; and, in that case, the issue of paternity was raised prior to the final judgment of dissolution.

Further, Daniel and all of the cases cited therein involved direct appeals of the final judgment of dissolution in which a support obligation was (or was not) imposed on a marital father who was not the child's biological father. By contrast, in the case sub judice (as well as DeRico, Lefler, and D.F.) the issue

of paternity was raised subsequent to the final judgment of dissolution through a petition for relief from the final judgment pursuant to Fla. Fam. L. R. P. 12.540 and Fla. R. Civ. P. 1.540(b) or a petition to modify or terminate the support obligation.

Prior to Daniel, the district courts were almost uniform in rejecting attempts by marital fathers to avoid their obligation to support children born during marriage where the issue of paternity was first raised after the final judgment of dissolution. See, e.g., Dept. of Health & Rehab. Svcs. v. Wright, 498 So.2d 1008 (Fla. 2nd DCA 1986) (issue of paternity is res judicata because issue could have been litigated in dissolution proceeding); Johnson v. Johnson, 395 So.2d 640 (Fla. 2nd DCA 1981)(same); Dept. of Health & Rehab. Svcs. V. Robison, 629 So.2d 1000 (Fla. 3rd DCA 1993) (same); Dept. of Health & Rehab. Svcs. v. Lara, 504 So.2d 1 (Fla. 2nd DCA 1986) (same); Decker v. Hunter, 460 So.2d 1014 (Fla. 3rd DCA 1984) (same; Bitch v. Bitch, 341 So.2d 251 (Fla. 1st DCA 1976) (paternity issue properly raised in the dissolution proceeding, but husband failed to prove that he was not the biological father); T.D.D. v. M.J.D.D., 453 So.2d 856 (Fla. 4th DCA 1984) (wife barred from raising the issue of the husband's paternity at the dissolution proceeding). But see M.A.F. v. G.L.K., 573 So.2d 862 (Fla. 1st DCA 1990) (husband allowed to raise paternity issue 4 years after

final judgment of dissolution because wife's deception constituted fraud on the court). There is nothing in Daniel that suggests that the holdings of those cases were undermined by the "well-settled rule of law" in Daniel. Several district courts have so held. See C.C.A. v. J.M.A., 744 So.2d 515 (Fla. 2nd DCA 1999); White v. White, 710 So.2d 208 (Fla. 1st DCA 1998); L.S.H. v. P.L.H., 739 So.2d 1264 (Fla. 2nd DCA 1999); cf. Swain, 567 So.2d at 1059 (Sharp, J., dissenting)(noting that Albert and the other cases later relied upon in Daniel in support of the "well-settled rule of law" did not involve findings of estoppel). And, as discussed above, the fact that the husbands in Daniel and the cases cited therein raised the paternity issue prior to the final judgment of dissolution distinguishes Daniel from the case sub judice and justifies the application of principles of res judicata and equitable estoppel in appropriate circumstances.

C. The Circumstances under Which a Marital Father Can Obtain Relief from a Child Support Obligation More than 1 Year after the Final Judgment of Dissolution Are and Should Be Extremely Limited.

In light of the well-established case law restricting the ability of the marital father to raise the issue of paternity after the final judgment of dissolution in a collateral proceeding, fathers are more frequently using Fla. R. Civ. P. 1.540(b)[4] to seek relief from the final judgment that establishes

[4] Fla. Fam. L. R. P. 12.540 provides that Fla. R. Civ. P. 1.540 "shall govern general provisions concerning relief from

the support obligation. As in this case, the most common ground relied upon for relief is in Fla. R. Civ. P. 1.540(b)(3)– i.e., alleged fraud or misrepresentation by the wife. See Pet. Br. at 3, 8, 13, 15. A claim for relief under that subparagraph of the rule must be brought within 1 year after entry of the final judgment. See Fla. R. Civ. P. 1.540(b). By contrast, the court may set aside a judgment order or decree more than 1 year after the final judgment for "fraud upon the court." Id.; see also DeClaire v. Yohanan, 453 So.2d 375, 378-79 (Fla. 1984).

The "fraud upon the court" language in the rule has been relied upon by one court to relieve a marital father of his obligation to support a quasi-marital child 4 years after the entry of the final judgment of dissolution. See M.A.F., 573 So.2d at 863. In that case, the court held that "when the wife knows that her husband is not the father of her children, and the husband does not know, concealment of that knowledge in a divorce proceeding is extrinsic fraud on the court." Id. (emphasis supplied); cf. DeRico, 714 So.2d at 625 (Harris, J., dissenting) (although trial court found that no fraud was committed on the husband, district court granted husband relief from his support obligation almost 2 years after entry of the final judgment of dissolution). The Solicitor General submits that the holding in M.A.F. is inconsistent with other decisions involving allegations

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judgment, decrees, or orders" in family law cases.

of fraud by the mother in contested paternity cases (see, e.g., Dept. of Revenue v. Stone, 707 So.2d 925, 926 (Fla. 4th DCA 1998) and cases cited therein), and highlights the difficulty that the lower courts have in distinguishing among intrinsic, extrinsic and fraud upon the court in this context.

In DeClaire, this Court distinguished between intrinsic and extrinsic fraud as follows:

> Extrinsic fraud involves conduct which is collateral to the issues tried in the case. . . . . [It] occurs where a defendant has somehow been prevented from participating in a cause.
>
> Intrinsic fraud, on the other hand, applies to fraudulent conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried.

DeClaire, 453 So.2d at 377; accord Cerniglia v. Cerniglia, 679 So.2d 1160, 1163 (Fla. 1996). The Court equated extrinsic fraud with fraud on the court but indicated that the concept is necessarily very limited so as to provide finality to litigation. See DeClaire, 453 So.2d at 379.

If, as the M.A.F. court held, a wife's concealment of the fact that her husband is not the biological father of their child(ren) constitutes extrinsic fraud on the court, dissolution cases involving minor children will never have finality. A better rule for the Court to adopt is that any alleged fraud or misrepresentation between the parties regarding the paternity of a child born during the marriage constitutes intrinsic fraud.

This rule is justified since the paternity of marital children is not "collateral" to the issues in the dissolution proceeding; in fact, it is an issue in all dissolution proceedings in which minor children are involved. See §§ 61.052(2)(b), (4), 61.13, 61.30, Fla. Stat.; see also Fla. Fam. L. Forms 12.901(b)(1), 12.902(c)(1) (including space to question whether a child born during marriage is "common to both parties"). Thus, the issue of paternity is, or could be litigated in the dissolution proceeding and any fraud related to that issue would be intrinsic fraud. See DeClaire, 453 So.2d at 377 (citing Johnson v. Wells, 73 So. 188 (1916) and defining "intrinsic fraud").

Unlike DeRico which involved a challenge to paternity through a petition to modify the support obligation almost 2 years after entry of the final judgment of dissolution, Petitioner in the case sub judice sought relief from his support obligation within 1 year after entry of the final judgment establishing the obligation. Pet. Br. at 3. Thus, the timeliness issue raised by the intrinsic/extrinsic fraud distinction is not implicated in this case and the trial court was not necessarily precluded from considering Petitioner's petition for relief. However, given the importance of this issue, the Court should address it in this case or D.F.

The Solicitor General, as *amicus curiae*, does not take a position on the merits of Petitioner's contention that the

evidence before the trial court was sufficient to entitle him to relief from the final judgment. However, the approaches followed by the trial court and the Second District in the case sub judice are consistent with the approach advocated by the Solicitor General to harmonize the competing legal principles and social policies implicated by this case. Specifically, where the issue of paternity (and the resulting legal obligation of support) was or could have been litigated in the dissolution proceeding, principles of res judicata bar the issue from being re-litigated. See, e.g., Johnson, 395 So.2d at 641 (final judgment of dissolution is res judicata on issue of paternity of children born during marriage). Alternatively, the marital father's delay in raising the issue of paternity once he had a sound basis to do may bar him (based upon principles of estoppel) from raising the issue, even if it is raised in the dissolution proceeding or within 1 year thereafter. See, e.g., Wright, 498 So.2d at 1009 (denying relief under Fla. R. Civ. P. 1.540(b)(5) because that rule is intended to provide relief based upon facts arising post-judgment)

II.

THE COURT SHOULD CLARIFY THE EFFECT OF ITS HOLDING IN DANIEL WHICH APPEARS TO SEPARATE THE ISSUE OF LEGITIMACY FROM THE LEGAL RIGHTS AND RESPONSIBILITIES OF A MARITAL FATHER TOWARDS HIS CHILD.

In Daniel, this Court commented that while legitimacy and paternity are related, they are separate and distinct concepts. See Daniel, 695 So.2d at 1254. This comment served to distinguish Daniel from the Court's prior decision in Privette and may be based upon the different public policies underlying the presumptions– i.e., stability in the family unit and prevention of the stigma associated with illegitimate children (presumption of legitimacy)[5] verses identification of the man obligated to support the child (presumption of paternity).[6] See Altenbernd Article at 254-55.

In child support cases involving a child born to a married woman but not fathered by her husband, however, these presumptions are inextricably intertwined. And, as a result, it has been suggested that Daniel renders the concept of legitimacy illusory. See id. at 255-56. It certainly raises a number of questions which the Court should take this opportunity to

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[5] See, e.g.,Privette, 617 So.2d at 307-08; Eldridge, 16 So.2d at 163-64.

[6] See, e.g., § 409.2551, Fla. Stat. ("It is declared to be the public policy of this state that . . . children shall be maintained from the resources of their parents . . . ."); Knauer, 360 So.2d at 404-05.

consider.

For example, does the child have a right of inheritance from the marital father who effectively disowned her? (Contino v. Estate of Contino, 714 So.2d 1210 (Fla. 3rd DCA 1998), suggests that she does); from the biological father? (uncertain under § 732.108(2), Fla. Stat.); Does the marital father who effectively disowned the child have a right of inheritance from the child? (as his "legitimate" father, presumably, under §§ 732.103 and .108(2)); does the biological father? (uncertain); Which father – marital or biological, or both – is entitled to seek damages for the wrongful death of the child, and vice versa? (uncertain under § 768.18(1), Fla. Stat.); Does a marital father who is required to support a child that is not biologically his have a right of contribution against the biological father? (presumably).

Admittedly, resolution of some of these questions may require legislative action. Cf. Altenbernd Article at Part VI, Appendix (proposing statutory amendments to chapter 742, Fla. Stat.). It does not follow, however, that this Court is without power to affect public policy in this area. As discussed in this brief, the Solicitor General submits that prior precedent of this Court and the district courts provides the framework to harmonize the competing legal principles and social policies implicated in this case in a manner that provides certainty and finality in the child support obligation.

CONCLUSION

For the foregoing reasons of law and policy, the Solicitor General respectfully requests that this Court approve the decision of the Second District in the case sub judice and disapprove the decision of the Fifth District in DeRico.

_____
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APPENDIX TO *AMICUS BRIEF* OF THE SOLICITOR GENERAL

SURVEY OF POST-*DANIEL* CASES IN WHICH THE MARITAL FATHER SOUGHT RELIEF FROM HIS COURT-ORDERED OBLIGATION TO SUPPORT A CHILD BORN TO HIS WIFE DURING THEIR MARRIAGE BUT WHICH HE DID NOT FATHER

Case Name and Citation	**Summary of Facts**	**Type of Proceeding in which Paternity Issue Raised**	**Length of Time After Final Judgment of Dissolution When Paternity Issue Raised**	**Age of Child(ren) at Time of Request to End Child Support**	**Marital Father Required to Pay Child Support?**	**Court's Basis for Granting or Denying Relief to Marital Father**
Anderson v. Anderson 746 So.2d 525 (Fla. 2nd DCA 1999)	Husband on notice prior to dissolution that he may not be the child's biological father; wife assured him that he was; father did not obtain a paternity test or otherwise contest paternity prior to the final judgment of dissolution; father obtained negative paternity test post-dissolution	Rule 1.540(b) Petition	Less than 1 year	2½ years	Yes	Father failed to prove fraud; issue of paternity was res judicata b/c father had reason to question paternity prior to dissolution final judgment, but failed to do so
C.C.A. v. J.M.A. 744 So.2d 515 (Fla. 2nd DCA 1999)	Husband had a vasectomy; husband and wife agreed to allow a friend to impregnate wife; wife conceived a child with another man (not the friend); husband raised the issue of non-paternity in the dissolution proceeding in an effort to avoid child support obligation	Husband raised paternity issue in dissolution proceeding	n/a	2½ years	Yes	Marital father is equitably estopped from providing child support because the child would suffer detriment if the father/child (support) relationship was eliminated
DeRico v. Wilson 714 So.2d 623 (Fla. 5th DCA 1998)	Husband did not know that wife had been unfaithful; wife did not know that children were not the husband's; husband obtained negative paternity test of 2 children born during the marriage	Husband Petitioned to Modify the Final Judgment of Dissolution	Almost 2 years	6 and 4 years	No	Marital father has no legal duty to support children who are not biologically his

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D.F. v. DOR 736 So.2d 782 (Fla. 2nd DCA 1999)	Husband alleged that he did not have sexual relations with the wife prior to the time that the child was conceived and therefore he couldn't have been the biological father; he did not contest paternity in the dissolution proceeding; husband requested DNA test 9 years after dissolution to establish his non-paternity	Wife Petitioned to Increase the Child Support Obligation	9 years	11 years	Yes	Res judicata bars the marital father from challenging paternity 9 years after the issue was adjudicated in the dissolution proceeding; husband had the knowledge and opportunity to litigate the issue of paternity in the dissolution proceeding
Gantt v. Gantt 716 So.2d 846 (Fla. 4th DCA 1998)	During the dissolution proceeding, husband claimed that he was uncertain whether he was the biological father of 2 of the 3 children born during the parties' marriage (he knew he wasn't as to the 3rd child); he requested blood tests	Husband raised paternity issue in dissolution proceeding	n/a	5 and 3 years	Uncertain (case remanded for court-ordered blood tests)	If the blood tests are negative, the marital father has no obligation to support the children (quoting Daniel) unless the circumstances justify a deviation from the "well-established rule" in Daniel
Lefler v. Lefler 722 So.2d 941 (Fla. 4th DCA 1998)	Husband apparently was not on notice prior to dissolution that he may not be the child's biological father; he came to suspect that he was not biological father 5 years after dissolution and had a private blood tests performed on the child which came back negative	Husband Petitioned to Modify the Final Judgment of Dissolution	5 years	7 years	Unknown (case remanded for court-ordered blood tests)	Trial court should have ordered blood tests(citing Daniel and Gantt)

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L.S.H. v. P.L.H. 739 So.2d 1264 (Fla. 2nd DCA 1999)	Parties entered into dissolution settlement agreement which acknowledged that husband was not biological father; wife waived child support in agreement	Husband raised paternity issue in dissolution proceeding	n/a	Unknown	Uncertain (case remanded)	Wife's waiver of child support does not bind the court; case remanded to determine whether husband contracted for support of the child through the settlement agreement or whether he is equitably estopped from avoiding his support obligation of a child born during marriage
White v. White 710 So. 2d 208 (Fla. 1st DCA 1998)	Parties were married and divorced on several occasions; no evidence that husband might not be child's biological father; husband prior treated the child as his own, never the less husband sought to raise the issue of paternity in the dissolution proceeding	Husband raised paternity issue in dissolution proceeding	n/a	Unknown	Yes	Marital fathers was equitably estopped from contesting paternity of child born during marriage where there is no evidence that he might not be father and he treated the child as his own over a period of many years and provided her financial support