IN THE SUPREME COURT, STATE OF FLORIDA

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

Petitioner, **CASE NO.: SC04-1045**

vs.

JAMES (WILLIE) CUMMINGS, et al.,

Respondents.

_____/

PETITIONER'S INITIAL BRIEF

An Appeal From The Second District Court Of Appeal
DCA CASE NOS. 2D02-5261; 2D02-5279; 2D02-5318; 2D02-5333; 2D02-5277; 2D02-5264

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

WILLIAM H. BRANCH
Assistant Attorney General
Bar No. 401552
Office of the Attorney General
Child Support Enforcement
The Capitol, Plaza 01
Tallahassee, Florida 32399-1050

Counsel for Petitioner

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PRELIMINARY STATEMENT

This appeal arises from six separate paternity actions that were filed in the circuit court of Pinellas County, Florida. The cases were consolidated for the purposes of appeal before the Second District Court of Appeal.

The Department of Revenue was the plaintiff or petitioner in each of the cases below, and brought each paternity action on behalf of the respective mother in each case.

Since there were six separate paternity cases, there were six separate defendants or respondents below.

The petitioner, Department of Revenue, will be referred to herein as DOR.

Reference to the record on appeal will be as follows: R- followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This appeal involves six separate paternity cases that were filed in the Pinellas County Circuit Court. The cases were consolidated for the purposes of appeal before the Second District Court of Appeal based upon their similar factual and legal issues.

Each case involves a paternity action in which DOR is seeking to establish paternity of a "biological" father, and in which at the time of the filing of the complaint to determine paternity there was a "legal" father, or husband.

In each case, a Complaint to Establish Paternity, Child Support and Other Relief Without Affecting Legal Rights of Husband or Mother at Time of Birth was filed.

Each complaint alleges that the named respondent in the complaint is the biological father of the named minor child.

Each complaint refers to an affidavit being attached to the complaint that contains facts alleging a basis for the belief that the named respondent is the biological father of the child in question. Each of the identified "affidavits" is entitled "Complaint to Establish Paternity, Child Support and for other Relief." Each of the "affidavits" sets forth the facts illustrating the sexual relations between the mother and the alleged biological father support the claim of paternity.

Each complaint provides, "The mother of the minor child[ren] was married to a man other than the Respondent at the time the child(ren) was conceived or born, but

Petitioners do not seek to affect any legal rights relating to this child(ren) said individual may possess."

The relief sought by each of the complaints was to establish the named respondent as the biological father of the named minor child, and to establish the child support obligation of the named biological father. None of the complaints requested any relief regarding the parental rights, obligations, or legal rights of the man to whom the mother was married at the time of the conception or birth of the child.

In conjunction with the filing of the complaint to determine paternity and the attached affidavit, DOR also filed a Notice of Action to Legal Father. Each of the notices to the legal father are identical. The notice states

> YOU ARE HEREBY NOTIFIED that the above-styled action has been filed to determine the paternity of the child(ren) born on the dates indicated in the Complaint to determine paternity and Exhibits attached thereto, a copy of which is attached. In filing this action, Petitioners seek to have the named Respondent ordered to pay child support for the child(ren) who are the subject of this action. YOU ARE NOT THE NAMED RESPONDENT. If you were legally married to the mother named in the Complaint at the time of the child(ren) was either conceived or born, you may have legal rights or responsibilities you wish to assert.
>
> Although in filing this action the Petitioners do not seek to affect any rights yo may possess, YOU SHOULD CONSULT WITH AN ATTORNEY OF YOUR OWN CHOOSING WITH REGARD TO YOUR RIGHTS AND POTENTIAL RESPONSIBILITIES. Your failure to file a pleading and/or attend a hearing in this cause will be interpreted as your having no objection to the Respondent being adjudicated to be the biological father of the named child(ren).

Each of the notices was sent to the legal fathers by U.S. mail.

In each of the cases an order was entered Setting Status Conference Re "Complaint To Establish Paternity, Child Support And Other Relief Without Affecting Legal Rights Of Husband Of Mother At Time Of Birth." The order was entered pursuant to the trial court's own motion for the purpose "to allow the Department of Revenue to present argument on the issues raised including whether the legal father is an indispensable party to the litigation, whether the requirements of Privette, supra, must be met in these types of cases, and the other issues discussed in R.H.B. v. J.B.W., supra."

The status conference hearing on all of the consolidated cases was held on June 6, 2002.

On June 10, 2002, an Order Requiring Inclusion As Indispensable Party The Legal Father was entered. All of the consolidated cases were addressed by the order. The court found that the legal father in each of the six consolidated cases was an indispensable party to the paternity action.

The June 10, 2002, order was appealed. However, the appeal was subsequently dismissed so that an appealable final order could entered.

On October 21 2002, an Order of Dismissal was entered in all six cases. In its order, the court acknowledged that the First District Court of Appeal had issued a

decision in *Department of Revenue o/b/o Baggs v. Pate*, 824 So.2d 1038 (Fla. 1st DCA 2002). The court stated that *Pate* was not persuasive on the issue of whether a legal father is an indispensable party.

The orders were timely appealed, and subsequently consolidated for review before the Second District Court of Appeal.

On May 12, 2004, the Second District Court of Appeal issued its opinion. *Department of Revenue o/b/o Preston v. Cummings*, 871 So.2d 1055 (Fla. 2d DCA 2004). The district court held:

> [W]e 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.

The *Cummings* court found that its decision was in direct and express conflict with the First District Court of Appeal's decision in *Department of Revenue o/b/o Baggs v. Pate*, 824 So.2d 1038 (Fla. 1st DCA 2002). The Second District Court of Appeal's decision was timely appealed to this court.

The factual and procedural history of this case is further set forth in the written opinion in *Department of Revenue o/b/o Preston v. Cummings*, 871 So.2d 1055 (Fla. 2d DCA 2004).

SUMMARY OF ARGUMENT

In *Department of Revenue o/b/o Preston v. Cummings*, 871 So.2d 1055 (Fla. 2d DCA 2004), the Second District Court of Appeal held that a legal father is an indispensable party to a paternity action against the alleged biological father. The *Cummings* decision expressly conflicts with *Department of Revenue o/b/o Baggs v. Pate*, 824 So.2d 1038 (Fla. 1st DCA 2002). Furthermore, *Cummings* fails to follow this court's decision in *Dept. of Health and Rehab. Services v. Privette*, 617 So.2d 305 (Fla. 1993).

A paternity action can be brought against an alleged biological father notwithstanding the existence of a legal presumption that another person is the father of the child. *Gammon v. Cobb*, 335 So.2d 261 (Fla. 1976), *R.H.B. v. J.B.W.* 826 So.2d 346 (Fla. 2d DCA 2002).

A paternity action is filed to adjudicate a person who will be legally responsible to support the subject child. *D.F. v. Department of Revenue*, 736 So.2d 782 (Fla. 2d DCA 1999)

"An indispensable party has been defined as one without whom the rights of others cannot be determined." *Bastida v. Batchelor*, 418 So.2d 297, 299 (Fla. 3d DCA 1982). In the present appeal, in each of the consolidated cases, a complete and equitable adjudication of the limited issues raised by the paternity action can be made

without joining the legal father as a party to the action. None of the paternity actions before this court for review involve parental rights issues such as custody or visitation, so no indispensable party issue exists. The alleged biological father's child support obligation can be established without the joinder of the presumed legal father.

In each of the six paternity cases before this court, DOR prepared and mailed a notice to the husband informing him of the existing paternity action. The notice provided to each of the husbands is in accordance with *Dept. of Health and Rehab. Services v. Privette*, 617 So.2d 305 (Fla. 1993), and federal and state constitutional due process requirements. Providing notice to the husband provided him the opportunity to intervene in the paternity action and to be heard. None of the husbands expressed any desire to have any relationship at all with the child that was the subject of the related paternity action.

Only the biological parentage and the financial obligation of the alleged biological father is at issue in each of the six paternity actions. Since no non-financial parental rights regarding custody, visitation, or other parental prerogatives are at issue, the imposition of the support obligation does not prejudice the husbands. Therefore, they are not indispensable parties to the paternity action.

The First District Court of Appeal has decided the question at issue. In *Pitcairn v. Vowell*, 580 So. 2d 219 (Fla. 1st DCA 1991), the court held that the legal

father/husband is not an indispensable party to an action seeking to determine that another man is the biological father of the child in order to obtain financial support from that man. The court affirmed this holding in *Department of Revenue o/b/o Baggs v. Pate*, 824 So.2d 1038 (Fla. 1st DCA 2002).

In *Dept. of Health and Rehab. Services v. Privette*, 617 So.2d 305, 307 (Fla. 1993), the Florida Supreme Court stated that the father need only "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."

The husbands in the six consolidated cases on appeal are not as a matter of law indispensable parties to their respective paternity actions. The Second District Court's decision in *Department of Revenue o/b/o Preston v. Cummings*, 871 So.2d 1055 (Fla. 2d DCA 2004) should be reversed.

ARGUMENT

WHETHER A HUSBAND, AS THE LEGAL FATHER OF A CHILD BORN DURING WEDLOCK, IS AN INDISPENSABLE PARTY TO A PATERNITY ACTION NAMING ANOTHER MAN AS THE BIOLOGICAL FATHER OF THAT MINOR CHILD.

The standard of appellate review is de novo. The issue before this court for resolution is whether a legal father is an indispensable party to a paternity action brought by the Department of Revenue, pursuant to its statutory obligations, against a different putative biological father . (Throughout this brief, "legal father" will mean the man to whom the mother was married at the time of the birth of the minor child who is the subject of the paternity action. In each of the six consolidated cases before this court for review, the mother and husband remained married at the time of the filing of the paternity action against another alleged biological father. However, the mother and husband were no longer living together in an intact family relationship.)

This case comes before this court on the basis of the court's conflict jurisdiction. The decision of the Second District Court of Appeal in *Department of Revenue on behalf of Preston v. Cummings*, 871 So.2d 1055 (Fla. 2d DCA 2004) directly and expressly conflicts with the First District Court of Appeal's decision in *Department of Revenue o/b/o Baggs v. Pate*, 824 So.2d 1038 (Fla. 1st DCA 2002). The *Cummings* court held that the legal father is an indispensable party. Whereas, the

Pate court, relying upon this court's decision in *Dept. of Health and Rehab. Services v. Privette*, 617 So.2d 305 (Fla. 1993), held the legal father is not an indispensable party to such a paternity proceeding.

The *Cummings* court held,

> Our conclusion requires us to conflict with *Pate*, 824 So.2d 1038... [W]e 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.

Id., at page 1062.

The *Cummings* court's decisions states that it is ruling in accordance with this court's decision in *Dept. of Health and Rehab. Services v. Privette*, 617 So.2d 305 (Fla. 1993). DOR disagrees with the *Cummings* court's interpretation of *Privette*. Instead, DORcontends that *Privette* must be interpreted to hold that a legal father is not an indispensable party to the types of paternity actions before this court for review.

When provided with the opportunity in *Privette* to rule on the indispensable party issue, this court did not find that the legal father was an indispensable party. However, the *Cummings* court has narrowly construed *Privette* on this issue, and in

doing so, has failed to follow *Privette*. *Cummings* justifies its limitation of *Privette* by stating *Privette* only involved a paternity test order. However, the underlying action in *Privette* was a paternity case involving both a legal father and an alleged biological father; the same fact pattern as the six consolidated cases before this court for review. Therefore, *Privette's* discussion of indispensable parties to paternity actions should have been followed by *Cummings*.

"An indispensable party has been defined as one without whom the rights of others cannot be determined." *Bastida v. Batchelor*, 418 So.2d 297, 299 (Fla. 3d DCA 1982). An indispensable party is "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." *Amerada Hess Corp. v. Morgan*, 426 So.2d 1122, 1125 (Fla. 1st DCA 1983); *Allman v. Wolf*, 592 So.2d 1261, 1263 (Fla. 2nd DCA 1992). A party is only deemed indispensable when it is absolutely necessary to protect substantial rights and only after the facts clearly establish that no complete and equitable adjudication of the controversy can be made in the party's absence. A party is not indispensable simply because his presence would aid in the adjudication of the paternity action. Pursuant to these definitions, a legal father is not an indispensable party to a paternity action when the paternity

proceeding involves only the narrow issue of paternity, and not other parenting related issues, such as custody and visitation.

Florida law provides that a paternity action can be brought against an alleged biological father notwithstanding the existence of a legal presumption that another person is the father of the child. *Gammon v. Cobb*, 335 So.2d 261 (Fla. 1976), *R.H.B. v. J.B.W.* 826 So.2d 346 (Fla. 2d DCA 2002). The presumption is not intended to allow a biological father to avoid his support obligation. Generally, a paternity action is filed to adjudicate a person who will be legally responsible to support the subject child. *D.F. v. Department of Revenue*, 736 So.2d 782 (Fla. 2d DCA 1999), approved *D.F. v. Department of Revenue ex rel. L.F.*, 823 So.2d 97 (Fla. 2002). The major objective of a paternity action is to enforce the responsible father's duty to financially support his child. *Mocher v. Rasmussen-Taxdal*, 180 So.2d 488 (Fla. 2d DCA 1965). *de Moya v. de Pena*, 148 So.2d 735 (Fla. 3d DCA.1963). The paternity statute provides the basis on which the court may order child support from a man adjudicated to be the biological father of a child. *Kendrick v. Everhart*, 390 So.2d 53 (Fla. 1980).

DOR contends that for purposes of the establishment of a child support obligation against an alleged biological father, the interests of the legal father and the subject matter are not so interrelated and would not be so directly affected by a

paternity judgment against the actual biological father so that a complete and equitable adjudication of the limited issues raised by the paternity action could not be made absent joinder of the husband to the action.

In the six cases before the court, DOR's action to establish paternity is a remedial action designed to correct the economic disadvantages placed upon the child by the absence of a legally establish child support obligation. Recognizing this fact the Florida Legislature made this declaration of legislative intent in section 405.2551, Florida Statutes:

> …In order to render resources more immediately available to meet the needs of dependent children, it is the legislative intent that the remedies provided herein are in addition to, and not in lieu of, existing remedies. It is declared to be the public policy of this state that this act be construed and administered to the end that children shall be maintained from the resources of their parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through public assistance programs.

The department has a responsibility to ensure that children shall be maintained from the resources of their parents, unless otherwise ordered by a court of competent jurisdiction.

The Department is designated as the Florida Title IV-D agency. § 409.2557(2), F.S. (2004) states:

> The department in its capacity as the state Title IV-D agency shall have the authority to take actions necessary to carry out the public policy of ensuring that children are maintained from the resources of their parents to the

> extent possible. The department's authority shall include, but not be limited to, the establishment of paternity or support obligations, as well as the modification, enforcement, and collection of support obligations.

DOR brought these paternity actions pursuant to its statutory obligations mandating it establish paternity and obtain support orders against biological fathers. Chapter 409.2551 - 409.25995, F.S., limits DOR's legal activities to those that are eligible for federal financial participation under Title IV-D of the Social Security Act. The legal activities eligible for financial participation in Department of Revenue child support enforcement program cases are the establishment of paternity and child support obligations, and the enforcement and modification of child support obligations. DOR can not use Title IV-D funds to litigate issues involving parenting rights and responsibilities, such as the right to parent the child, the right to direct the child's activities, right to make decisions about the child, or rights of custody and visitation. Therefore, the establishment of paternity as the prerequisite to the establishment of a support obligation is an activity eligible for federal financial participation. The primary objective of the Title IV-D program in filing a petition to establish paternity and support is the entry of a court order requiring financial support for the child. These objectives can be met against the biological father without substantially and directly affecting the parenting rights of the legal father, such that the legal father is not an indispensable party to the paternity action.

In each of the cases before this court, the mother, who was married to the legal father at the time of the birth of the child, provided information to DOR identifying a man other than the legal father as the actual biological father of the child in question. Such information is solely within the knowledge of the mother. Based upon that information, and in accordance with its statutory obligations, DOR was obligated to sue the putative father for paternity, notwithstanding the existence of the legal father. Not only was DOR meeting its statutory obligations, it was following the rule of law established by this court that a legal father does not have an obligation to provide financial support to a child that is not his biological child, adopted child, or one for whom he has contracted to support. *Daniel v. Daniel*, 695 So.2d 1254 (Fla. 1997).

Accordingly, the purpose of each of the paternity actions at issue was solely to adjudicate paternity, thereby identifying the father legally responsible under Florida law for the payment of child support. None of the paternity actions before this court for review involve parental rights issues such as custody or visitation. Since these issues are not to be adjudicated, the legal father is not an indispensable party to the paternity action. No parental prerogatives are at issue in these proceedings. Accordingly, the legal father's status is not affected by an action to establish biological paternity. If, in fact, such parenting issues were at issue, that would present an altogether different question regarding the necessity of joining the husband or former husband. However,

an order that simply obligates the actual biological father to pay child support does not prejudice the husband's legal interests. Therefore, the obligation against the biological father can be established without the joinder of the legal father as a party.

As stated by this court, "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." *Daniel v. Daniel*, 695 So.2d 1253, 1254 (Fla. 1997), citing *Albert v. Albert,* 415 So.2d 818, 820 (Fla. 2d DCA 1982). Therefore, 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. Additionally, the child will not be "bastardized" or made "illegitimate" by a subsequent finding of actual parentage. *Daniel v. Daniel*, 695 So.2d 1253 (Fla. 1997). Since such a stigma does not exist under Florida law, the joining of the husband is not necessary. Therefore, none of the legal fathers should be considered to be an indispensable party to their respective paternity action.

On their face, the paternity actions brought against the alleged putative fathers (as opposed to the husbands) do nothing more then seek to determine the actual "biological" father of the child, and a child support obligation for that child. Not one of the paternity proceedings before this court for review involve the termination of parental rights, or otherwise address parenting rights. None of the paternity actions

imply that such parenting rights are at issue. Any such implication otherwise is simply wrong insofar as it suggests that the husband is an indispensable party in proceedings in which he has no financial interest at stake, and there are not parenting issues involved.

DOR recognizes, "A parent has a constitutionally protected liberty interest in the companionship, care, custody and management of his or her children." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). However, this protected liberty interest is dependent upon an actual relationship with the child, where the parent assumes responsibility for the child's emotional and financial needs. *Id.* 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.

DOR recognizes that perhaps the initial pleading filed in each of the consolidated paternity cases was deficient in that it failed to set forth the legal father's relationship with the particular child in question, or the legal father's relationship with the mother and the status of their marital relationship. If this case turns, even partially, on a pleading issue, DOR 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.

Additionally, as mentioned above, in each of the six paternity cases before this court, DOR prepared and mailed a notice to the husband at his best known address informing him of the existing paternity action. Providing notice to the husband allowed him the opportunity to intervene in the paternity action and to be heard, as required by *Privette*. The record does not illustrate that any of the husbands expressed any desire to maintain or protect a relationship with the child that was the subject of the related paternity action. The failure to do so is an indication that they did not have any legal interests affected by the paternity action. It also illustrates that the procedure providing notice, rather than the necessity of joining the legal father as party, safeguards whatever rights that legal father seeks to protect.

DOR contends that the notice provided to each of the husbands is in accordance with *Dept. of Health and Rehab. Services v. Privette*, 617 So.2d 305 (Fla. 1993), and federal and state constitutional due process requirements. As the Florida Supreme Court explained in *Department of Law Enforcement v. Real Property,* 588 So.2d 957, 960 (Fla. 1991), "[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." Procedural due process requires both fair notice and a real opportunity to be heard. *See id*. As the United States Supreme Court explained, the notice must be

"reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (citations omitted). Further the opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *accord Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (stating that procedural due process under the Fourteenth Amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner). *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001). DOR contends that the notice provided to each of the legal father's in each of the six consolidated cases meets constitutional due process requirements.

Only the biological parentage and financial obligation of the alleged biological father are at issue in each of the six paternity actions. Since no non-financial parental rights regarding custody, visitation, or other parental prerogatives are at issue, the imposition of the support obligation does not prejudice the husbands. Therefore, they are not indispensable parties to the paternity action.

The First District Court of Appeal has decided the question at issue. *Pitcairn v. Vowell*, 580 So. 2d 219 (Fla. 1st DCA 1991). The *Pitcairn* court's opinion states in pertinent part

> There is a strong rebuttable presumption that a child born to a married woman is the child of the woman's husband, and that the presumption exists for the protection of the child. However, we cannot agree that because of that presumption the child's mother must first prove that her husband is not the father. The husband is not a required party to an action seeking to determine that another man is the father of the child in order to obtain support from that man. To permit the presumption to be used in that manner would work to the disadvantage of the child and would not serve the best interests of the child. Certainly, if the petitioner wants to bring the husband into the proceeding as a party or call him as a witness, that should be permitted. If the husband believes that he is the father of the child, he should be permitted to enter the proceeding. However, we do not believe it would further the child's interests to require anyone to be a party other than the person alleged in the complaint to be the father of the child.

Id. at 221-223 (emphasis added). The court further noted that "a putative father does not have standing to raise the presumption of legitimacy in avoidance of the potential ordering of support for the child." *Id.* at 223.

The First District Court of Appeal reaffirmed its position in *Department of Revenue o/b/o Baggs v. Pate*, 824 So.2d 1038 (Fla. 1st DCA 2002). There is no significant factual distinction among the present cases on appeal and *Pitcairn* and *Baggs*.

Following the decision in *Pitcairn*, this court decided *Dept. of Health and*

Rehab. Services v. Privette, 617 So.2d 305 (Fla. 1993). Although not the primary issue on appeal in *Privette*, this court did address whether a legal father is an indispensable party to an action by DOR against a separate alleged biological father for paternity and support. In establishing the prerequisites for entry of an order requiring the alleged biological father to submit to paternity testing, the *Privette* court states:

> Thus, 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* [FN4] and a guardian ad litem appointed to represent the child. [FN5] *See State in re J.W.F.*, 799 P.2d 710, 713 (Utah 1990). HRS also may be an appropriate party in cases involving the expenditure of public monies on behalf of the child. (emphasis added)

Id., at page 308.

Footnotes four and five address the status of the legal father and child as parties to the paternity action, and the procedural rights of the legal father concerning the hearing on whether blood testing of the alleged biological father is in the child's best interests. Footnote four does not require that the legal father be made a party; it only requires that he be given notice and an opportunity to be heard.

> FN4 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.

Id., at page 308.

In contrast, footnote five expressly states that the child is an indispensable party.

> FN5 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.

Id., at page 308.

Even though this court recognized the husband "has an unmistakable interest in maintaining the relationship with his child unimpugned," *Id.*, at page 307, he need only "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." *Id.*, at page 308, footnote 4. (emphasis added). However, his actual joinder as a party is necessary.

In yet another footnote in *Privette*, the court in dicta discussed that perhaps it was dealing "essentially...with a species of termination proceeding" which could vest parental rights in the putative natural father and remove them from the legal father. *Id.*, at page 309, footnote 7. However, notwithstanding that consideration, the *Privette* court still did not state that the legal father was an indispensable party. Instead, his is one whose interests are such as to entitle him to notice of the paternity action. Notwithstanding the *Privette* court's statements on this issue, the *Cummings* court chose to construe *Privette* as not having addressed the indispensable party issue. In

doing so, *Cummings* ignores the clear language of *Privette*.

Subsequent appellate decisions have not attempted to modify or otherwise address the issue that was discussed in *Privette* . See *Pareja v. State, Dept. of Revenue, ex rel. Ayala*, 725 So. 2d 467, 468 (Fla. 3rd DCA 1999) ("We hold...that the trial court's "best interests" finding could not be made without providing the legal father an opportunity to be heard."). See also; *Gantt v. Gantt*, 716 So. 2d 846 (Fla. 4th DCA 1998) (recognizing that in *Privette* "the man listed on the child's birth certificate, who was married to the mother at the time of the child's birth, was not a party to that action.").

Cummings also expressly conflicts with *Department of Revenue o/b/o Baggs v. Pate*, 824 So.2d 1038 (Fla. 1st DCA 2002). The *Pate* opinion discusses *Privette*, stating,

> 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, supra at page 1039. Additionally, the *Pate* court recognized that although the Supreme Court disapproved of the *Pitcairn* decision, it only did so to the extent that *Pitcairn* was inconsistent with *Privette*. *Pate*, supra page 1019, footnote 1. In *Privette*, this court stated, "We disapprove of *Pitcairn* to the extent it is inconsistent

with our views here." Since *Privette* is consistent with the holding in *Pitcairn* that the legal father is not an indispensable party, *Privette* approved that part of the *Pitcairn* opinion.

The husbands in the six consolidated cases on appeal are not as a matter of law indispensable parties to their respective paternity actions. DOR contends that neither the trial court nor the district court of appeal set forth sufficient facts or identified any parental interests of any of the presumed legal fathers, the mothers, the children, or any of the defendants that would make any of the husbands an indispensable party to the paternity proceedings.

A ruling that a presumed legal father is an indispensable party in every paternity action could cause many of those actions to fail. Paternity proceedings are conducted pursuant to Chapter 742, Florida Statutes. § 742.09 (2004), Florida Statutes, provides:

> 742.09 Publishing names; penalty. - It shall be unlawful for the owner, publisher, manager, or operator of any newspaper, magazine, radio station, or other publication of any kind whatsoever, or any other person responsible therefor, or any radio broadcaster, to publish the name of any of the parties to any court proceeding instituted or prosecuted under this act; and any person violating this provision shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

This section appears to preclude constructive service on legal fathers in paternity actions filed under the authority of Chapter 742, F.S, even though personal

or substitute service upon the legal father will not be possible. In light of the foregoing statute, if a legal father, without any evident interest in a paternity action, is as a matter of law an indispensable party, many paternity actions against the actual biological father will fail if personal or substitute service cannot be made upon the legal father as an indispensable party. Such a result is contrary to strong Florida public policy that seeks to assure that the legal responsible father will support his child. Accordingly, legal fathers should not be deemed indispensable parties to DOR's Title IV-D paternity actions.

It is respectfully submitted that the ends of justice, the needs of Florida's children, and upholding the public policy of the state can be better served by the indispensable party rule set forth in the *Pate* decision, rather than by that announced in *Cummings*. No one, certainly not DOR, would argue seriously that parental rights are insubstantial, to be cast aside whenever inconvenient or difficult to honor. However, as it happens, the Florida Legislature has had occasion to address the very fundamental issues of when and how the legal bonds between parents and children may be temporarily or permanently severed by the courts, and the Florida Supreme Court has likewise considered the question of the sufficiency of notice to a parent who cannot be located.

Spurred by the passage of the federal Adoption and Safe Families Act of 1997,

the Florida Family Court Steering Committee encouraged emerging initiatives within the judicial branch, which led to the establishment of the Dependency Court Improvement Project, leading to the adoption by the Legislature in 1998 of a revised and modernized chapter 39, F.S., which brought together and harmonized formerly scattered provisions relating to child protection and dependency. Florida thus became the first state in the nation to enact the provisions of the federal act.

This was followed in 2001 by another major bill, representing the work of a round table of adoption advocates, the Family Law Section of the Bar, interested members of the judicial and legislative branches, and adoptive parents and adopted children. This legislation provided the same types of improvements for chapter 63, F.S., dealing with adoptions, as had been done with respect to dependency in chapter 39; in fact, many of the definitions and procedures are identical or very similar. In about the same time frame, the Florida Supreme Court was amending the Rules of Juvenile Procedure. The end result of this reform effort is that there is a coherent and workable set of procedures in place to give maximum protection to the interests of parents (legal, biological, putative, alleged, self-declared, etc.), while not allowing any lack of knowledge as to their identity or whereabouts to totally prevent the courts from getting on with the business of protecting the welfare of the children.

The details vary, but fundamentally, any time the state or a private agency seeks

the aid of the courts in actions that would (1) remove a child from the parental home, (2) affect a child's liberty, (3) determine with whom (other than a parent) the child lives, (4) mandate that the parent participate in a judicially approved plan to alleviate some condition deemed deleterious to the child, or (5) terminate a parent's parental rights altogether, then the parent is entitled to certain rights, depending on the nature of the proposed state action, the degree of certainty of the parent's legal status as a parent, and whether the parent can be identified and notified.

There is rarely any dispute concerning the identity of a child's natural mother, so the various classifications generally concern 'fathers' of one kind or another. Since fatherhood may be disputed, the statutes initially speak in terms of persons required to consent to impending adoptions, or entitled to notice of terminations of parental rights or actions affecting the child. There are many permutations of factual scenarios set forth in these new laws and rules, but at the end of the day, the important thing is that the absence of one person is not allowed to prevent a remedy from going forward. Cases are determined; children's rights and parents' rights are determined and adjudicated; and absent, or unknown, or unlocatable, persons are sought out, given as much notice as reasonably possible under the circumstances, but actions needed for the benefit of children are not stalled or frustrated indefinitely or abandoned. See, e.g., § 63.082, § 63.088, § 63.089, § 39.502, § 39.503, § 39.801, § 39.803, F.S.; Rules

8.225(a)(3)(B) and 8.225(b)(5)(A), Fla. R. Juv. P.; *cf.* Form 12.913(b), Fla.Fam.L.R.P. *with* §§39.503(5),(6), 39.803(6), and 63.088, F.S.

Applying the sound reasoning of *Privette, Pitcairn*, and *Pate,* there should be no confusion as to who is an indispensable party in a paternity action in which the 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 has 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. It is clear that in those types of paternity and support establishment cases, the only indispensable party respondent is the biological father identified by the mother of the child.

It is not in the best interest of a child for any court to be bound by the indispensable party rule created by the *Cummings* decision. Because of the joinder of the legal father requirement set forth in the *Cummings'* decision, paternity cases against the alleged actual biological father may not be able to proceed because he assert the presumption of legitimacy regarding the legal. Many paternity cases will be

thwarted because the non-biological legal father cannot be personally served with the paternity complaint, and Florida statute prohibits naming him through through publication and constructive service. Therefore, the paternity action could not proceed because of the failure of notice cause by the indispensable party rule. Paternity cases can be stymied because the non-biological legal father is not amendable to service because he has not had the sufficient minimal contacts with the State of Florida to enable personal service upon him.

While they have used different standards of review, the Supreme Court of Florida and the First District Court of Appeal, in *Privette*, *Pitcairn*, and *Pate*, have held that a legal father is not an indispensable party in a paternity action brought by the Department to establish paternity and child support of a child born during the mother's marriage to another man. This is the rule that should be adopted by this court, and the *Cummings'* ruling rejected.

CONCLUSION

The petitioner respectfully requests that this Honorable Court reverse the decision of the Second District Court of Appeal in *Department of Revenue o/b/o Preston v. Cummings*, 871 So.2d 1055 (Fla. 2d DCA 2004), and instead adopt the First District Court of Appeal's decision in *Department of Revenue o/b/o Baggs v. Pate*, 824 So.2d 1038 (Fla. 1st DCA 2002), and hold that a legal father is not an

indispensable party to a paternity action.

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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WILLIAM H. BRANCH
Assistant Attorney General
Bar No. 401552
Office of the Attorney General
Child Support Enforcement
The Capitol, Plaza 01
Tallahassee, Florida 32399-1050
(850) 414-3400

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and facsimile transmission to **Louis K. Rosenbloum, Esquire**, 4300 Bayou Blvd., Suite 36, Pensacola, FL. 32503-2671, this 10th day of October, 2004.

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WILLIAM H. BRANCH

CERTIFICATE OF COMPLIANCE

I CERTIFY that this initial brief is in compliance with rule 9.210(a)(2) for computer generated briefs. The font used is Times New Roman 14-point.

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WILLIAM H. BRANCH

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