SUPREME COURT OF FLORIDA

CASE NO. SC04-1045

STATE OF FLORIDA, DEPARTMENT OF REVENUE, o/b/o AMELIA PRESTON, et al.,

Petitioner,

vs.

JAMES (WILLIE) CUMMINGS, et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT CASE NOS. 2D02-5261, 2D02-5279, 2D02-5318, 2D02-5333 2D02-5277 and 2D02-5264

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND FACTS 1

ISSUE PRESENTED FOR REVIEW 3

(as reframed by respondents)

WHETHER THE DISTRICT COURT CORRECTLY HELD THAT THE "LEGAL FATHER" IS AN INDISPENSABLE PARTY WHO MUST BE JOINED IN AN ACTION BROUGHT BY THE DEPARTMENT OF REVENUE AGAINST THE "BIOLOGICAL FATHER" TO DETERMINE PATERNITY AND ESTABLISH CHILD SUPPORT

SUMMARY OF ARGUMENT 4

ARGUMENT 6

A. STANDARD OF REVIEW 6

B. INDISPENSABLE PARTIES 6

1. Legal Father's Support Obligation 8

2. Legal Father's Parental Rights 11

C. PRIVETTE'S NOTICE REQUIREMENTS AND PATE 16

D. UNIFORM PARENTAGE ACT 21

E. DECISIONS FROM OTHER STATES 24

F. THE RECORD 26

G. THE DISTRICT COURT'S NARROW HOLDING 27

CONCLUSION 28

CERTIFICATE OF SERVICE 29

CERTIFICATE OF TYPE SIZE AND STYLE 30

TABLE OF AUTHORITIES

CASES

Achumba v. Neustein,
793 So. 2d 1013 (Fla. 5th DCA),
cause dismissed, 805 So. 2d 804 (Fla. 2001) 6, 12

Albert v. Albert,
415 So. 2d 818 (Fla. 2d DCA 1982) 10

Allman v. Wolfe,
592 So. 2d 1261 (Fla. 2d DCA 1992) 7

Amerada Hess Corp. v. Morgan,
426 So. 2d 1122 (Fla. 1st DCA),
rev. denied, 436 So. 2d 97 (Fla. 1983) 7, 10

Betzaida D. v. Lazaro,
99 Misc. 2d 408, 416 N.Y.S.2d 190
(N.Y. Fam. Ct. 1979) 25, 26

Blanton v. City of Pinellas Park,
No. SC03-1685, 2004 WL 2359991,
(Fla. Oct. 21, 2004) 6

Burnes v. Burnes,
60 Misc. 2d 675, 303 N.Y.S.2d 736
(N.Y. Fam. Ct. 1969) 25

Coast Cities Coaches, Inc. v. Dade County,
178 So. 2d 703 (Fla. 1965) 18

Commissioner of Public Welfare v. Koehler,
284 N.Y. 260, 30 N.E.2d 587 (1940) 25, 26

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469, 95 S. Ct. 1029, 1047,
43 L. Ed. 2d 328 (1975) 20

Czajak v. Vanonese,
104 Misc. 2d 601, 428 N.Y.S.2d 986
(N.Y. Fam. Ct. 1980) 25

D.F. v. Department of Revenue ex rel. L.F.,
823 So. 2d 97 (Fla. 2002) 10

Daniel v. Daniel,
681 So. 2d 849 (Fla. 2d DCA 1996) 15

Daniel v. Daniel,
695 So. 2d 1253 (Fla. 1997) 10, 11, 15, 28

Department of Health & Rehabilitative Servs.
ex rel. Ward v. Wyatt,
475 So. 2d 1332 (Fla. 5th DCA 1985) 18

Department of Health & Rehabilitative Servs. v. Privette,
617 So. 2d 305 (Fla. 1993) 6, 12, 13, 16, 17

Department of Revenue ex rel. Freckelton v.
Goulbourne,
648 So. 2d 856 (Fla. 4th DCA 1995) 18

Department of Revenue ex rel. Preston v. Cummings,
871 So. 2d 1055 (Fla. 2d DCA 2004) ..... *passim*

Doe v. American Lawyer Media, L.P.,
639 So. 2d 1021 (Fla. 3d DCA 1994) 20

E.J.B. v. State ex rel. A.C.,
669 So. 2d 992 (Ala. Civ. App. 1995) 22

Environmental Confederation of Southwest Fla., Inc. v.
IMC Phosphates, Inc.,
857 So. 2d 207 (Fla. 1st DCA 2003) 18

Fernandez v. McKenney,
776 So. 2d 1118 (Fla. 5th DCA 2001) 12

Fulmer v. Northern Central Bank,
386 So. 2d 856 (Fla. 2d DCA 1980),
rev. denied, 394 So. 2d 1152 (Fla. 1981) 7

G.F.C. v. S.G.,
686 So. 2d 1382 (Fla. 5th DCA 1997) 12

G.T. v. Adoption of A.E.T.,
725 So. 2d 404 (Fla. 4th DCA 1999) 9

Hertz Corp. v. Piccolo,
453 So. 2d 12 (Fla. 1984) 7

In re the Paternity of Chad M.G.,
194 Wis. 2d 689, 535 N.W.2d 97 (Wis. Ct. App.),
rev. denied, 540 N.W.2d 202 (Wis. 1995) 19

J.M.L. v. C.L.,
536 S.W.2d 944 (Mo. Ct. App. 1976) 25

Martinez v. Balbin,
76 So. 2d 488 (Fla. 1954) 7

Pitcairn v. Vowell,
580 So. 2d 219 (Fla. 1st DCA 1991) 28

R.A.J. v. L.B.V.,
169 Ariz. 92, 817 P.2d 37 (Ariz. Ct. App. 1991) 24

R.H.B. v. J.B.W.,
826 So. 2d 346 (Fla. 2d DCA 2002) 9, 12

State, Dep't of Revenue ex rel.
Boggs v. Pate,
824 So. 2d 1038 (Fla. 1st DCA 2002) 16, 17, 28

State, Dep't of Social Servs. Support Enforcement
Servs. v. Guichard,
655 So. 2d 1371 (La. Ct. App. 1995) 25

Taylor v. Taylor,
279 So. 2d 364 (Fla. 4th DCA 1973) 9, 11

Thomas v. Collen,
521 So. 2d 1322 (Ala. Civ. App. 1987) 22

Union Cent. Life Ins. Co. v. Carlisle,
593 So. 2d 505 (Fla. 1992) 17

United States v. McMaster,
174 F.2d 257 (5th Cir. 1949) 9

FLORIDA STATUTES AND RULES

Section 39.801(3)(b), Florida Statutes (2004) 21

Section 49.011(13), Florida Statutes (2004) 21

Section 382.013(2)(a), Florida Statutes (2000) 6

Section 382.015(2), Florida Statutes (2002) 14, 15

Section 409.2564(1), Florida Statutes (2000) 4, 6, 8, 9, 20

Section 742.09, Florida Statutes 20

Fla. Fam. L. R. P. 12.230 18

Fla. R. Civ. P. 1.230 18

STATUTES FROM OTHER STATES

Ala. Code §§ 26-17-1 to 26-17-22 (1975) 21

Cal. Fam. Code §§ 7600 to 7730 (2004) 21

Col. Rev. Stat. Ann. §§ 19-4-101 to 19-4-130 (1999) 21

13 Del. Code Ann. §§ 8-101 to 8-904 (2004) 22

Haw. Rev. Stat. §§ 584-1 to 584-25 (2003) 21

750 Ill. Comp. Stat. Ann. 45/1 to 45/27 (2004) 21

Kan. Stat. Ann. §§ 38-1110 to 38-1138 (1993) 21

LSA-R.S. 46:236.1 F(1) 25

Minn. Stat. Ann. §§ 257.51 to 257.75 (2003) 21

Mo. Stat. Ann. §§ 210.817 to 210.852 (2004) 21

Mont. Code Ann. §§ 40-6-101 to 40-6-135 (2003) 21

Nev. Rev. Stat. 126.011 to 126.371 (2004) 21

N.J. Stat. Ann. §§ 9:17-38 to 9:17-59 (2002) 21

N.M. Stat. Ann. §§ 40-11-1 to 40-11-23 (1978) 21, 22

N.D. Cent. Code §§ 14-17-01 to 14-17-26 (2003) 21

Ohio Rev. Code Ann. §§ 3111.01 to 3111.19 (2002) 21

R.I. Gen. Laws §§ 15-8-1 to 15-8-27 (1956) 21, 22

Tex. Fam. Code Ann. §§ 160.001 to 160.763 (2002) 22

Wash. Rev. Code Ann. §§ 26.26.011 to 26.26.913 (2005) 22

Wyo. Stat. Ann. §§ 14-2-401 to 14-2-907 (1977) 22

OTHER AUTHORITIES

Chris W. Altenbernd,
Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory Reform,
26 Fla. St. U. L. Rev. 219, 225 (1999) 7

Unif. Parentage Act (1973), 9B U.L.A. 377 (2001) 21

Unif. Parentage Act (1973) § 4, 9B U.L.A. 393 (2001) 22

Unif. Parentage Act (1973) § 9, 9B U.L.A. 435 (2001) 22

Unif. Parentage Act (2000) § 603, 9B U.L.A. 339 (2001) 23

STATEMENT OF THE CASE AND FACTS

Respondents accept the Department of Revenue's statement of the case and facts with the following corrections and additions.

At page one of its argument section, the Department asserts that in each of the six cases under review "the mother and husband were no longer living together in an intact family relationship." Similarly, at page nine of its argument section, the Department states:

> In the paternity cases before this court for review, none of the legal fathers have maintained an actual relationship with their child. At the time of the filing of the paternity complaints against the alleged biological fathers, there was no father-child relationship with the children. The marriages between the legal fathers and mothers were not intact.

Although possibly true, respondents cannot accept these assertions as fact because the Department did not include any information in the record about the current status of the "legal fathers" other than their names and last known addresses, with the possible exception of the Cummings case (Case No. 00-10169-FD-24). In Cummings, the mother filed an "Affidavit of Marital Status" in which she testified that she married the child's legal father on January 2, 1973, but separated from him in 1977. (R-II 20). According to the affidavit and the mother's sworn complaint, the child in the Cummings case was born April 22, 1986. (R-II 4, 20). Otherwise, the record contains no information about whether the mothers and legal fathers

were still living together when the Department filed the complaints or whether the family units remain intact.

At page ix of its initial brief, the Department states that each "Notice of Action to Legal Father" was sent by United States mail. In addition to mail, the Department attempted personal service in five cases (albeit without success) (R-I 17; R-III 21; R-IV 24; R-V 18; R-VI 22) and published notice in a newspaper of local circulation in one case. (R-I 23).

ISSUE PRESENTED FOR REVIEW

(as reframed by respondents)

WHETHER THE DISTRICT COURT CORRECTLY HELD THAT THE "LEGAL FATHER" IS AN INDISPENSABLE PARTY WHO MUST BE JOINED IN AN ACTION BROUGHT BY THE DEPARTMENT OF REVENUE AGAINST THE "BIOLOGICAL FATHER" TO DETERMINE PATERNITY AND ESTABLISH CHILD SUPPORT

SUMMARY OF ARGUMENT

For several reasons, the district court correctly determined that the legal father is an indispensable party who must be joined in an action filed by the Department against the biological father to determine paternity and establish child support pursuant to section 409.2564(1), Florida Statutes (2000), unless the legal father's parental rights and obligations have been divested by an earlier judgment.

First, the Department filed the complaints in these cases "to secure the obligor's payment of current support . . . ." § 409.2564(1), Fla. Stat. (2000). Because the legal father is obligated to support his minor child as long as he remains in loco parentis, he is an "obligor" under section 409.2564(1) and therefore must be named as an indispensable party in the Department's action.

Second, the legal fathers' parental rights in these cases may be adversely impaired by the Department's paternity proceedings. The legal fathers also may have a strong interest in preventing their children from suffering the stigma of illegitimacy which would result if the court enters judgments in these cases determining that the biological fathers are the children's actual fathers.

Third, although the notices of action mailed by the Department to the legal fathers in these cases gave them an opportunity to be heard, the notices were insufficient to protect their parental rights because they did not confer the status of "party" with the right to call and cross-examine witnesses and, if necessary, appeal

an adverse decision. Also, unless the legal fathers are joined as parties, the court's judgment will not have preclusive effect against them under the doctrine of res judicata, which could lead to additional litigation which certainly will not promote the children's best interests.

Finally, the second district's holding in this case is narrowly drawn—it does not require the Department to join the legal father as an indispensable party in every case of this type. If the pleadings establish conclusively that the legal father's parental rights have been divested by an earlier judgment, his joinder is unnecessary.

ARGUMENT

A.

STANDARD OF REVIEW

Respondents agree with the Department that the issue in this case is one of law reviewed by the court de novo. See Blanton v. City of Pinellas Park, No. SC03-1685, 2004 WL 2359991, at *1 (Fla. Oct. 21, 2004) ("The trial court's ruling, which was based on a question of law, is reviewed by this Court de novo.").

B.

INDISPENSABLE PARTIES

The issue in this case is whether the "legal father" is an indispensable party to an action filed against the "biological father" by the Department of Revenue to determine paternity and establish child support pursuant to section 409.2564(1), Florida Statutes (2000). In this brief, the term "legal father" refers to the man who was married to the mother on the child's date of birth and whose name appears as the father on the child's birth certificate as mandated by section 382.013(2)(a), Florida Statutes (2000).[1] See Department of Health & Rehabilitative Servs. v. Privette, 617 So. 2d 305, 307 (Fla. 1993); Achumba v. Neustein, 793 So. 2d 1013,

[1] Section 382.013(2)(a), Florida Statutes (2000), provides:

> If the mother is married at the time of birth, the name of the husband shall be entered on the birth certificate as the father of the child, unless paternity has been determined otherwise by a court of competent jurisdiction.

1014 (Fla. 5th DCA), cause dismissed, 805 So. 2d 804 (Fla. 2001). The term "biological father" refers to "the man whose sperm fertilized the mother's egg, usually through an act of sexual intercourse." Chris W. Altenbernd, Quasi-Marital Children: The Common Law's Failure in Privette and Daniel Calls for Statutory Reform, 26 Fla. St. U. L. Rev. 219, 225 (1999). In all six cases before the court, the legal fathers and the biological fathers are not the same person. Judge Altenbernd's article refers to the children of such relationships as "quasi-marital children." Altenbernd, supra, at 224.

"Indispensable parties are necessary parties so essential to a suit that no final decision can be rendered without their joinder." Hertz Corp. v. Piccolo, 453 So. 2d 12, 14 n.3 (Fla. 1984). "An indispensable party has also been described as 'one whose interest will be substantially and directly affected by the outcome of the case' and 'one whose interest in the subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible.'" Department of Revenue ex rel. Preston v. Cummings, 871 So. 2d 1055, 1058 (Fla. 2d DCA 2004) ("Cummings") (quoting Amerada Hess Corp. v. Morgan, 426 So. 2d 1122, 1125 (Fla. 1st DCA), rev. denied, 436 So. 2d 97 (Fla. 1983), and Allman v. Wolfe, 592 So. 2d 1261, 1263 (Fla. 2d DCA 1992)). If plaintiff fails to join an indispensable party, the trial court must dismiss the action. See Martinez v. Balbin, 76 So. 2d 488, 490 (Fla. 1954); Fulmer v.

Northern Central Bank, 386 So. 2d 856, 858 (Fla. 2d DCA 1980), rev. denied, 394 So. 2d 1152 (Fla. 1981).

In this case, the district court determined that the legal fathers were indispensable parties to the actions filed by the Department against the biological fathers for two basic reasons. First, an action under section 409.2564(1), Florida Statutes (2000),[2] to secure child support from the "obligor" must name the legal father as a party because he may owe the primary obligation to support the minor child financially. See Cummings, 871 So. 2d at 1059-60. Second, the legal father's parental rights may be adversely affected by the proceedings. See Cummings, 871 So. 2d at 1060-61. For the reasons which follow, respondents respectfully submit that the district court's analysis is correct and should be approved by this court.

1. Legal Father's Support Obligation

As noted by the court below, "[w]hen a child is born during a marriage, the legal duty to support that child presumptively rests with the parties to the

[2] Section 409.2564(1), Florida Statues (2000), provides in pertinent part:

> In each case in which regular support payments are not being made as provided herein, the department shall institute, within 30 days after determination of the obligor's reasonable ability to pay, action as is necessary to secure the obligor's payment of current support and any arrearage which may have accrued under an existing order of support.

marriage." Cummings, 871 So. 2d at 1059. "This is because a child born during a marriage is presumed to be the legitimate and legal child of the husband and wife." Id. Based on this presumption of legitimacy with the concomitant duty of support, "so long as a couple remains married, the husband and legal father stands in loco parentis[3] to the child and owes a duty of support to the child." Id. (footnote added) (citing R.H.B. v. J.B.W., 826 So. 2d 346, 347 (Fla. 2d DCA 2002); G.T. v. Adoption of A.E.T., 725 So. 2d 404, 411 (Fla. 4th DCA 1999) ("A husband is presumed to be the father of a child born during the marriage and must provide for support of the child unless and until the husband meets his burden of disproving paternity."); Taylor v. Taylor, 279 So. 2d 364, 366 (Fla. 4th DCA 1973)).

Because the legal father may be the very person obligated for the child's financial support, he must be joined as a party to an action filed by the Department under section 409.2564(1) to determine the child support "obligor." As explained by the district court:

> Piecing together these various legal principles, the law suggests that not only is the legal father an indispensable party, he is the person the Department must usually first pursue in determining who has a duty to support the child. If the presumption of legitimacy or legal

[3] The Latin phrase "in loco parentis" has been defined as "[i]n the place of a parent; charged factitiously with a parent's rights, duties, and responsibilities[,] . . . more specifically, the relationship which a person[] assumes toward a child not his own, holding the child out to the world as a member of his family toward whom he owes the discharge of parental duties." United States v. McMaster, 174 F.2d 257, 259 (5th Cir. 1949) (internal quotations and citation omitted).

> fatherhood has any meaning, it must require that the State and the courts, strangers to the marital and familial relationships in these cases, look first to the legal father in trying to establish court-ordered child support. If the legal father remains in loco parentis, he may be required to fulfill the duty to support the child, R.H.B., 826 So. 2d at 347, and the Department may have no basis to look elsewhere for the child's support.

Cummings, 871 So. 2d at 1060. Based on this rationale, "'a complete and efficient determination of the equities and rights between the other parties is not possible'" without joining the legal father as a party to the Department's action. Cummings, 871 So. 2d at 1058 (quoting Amerada Hess, 426 So. 2d at 1125)).

Citing Daniel v. Daniel, 695 So. 2d 1253, 1254 (Fla. 1997), the Department maintains at page eight of its initial brief that "joining a husband, who is not alleged to be the biological father of the child, is not necessary since that husband has no legal support obligation once the paternity of the actual biological father is established." In Daniel, this court cited "the well-settled rule of law in this state 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 care and support he has not contracted.'" (quoting Albert v. Albert, 415 So. 2d 818, 820 (Fla. 2d DCA 1982)). Although the court made this statement without qualification, the facts in Daniel indicate that the quoted rule relieves the legal father of his obligation to support a quasi-marital child only upon divorce. This assumption was confirmed by this court in D.F. v. Department of Revenue ex rel. L.F., 823 So. 2d 97, 99 (Fla. 2002),

when it cited Daniel for the proposition "that a former husband who raises the issue of paternity during a dissolution of marriage proceeding has no duty to support a child he neither biologically fathered, adopted, nor contracted to care for." (emphasis supplied). See also Taylor, 279 So. 2d at 366 ("A man has no legal duty to provide support for a minor child which is neither his natural nor adopted child and for whose care and support he has not contracted. An exception to this is made in the case of one who stands in loco parentis to the child."). Thus, so long as the legal father is married to the mother of the child, he remains primarily responsible for the child's financial support. In such cases, if the legal father is joined as an indispensable party and objects to the paternity proceedings filed by the Department against the alleged biological father, and can support his objection with proof of his current family status, the court will likely dismiss the Department's action in which case the alleged biological father's paternity and his concomitant duty of support will not be established.

2. Legal Father's Parental Rights

The Department argues that the court can determine paternity in these cases without affecting the legal fathers' parental rights. In support of its argument, the Department notes that their complaints, each self-servingly labeled "Complaint to Establish Paternity, Child Support and Other Relief without Affecting Legal Rights of Husband of Mother at Time of Birth," allege in paragraph five that "Petitioners

do not seek to affect any legal rights relating to this child(ren) said individual may possess." (R-I 1; R-II 1; R-III 1; R-IV 1; R-V 1). The Department contends further that none of the actions involves custody, visitation or other parental prerogatives. For the reasons discussed below, the court should reject the Department's argument.

In Achumba, 793 So. 2d at 1015, and G.F.C. v. S.G., 686 So. 2d 1382, 1386 (Fla. 5th DCA 1997), the fifth district indicated that the concept of "dual fathership" between the biological father and the legal father is untenable under Florida law. According to the second district, Achumba and G.F.C. "suggest that a determination that the biological father is the 'father' of a child results in the termination of any rights theretofore held by the husband and legal father." R.H.B., 826 So. 2d at 350 n.5. This court echoed the same sentiment in Privette when it described a paternity action as "a species of termination proceeding when the petition will have the effect of vesting parental rights in the putative natural father and removing parental rights from the legal father." Privette, 617 So. 2d at 309 n. 7. See also Fernandez v. McKenney, 776 So. 2d 1118, 1121 n.5 (Fla. 5th DCA 2001) (Sharp, J., concurring) ("A child can have only one legal father under our present law and that determination will resolve which man will enjoy the rights and responsibilities of fatherhood . . . ."). It stands to reason that a court should not

terminate the legal father's parental rights without making him a formal party to the action in which the court will make that critical determination.

In many cases involving what Judge Altenbernd refers to as quasi-marital children, "the legal father has established a mutually rewarding relationship with the child, he desires to continue exercising parental rights, he is supporting the child to the best of his ability, and maintaining the existing relationship is in the child's best interests." Privette, 617 So. 2d at 308 n.3. In such cases, the legal father "has an unmistakable interest in maintaining the relationship with his child unimpugned." Id. at 307. As the Cummings court explained:

> While there may be some cases where the child has had little contact with the legal father, other cases will be quite the contrary. It is conceivable that a man who has established a loving, caring relationship of some years' duration with his legal child later will prove not to be the biological father. Where this is so, it seldom will be in the children's best interests to wrench them away from their legal fathers and judicially declare that they now must regard strangers as their fathers. The law does not require such cruelty toward children.

Id. at 309.

As an additional reason to name him as an indispensable party, the legal father has a strong interest in protecting the child from the stigma of illegitimacy which undoubtedly will arise if the court enters a judgment identifying the biological father as another man. As explained by the court below,

> if these paternity actions were allowed to proceed and the Department established that a putative biological father of a child was in fact the biological father of a child, the Department intends for the trial court to enter a judgment of paternity. Despite the title of the Department's complaint, this cannot be accomplished without affecting the legal rights of both the legal father and the child. Section 382.013(2)(d), Florida Statutes (2002), mandates that the name of the man who is determined to be the biological father in a paternity action be placed upon the birth certificate. Upon receipt of such a judgment, the Department of Health is required to prepare and file a new birth certificate reflecting the name of the biological father as the legal father. See § 382.015(2), Fla. Stat. (2002).

Cummings, 871 So. 2d at 1060.

The statute cited by the court below, section 382.015(2), Florida Statutes (2002), provides:

> Upon receipt of the report or a certified copy of a final decree of determination of paternity, together with sufficient information to identify the original certificate of live birth, the department shall prepare and file a new birth certificate which shall bear the same file number as the original birth certificate. The registrant's name shall be entered as decreed by the court. The names and identifying information of the parents shall be entered as of the date of the registrant's birth.

Thus, once the trial court enters a judgment identifying the putative biological father as the child's actual father, the legal father's name must be removed from the birth certificate and replaced with the name of a man who was not married to the mother on the child's date of birth. Under these circumstances, even if the

child remains technically legitimate, the stigma of illegitimacy nevertheless attaches, a stigma which should be avoided whenever possible to protect the best interests of the child.

The Department takes issue with this analysis by citing Daniel for the proposition that "the child will not be 'bastardized' or made 'illegitimate' by a subsequent finding of actual parentage." Initial Brief at 8. Respondents disagree with the Department's interpretation of Daniel. The final judgment of dissolution of marriage in Daniel did not identify the biological father or otherwise establish paternity. Therefore, the legal father's name remained on the birth certificate and, consequently, the child was not, using the Department's terms, "bastardized" or made "illegitimate." See Daniel v. Daniel, 681 So. 2d 849, 851 (Fla. 2d DCA 1996). The present cases differ from Daniel because, here, the Department has requested judgments establishing the alleged biological fathers as the actual fathers (R-I 2; R-II 2; R-III 2; R-IV 2; R-V 2; R-VI 2) and, in four of the cases, has actually asked the trial court to require the Office of Vital Statistics to enter the names of the alleged biological fathers on the children's birth certificates. (R-I 5; R-II 5; R-III 5; R-IV 5) (ad damnum clauses, paragraph 6). If the trial court grants the requested relief, the legal fathers' names on the birth certificates will be removed and replaced with the names of the biological fathers pursuant to section 382.015(2), Florida Statutes, effectively making the children "illegitimate."

C.

PRIVETTE'S NOTICE REQUIREMENTS AND PATE

In Privette, this court held that

> before a blood test can be ordered in cases of this type, the trial court is required to hear argument from the parties, including the legal father if he wishes to appear[4] and a guardian ad litem appointed to represent the child.[5]
>
> ---
>
> **4**. The legal father must be given notice of the hearing either actually if he is available or constructively if otherwise; and he must be heard if he wishes to argue personally or through counsel.
>
> **5**. The child as represented by the guardian ad litem is an indispensable party, since the child's best interests are the primary issue of the proceeding.

Privette, 617 So. 2d at 308.

In the case cited for conflict, State, Dep't of Revenue ex rel. Boggs v. Pate, 824 So. 2d 1038 (Fla. 1st DCA 2002), the first district seized upon the dicta included in the Privette footnotes quoted above to hold that the legal father, unlike the child's guardian ad litem, is not an indispensable party in an action to determine paternity. The first district reasoned:

> In Department of Health & Rehabilitative Services v. Privette, 617 So.2d 305 (Fla. 1993), the supreme court held that the trial court was required to hear arguments from all parties, including the legal father "if he wishes to appear." Id. at 308. In determining whether the father wishes to appear, the supreme court notes that the legal father must be given notice of the paternity hearing

> "either actually if he is available or constructively if otherwise." Id. at 308, n.4. Although the opinion specifically states that the child, as represented by the guardian ad litem, is an indispensable party, in the same sentence it notes that the legal father only must be given notice of the hearing. Id. at 308. Thus, it appears that the supreme court does not necessarily deem the legal father to be an indispensable party.

Pate, 824 So. 2d at 1039. For several reasons, respondents urge this court to disapprove Pate, clarify the Privette footnotes and hold that the legal father is an indispensable party in paternity proceedings involving quasi-marital children.

First, in declining to follow Pate, the district court below explained that Privette "had a narrow scope and standard of review, and the court was not called upon to determine whether a legal father was indispensable to the action." Cummings, 871 So. 2d at 1062.

Second, merely providing the legal fathers with notice of hearing without making them actual parties is not sufficient to protect their parental rights. Although notice of the type given by the Department in these cases gives the legal fathers an opportunity to be heard, it does not provide the basic rights afforded to parties to call witnesses, confront witnesses by cross-examination and, if necessary, appeal an adverse decision. Although legal fathers arguably can gain these rights through intervention, the right to intervene is discretionary and thus not guaranteed. See Union Cent. Life Ins. Co. v. Carlisle, 593 So. 2d 505, 507 (Fla. 1992). Further, an intervenor's rights are subordinate to the rights of the parties.

See Fla. R. Civ. P. 1.230;[4] Coast Cities Coaches, Inc. v. Dade County, 178 So. 2d 703, 706 (Fla. 1965) ("It is settled law, however, that an intervening defendant is bound by the record made at the time that he intervenes and must take the suit as he finds it unless the court, in its discretion, otherwise orders."); Environmental Confederation of Southwest Fla., Inc. v. IMC Phosphates, Inc., 857 So. 2d 207, 210-11 (Fla. 1st DCA 2003) ("[T]he rights of an intervenor are much more limited than the rights of a party.").

Third, the interests of finality and judicial economy are best served if all potential parties to the paternity proceedings are joined in one action. While a judgment establishing paternity in the biological father is binding on him under the doctrine of res judicata, see Department of Revenue ex rel. Freckelton v. Goulbourne, 648 So. 2d 856, 857 (Fla. 4th DCA 1995), that judgment will not bind the legal father unless he is joined in the paternity action as a party. Cf. Department of Health & Rehabilitative Servs. ex rel. Ward v. Wyatt, 475 So. 2d 1332, 1333-34 (Fla. 5th DCA 1985) (dismissal with prejudice of paternity action

[4] Fla. R. Civ. P. 1.230 provides:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

Accord Fla. Fam. L. R. P. 12.230.

brought by mother against alleged father did not bar by res judicata right of child to bring subsequent paternity action against alleged father because parties to two actions were different and quality or identity of persons for whom each claim was made also was different.). A Wisconsin appellate court recognized the advantages of joining all parties in one paternity action:

> Rather, we recommend that when a paternity action is initiated by a party, trial courts take affirmative steps to ensure that those persons whose similar interests remain unlitigated are added as additional parties. In this way, the first judgment will have preclusory effects on all individual parties to the action, and the courts and defendants will not be confronted with a series of sequential claims identical to previously resolved judicial matters. Taking steps to join the unnamed parties who have an interest in the determination should be neither difficult nor time consuming, and the benefits of fairness and judicial economy well support whatever additional expense may be required to litigate the rights of all parties in the initial action.

In re the Paternity of Chad M.G., 194 Wis. 2d 689, 535 N.W.2d 97, 100 (Wis. Ct. App.), rev. denied, 540 N.W.2d 202 (Wis. 1995).

At pages 16 and 17 of its initial brief, the Department contends that a holding which requires the legal father's joinder as an indispensable party in paternity actions involving quasi-marital children will cause many actions to fail because the Department cannot serve the legal fathers by publication. In support of this contention, the Department argues that when personal service on the legal father cannot be obtained, the Department will be prevented from serving the legal

father with constructive process by publication because section 742.09, Florida Statutes, makes it unlawful for print and broadcast media to publish the name of any party to an action to establish paternity. This argument lacks merit for several reasons.

First, section 742.09, Florida Statutes, does not apply to an action brought by the Department pursuant to section 409.2564(1), Florida Statutes. By its express terms, section 742.09 applies only to actions brought pursuant to Chapter 742, Florida Statutes.

Second, it is not a violation of section 742.09 for a newspaper to publish the names of the parties to a paternity action when the newspaper obtains the names from unsealed court files or other public records. See Doe v. American Lawyer Media, L.P., 639 So. 2d 1021 (Fla. 3d DCA 1994). As the Doe court noted, "'[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.'" Id. at 1022 (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496, 95 S. Ct. 1029, 1047, 43 L. Ed. 2d 328 (1975)). The record in this case indicates that the Department has not asked the trial court to seal any of the files, and the names of the parents and putative fathers are thus open for public scrutiny.

Third, the Department's concern about disclosing confidential information through constructive service by publication is somewhat dubious since it attempted

in this case to serve the legal father in Case No. 01-6941-FD-24 by publishing notice in the Tampa Bay Review. (R-I 23). The notice published by the Department included the names of the mother, legal father and biological father without any semblance of confidentiality. (R-I 23).

Finally, constructive service of process by publication is allowed in termination of parental rights cases pursuant to sections 39.801(3)(b) and 49.011(13), Florida Statutes (2004). If serving the natural parents by publication is sufficient in termination cases, it should be adequate for serving legal fathers in paternity actions.

D.

UNIFORM PARENTAGE ACT

In 1973, the National Conference of Commissioners on Uniform State Laws approved the Uniform Parentage Act (UPA). See Unif. Parentage Act (1973), 9B U.L.A. 377 (2001) (Historical Notes). Fifteen states have adopted the 1973 UPA[5]

[5] Alabama: Ala. Code §§ 26-17-1 to 26-17-22 (1975); California: Cal. Fam. Code §§ 7600 to 7730 (2004); Colorado: Col. Rev. Stat. Ann. §§ 19-4-101 to 19-4-130 (1999); Hawaii: Haw. Rev. Stat. §§ 584-1 to 584-25 (2003); Illinois: 750 Ill. Comp. Stat. Ann. 45/1 to 45/27 (2004); Kansas: Kan. Stat. Ann. §§ 38-1110 to 38-1138 (1993); Minnesota: Minn. Stat. Ann. §§ 257.51 to 257.75 (2003); Missouri: Mo. Stat. Ann. §§ 210.817 to 210.852 (2004); Montana: Mont. Code Ann. §§ 40-6-101 to 40-6-135 (2003); Nevada: Nev. Rev. Stat. 126.011 to 126.371 (2004); New Jersey: N.J. Stat. Ann. §§ 9:17-38 to 9:17-59 (2002); New Mexico: N.M. Stat. Ann. §§ 40-11-1 to 40-11-23 (1978); North Dakota: N.D. Cent. Code §§ 14-17-01 to 14-17-26 (2003); Ohio: Ohio Rev. Code Ann. §§ 3111.01 to 3111.19 (2002); Rhode Island: R.I. Gen. Laws §§ 15-8-1 to 15-8-27 (1956).

while four states have adopted the more recent 2000 version.[6] Concerning indispensable parties in paternity actions, the 1973 UPA provides:

> The child shall be made a party to the action. If he is a minor he shall be represented by his general guardian or a guardian ad litem appointed by the court. The child's mother or father may not represent the child as guardian or otherwise. The court may appoint the [appropriate state agency] as guardian ad litem for the child. The natural mother, each man presumed to be the father under Section 4,[7] and each man alleged to be the natural father, shall be made parties or, if not subject to the jurisdiction of the court, shall be given notice of the action in a manner prescribed by the court and an opportunity to be heard. The court may align the parties.

Unif. Parentage Act (1973) § 9, 9B U.L.A. 435 (2001) (emphasis supplied; footnote added).[8] Based on this provision, the legal father is an indispensable party to a paternity action under the 1973 UPA, see Thomas v. Collen, 521 So. 2d 1322 (Ala. Civ. App. 1987), unless a divorce decree determines the minor child is not the biological child of the legal father. See E.J.B. v. State ex rel. A.C., 669 So. 2d 992 (Ala. Civ. App. 1995). Thus, the 1973 UPA is entirely consistent with the

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[6] Delaware: 13 Del. Code Ann. §§ 8-101 to 8-904 (2004); Texas: Tex. Fam. Code Ann. §§ 160.001 to 160.763 (2002); Washington: Wash. Rev. Code Ann. §§ 26.26.011 to 26.26.913 (2005); Wyoming: Wyo. Stat. Ann. §§ 14-2-401 to 14-2-907 (1977).

[7] Under section 4 of the 1973 UPA, the "man presumed to be the father" includes the "legal father" as defined in this brief. See Unif. Parentage Act (1973) § 4, 9B U.L.A. 393 (2001).

[8] New Mexico and Rhode Island did not adopt section nine as worded. See N.M. Stat. Ann. §§ 40-11-9 (1978); R.I. Gen. Laws §§ 15-8-1 to 15-8-27 (1956).

district court's holding in this case "that a legal father of a child is an indispensable party in any action to determine paternity and to place support obligations on another man unless the pleading conclusively establishes that the legal father's rights to the child have been divested by some earlier judgment." Cummings, 871 So. 2d at 1061-62.

Under the 2000 version of the UPA, parties to a paternity action must include "(1) the mother of the child; and (2) a man whose paternity of the child is to be adjudicated." Unif. Parentage Act (2000) § 603, 9B U.L.A. 339 (2001). Respondents assume that "a man whose paternity of the child is to be adjudicated" includes the legal father under the facts of the present cases.

Although the adoption of the UPA in Florida is a legislative prerogative, respondents urge the court to follow the UPA's treatment of indispensable parties which, in our view, represents the more enlightened approach to this procedural problem because it accounts for the many variations and permutations prevalent in twenty-first century family structure. Also, as discussed below, several other states, notably Arizona, likewise have modernized their procedural requirements in paternity actions and Florida should follow suit.

E.

DECISIONS FROM OTHER STATES

States which have not adopted the UPA have reached different conclusions as to whether the legal father, as defined in this brief, is an indispensable party to a paternity action. For example, in R.A.J. v. L.B.V., 169 Ariz. 92, 817 P.2d 37 (Ariz. Ct. App. 1991), the court held that the legal father is an indispensable party based on the following rationale:

> We find that the legal and equitable considerations involved in a paternity action weigh heavily in favor of naming Mr. V. [legal father] as a party to the proceedings. Under both the federal and Arizona constitutions, a person is entitled to due process of law. Amend V and XIV, United States Constitution; Art. II, section 4, Arizona Constitution. Mr. V. was entitled to receive notice of Mr. J.'s [biological father's] paternity claim so that he could choose for himself his legal posture regarding this child and the integrity of his family.
>
> A consideration of Rule 19(a)[, Arizona Rules of Civil Procedure] also leads to the conclusion that Mr. V. should be a party to the action. Like the husbands in J.M.L. and Betzaida D., Mr. V., as the presumptive father, has an interest in a child born to his wife during their marriage, a child who carries his name and lives with him. Because Mr. V.'s objective for the outcome of the litigation might differ from that of either his wife or Mr. J.'s, his ability to protect his interests is impaired if he is not named as a party and given an opportunity to present his position.
>
> Finally, equitable considerations support naming Mr. V. as a party, specifically the effect that the outcome of the action will have on the family relationship. As one of

> the presumptive heads of the family unit, he should be given an opportunity to give voice to his view regarding who is named as the child's father. The order requested here would be determinative of the child's parentage.

Id. at 43. See also J.M.L. v. C.L., 536 S.W.2d 944 (Mo. Ct. App. 1976) (decided before Missouri adopted the 1973 UPA).

On the other hand, in State, Dep't of Social Servs. Support Enforcement Servs. v. Guichard, 655 So. 2d 1371 (La. Ct. App. 1995), a Louisiana appellate court held that the legal father is not an indispensable party to an action brought by the state against the biological father to establish paternity and support. Notably, however, the Louisiana court relied on a statute which specifically authorizes the Louisiana Department of Social Services to bring a paternity action "'against an alleged biological parent notwithstanding the existence of a legal presumption that another person is the parent of the child solely for the purpose of fulfilling its responsibility under this Section . . . .'" Id. at 1375 (quoting LSA-R.S. 46:236.1 F(1)). Florida has not enacted similar legislation.

New York courts have decided cases going both ways. In Commissioner of Public Welfare v. Koehler, 284 N.Y. 260, 30 N.E.2d 587 (1940), and Czajak v. Vanonese, 104 Misc. 2d 601, 428 N.Y.S.2d 986 (N.Y. Fam. Ct. 1980), the courts determined that the legal father is not an indispensable party to an action to establish paternity. However, the courts in Betzaida D. v. Lazaro, 99 Misc. 2d 408, 416 N.Y.S.2d 190 (N.Y. Fam. Ct. 1979), and Burnes v. Burnes, 60 Misc. 2d 675,

303 N.Y.S.2d 736 (N.Y. Fam. Ct. 1969), reached the opposite conclusion. The court in Betzaida found that Koehler was outdated precedent based on intervening statutory enactments. See Betzaida D., 416 N.Y.S.2d at 191.

F.

THE RECORD

In its initial brief, the Department asserts that the biological father is the only indispensable party in paternity and support establishment cases when

> [t]he factual allegations of the paternity complaint include: that while the mother was married, she engaged in sexual relations with a man other than her husband; as a result, of those sexual relations she became pregnant with the other man's child; and although she was still married when the child was born, the marriage was no longer intact; the legal father had had no relationship with the child; the legal father has not provided any ongoing financial support for the child; the child is in need of support from the actual biological father; the biological father has been identified by the mother; and the court can acquire jurisdiction over the biological father.

Initial Brief at 20 (emphasis supplied).

Despite these assertions, the factual allegations of the complaints and supporting materials in these cases, with the possible exception of the Cummings case, do not indicate whether the marriages between the mothers and legal fathers are intact, whether the legal fathers have any relationship with their children or whether the legal fathers have provided support. Indeed, the Department concedes

this record deficiency at page nine of its initial brief, but nevertheless "invites this court to provide direction as to the allegations or elements of the cause of action that must be plead in these unique types of cases."

Respondents urge the court to decline the Department's invitation unless it requires the Department to join the legal father in these cases as a named party. The critical facts surrounding the relationship between the legal father and the child and the status of the family unit cannot be disposed of simply by allegations in the Department's complaint. The legal father's failure to establish a relationship with the child, his failure to support the child and his absence from the family unit should never be assumed and, even if alleged, should be tested by the usual rules of evidence and standards of proof, and then only after the Department joins the legal father as a bona fide party.

G.

THE DISTRICT COURT'S NARROW HOLDING

It should be emphasized that the second district's holding quoted below does not require the legal father's joinder in every paternity and support action as the Department's brief suggests.

> Unlike the First District, we conclude that when the Department seeks to establish the paternity of a child born during the mother's marriage to another man, the notice and opportunity to be heard that must be provided to a legal father pursuant to Privette will generally require the joinder of the legal father as an indispensable

> party, unless the factual allegations in the complaint conclusively establish the legal father's rights have already been divested by an earlier judgment.

Cummings, 871 So. 2d at 1061. Thus, if the Department can produce an earlier judgment, as in Daniel, which conclusively establishes that the legal father is not obligated to support the child and claims no parental rights, the legal father's joinder is unnecessary. Otherwise, it is not an onerous burden to require the Department to join the legal father as an indispensable party to protect his interests.

CONCLUSION

Respondents respectfully urge the court to approve the decision of the second district in Cummings and disapprove the decision of the first district in Pate.[9]

Respectfully submitted:

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[9] The court also should disapprove Pitcairn v. Vowell, 580 So. 2d 219 (Fla. 1st DCA 1991), which reached the same result as Pate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William H. Branch, Esquire, Assistant Attorney General, Office of the Attorney General, Child Support Enforcement, The Capitol, Plaza 01, Tallahassee, Florida 32399-1050 by regular U.S. Mail this 1st day of December, 2004.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned attorney hereby certifies that this brief was prepared using a Times New Roman 14-point font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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