IN THE SUPREME COURT
OF FLORIDA

CASE NO.: SC00-600

DISTRICT COURT OF APPEAL
4th DISTRICT NO. 98-2918

JAMIE BARDOL AND LORI BARDOL,

Petitioners,

v.

MARY MARTIN,

Respondent.
_____/

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

STATE OF FLORIDA

INITIAL BRIEF OF PETITIONERS, JAMIE BARDOL AND LORI BARDOL

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INTRODUCTION

The Petitioners, JAMIE BARDOL AND LORI BARDOL were petitioners in the trial court. Respondent, MARY MARTIN, was the respondent in the trial court. This brief, the parties will be referred to as Petitioners and Respondent.

STATEMENT OF THE CASE AND THE FACTS

The statement of the case and of the facts can be taken from the decision of the Fourth District. As explained in the decision, Petitioners JAMIE BARDOL and LORI BARDOL had filed an action in the Circuit Court in and for Broward County, Florida for retroactive child support. The Petitioners filed their action one day previous to their 18th birthday; said action was dismissed for lack of standing. An Amended Petition was filed after the Petitioners reached majority. The Respondent, Mary Martin, moved for summary judgment based on the premise that Florida law does not recognize a cause of action for an adult suing for child support that accrued while said adult was a child. The trial court entered summary judgment in favor of Respondent. Petitioners timely filed an appeal in the Fourth District on December 22, 1999 and the Fourth District affirmed; BARDOL vs. MARTIN,1999 WL 1243870 (Fla.4th DCA 1999).

Petitioners timely filed a Motion for Rehearing; the Motion for Rehearing was denied by the Fourth District. In its opinion, filed December 22, 1999, the Fourth District certified the following question to be of great public importance:

> DO ADULT CHILDREN HAVE STANDING TO BRING SUIT ON THEIR OWN BEHALF AGAINST A PARENT FOR RETROACTIVE CHILD SUPPORT, ABSENT AN AGREEMENT OR COURT ORDER PREVIOUSLY ESTABLISHING A CHILD SUPPORT OBLIGATION?

Petitioners, JAMIE BARDOL and LORI BARDOL timely filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court to review the decision rendered by the Fourth District. On March 24, 2000, this Court entered its Order which postponed a decision on jurisdiction and required briefs to be served by the parties.

SUMMARY OF ARGUMENT

The trial court erred in granting Respondent Mary Martin's motion for summary judgment. The law in the State of Florida imposes on a parent the obligation to support his or her minor children until the child reaches the age of majority; said obligation exists pursuant to the common law of the State of Florida and pursuant to Chapter 742 as regards children of unmarried parents and pursuant to Florida Statute 61.30 as regards children of married parents. Child support is a pre-existing and unavoidable duty of parenthood. The common law of the State of Florida provides that the duty of support is for the benefit of and belongs to the children, not their parents. In the case at hand, the Petitioners, upon reaching the age of majority, promptly pursued their rights to retroactive child support. Previous to reaching the age of 18, the Petitioners did not have the right to bring an action on their own behalf for retroactive child support. To that effect, and because no party stepped forward to bring an action for them, Petitioners would be forfeiting their rights to child support should Florida law fail to recognize their right to bring suit on their own behalf against a parent for retroactive child support, even where there is no agreement or Court Order previously establishing a child support obligation. The motion for summary judgment was improperly granted by the trial court.

ARGUMENT

ADULT CHILDREN SHOULD HAVE STANDING TO BRING SUIT ON THEIR OWN BEHALF AGAINST A PARENT FOR RETROACTIVE CHILD SUPPORT NOTWITHSTANDING LACK OF PREVIOUS AGREEMENT OR COURT ORDER ESTABLISHING A CHILD SUPPORT OBLIGATION.

It is well settled that a person under the age of 18 years is, in the eyes of the law, an infant. The trial court, in finding that an adult cannot bring a cause of action for retroactive child support, has effectively ruled that an infant has no cause of action for retroactive child support unless said infant was fortunate enough to have had a third party step forward to bring an action in Circuit Court to enforce child support obligations. In the case at bar, the Petitioners who were raised by a third party, upon reaching majority, promptly prosecuted an action for retroactive child support.

The Petitioners could only have brought an action for past due child support while under the age of 18 if a guardian ad litem or next friend would have taken the initiative to bring such an action. (*see* Kingsley vs. Kingsley 623 So.2d 780 (Fla. 5th DCA 1993). In Kingsley, the Court held that

> disability of non-age prevents a minor from initiating or maintaining an action for termination of parental rights. Id. at 783.

The Court enunciated the general rule that

> Courts historically recognize that

> unemancipated minors do not have the legal capacity to initiate legal proceedings in their own names.
> Id.

Were this a paternity action brought by the natural mother to enforce her rights to child support, Florida law would favor recovery in that instance. The case of Fowland vs. Piper, 611 So.2d 1308 (Fla. 1st DCA 1992), involved an action wherein the trial court awarded retroactive child support from the date of birth. In the Fowland case, the child was born on July 21, 1982. On May 10, 1991, almost 9 years later, Piper filed a complaint to determine paternity. At trial, Fowland was ordered to pay monthly child support of $2200.00 per month since the birth of the child, for a total of $22,600.00. In awarding retroactive child support, the Fowland court cited the proposition that

> the father owes a duty to nurture, support, educate and protect his child, and the child has the right to call on him for the discharge of this duty. These obligations are imposed and conferred by the laws of nature and public policy for the good of society, will not permit or allow the father to irrevocably divest himself of or to abandon them at his mere will or pleasure.
> Id. at 1312.

The Fourth District court, in the case under review believes that Fowland is distinguishable by virtue of the fact that it was a paternity action. However,it is arguable that this is not an important distinction.

As Judge Farmer of the Fourth District pointed out in his dissent,

> For parents who have never married, the legislature has given us Chapter 742. It is no accident that Section 742.01 provides that "any child" among others, "may bring proceedings in the Circuit Court in chancery, to determine the paternity of the child when paternity has not been established by law or otherwise..."

Judge Farmer further observed in his disenting opinion that the legislature does not occupy the area of child support to the exclusion of common law development. Judge Farmer cites Fisher vs. Guidy 106 Fla. 94, 142 So. 818, 821(1932)

> Unless changed by statute, courts of equity have inherent jurisdiction to control and protect infants and their property .... and in the absence of express provision, such jurisdiction is not taken away by provisions of law conferring like power on other courts.

In the case at hand, the order of the trial court provided that the Court did not find any case law that allowed a party to seek retroactive child support prior to the date that the petition for support was filed, other than in cases dealing with paternity matters. Petitioners submit that the case at hand is analogous to a paternity action and that there is no Florida law barring Respondents from bringing an action upon reaching majority for retroactive child support.

The parties have not disputed the fact that the Petitioners were provided support by a third party; therefore, the issue of whether said support by a third party combined with a claim for retroactive support amounts to a windfall must be addressed. Petitioners have found case law in other jurisdictions that indicates that there should not be a double recovery and that

therefore, an action for retroactive support such as is urged in the case at hand, must fail. *See* Cole v. Estate of Armstrong, 707 SW 2d 459 (Mo. App. 1986) and *See* In re: Paternity of PJW (Wis. App. 1989). However, Petitioners submit that the more persuasive

argument is that which was enunciated by Judge Farmer in the dissenting opinion in the Fourth District. Judge Farmer disputed the notion that a Judgment for unpaid child support accruing during a child's minority would amount to a windfall. Further, Judge Farmer pointed out that if anything, said question of a windfall would be an affirmative defense

> subject to pleading and proof by the Defendant, rather than to a judicial guess as to the ultimate outcome of the case on the merits.

and further that said evidentiary issues would explore the possibility that the children may have been living on the edge of poverty and whether they were deprived of certain intangibles beyond food and shelter.

Petitioners submit that children of unmarried parents should have the same right to sue for retroactive child support as do children where only one parent shirks the obligation to pay child support. If anything, children in the position of Petitioners, where both natural parents abandoned them, need more protection and more latitude to bring suit upon reaching majority. The law in the State of Florida recognizes the fact that the rights of

children born within wedlock should be the same as those born outside of wedlock with regard to child support obligations. *See* Cole v. Cole, 723 So.2d 925, 927 (Fla. 3rd DCA 1999). Children in the position of Petitioners herein should not be deemed to have waived rights for retroactive child support where they have been abandoned not only by one parent but by both parents.

CONCLUSION

Based on the foregoing, Petitioners request that this court enter its order reversing the trial court's Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing was sent via U.S. Mail this ____day of April, 2000, to: Marc H. Brawer, Esq., Law Offices of Marc H. Brawer, 7771 West Oakland Park Blvd., Suite 214, Sunrise, Florida, 33351, attorney for Respondent, Mary Martin.

I HEREBY CERTIFY that this brief is produced in 12 point courier font type, which is proportionately spaced.

Respectfully submitted,

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