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 REPLY 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

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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.

As noted by the respondents, "[w]hen a child is born during a marriage, the legal duty to support that child presumptively rest with the parties to the marriage." (Quoting *Department of Revenue o/b/o Preston v. Cummings*, 871 So.2d 1055, 1059 (Fla. 2d DCA 2004). This presumption is established for public policy purposes. "Presumptions which shift the burden of proof in civil proceedings are primarily expressions of social policy." *Department of Agriculture & Consumer Services v. Bonanno*, 568 So. 2d 24 (Fla. 1990). The presumption is therefore a § 90.304, F.S., presumption affecting the burden of proof. It is a rebuttable presumption that "imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact." § 90.302(2), F.S. "Thus, when evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." *Beal Bank, SSB v. Almand & Assocs*., 780 So. 2d 45 (Fla. 2001).

The presumed rebuttable fact is the husband's legal duty to support his child.

Accordingly, if the trier of fact is persuaded the presumption of the legal duty of support should no longer apply, the presumption is overcome.

DOR contends the presumption of a legal duty to support one's child arises from another rebuttable public policy presumption. This other presumption is that a child born during wedlock is presumed to be the child of the husband. *Johnson v. Ruby*, 771 So. 2d 1275 (Fla. 4th DCA 2000); *Taylor v. Taylor*, 279 So.2d 364 (Fla. 4th DCA 1973). As stated in *Taylor*, the husband must provide for the support of the child until the presumption is rebutted. Therefore, if it is shown that the child born during wedlock is not the biological child of the husband, DOR contends that the presumption of the legal duty of support is overcome. In order to address the issue of paternity, the husband need not be joined as an indispensable party.

The respondents contend that *Daniel v. Daniel*, 695 So.2d 1253 (Fla. 1997) has no application to this appeal. The respondents claim *Daniel* is limited by its facts only to situations where the husband and wife are divorced. In other words, the respondent contends a husband, as the legal father, but not the biological father, is only relieved of his duty of support upon divorce. The logical extension of the respondents' argument is that if a husband is proven not to be the biological father of a child, and he is only separated from the mother, he continues to have the sole obligation of supporting the child, even if another man is proven to be the biological

father. DOR contends that the principal expounded in *Daniel* is not so narrow.

Accordingly, 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.

The respondents argue that the failure to join the legal father could have the practical effect of terminating the legal father's parental rights. As illustrated by the respondents, the Second District Court has voiced such a concern. *R.H.B. v. J.B.W.* 826 So.2d 346 (Fla. 2d DCA 2002). This Court has also 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." *Dept. of Health and Rehab. Services v. Privette,* 617 So.2d 305, 309 (Fla. 1993).

However, "In Florida, there are only two means by which a parent's rights may be terminated: one is through adoption pursuant to Florida Statutes Chapter 63 and the other is through the strict procedures set forth in Florida Statutes Chapter 39,

specifically sections 39.46 through 39.469. Fleming v. Brown, 581 So. 2d 202 (Fla. 5th DCA 1991)." *Casbar v. DiCanio,* 666 So. 2d 1028, 1029 (Fla. 4th DCA 1996). All of the actions below were chapter 742 proceedings to establish paternity. None involve chapter 39 allegations for the termination of parental rights. The resolution of the issue of paternity under chapter 742 does terminate the legal father's parental rights, if he chooses to enforce or exercise those rights. This is particularly true since he is not a party to the paternity action.

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

The respondents raise the specter that a "stigma of illegitimacy" will attach to any child who is found not to have been fathered by the legal father. Without intending

to lessen the importance of the child's interests, DOR respectfully suggests that in today's society the determination that a person other than the legal father is the biological father of the child no longer carries the "social stigma" placed upon it by the respondents. There is nothing in the appellate record, and no authority has been cited by the respondents, that supports this contention. Clearly, as a matter of law, 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 actions.

DOR contends that it provided notice to the legal fathers in accordance with *Dept. of Health and Rehab. Services v. Privette*, 617 So.2d 305 (Fla. 1993), and that this was sufficient to inform the legal fathers of the ongoing paternity action. Providing notice to the legal father's provided each of them with 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 their particular paternity action.

Although any legal father provided notice of their paternity proceeding has the right to seek intervention, the respondents argue that since intervention is discretionary

with the court, it is not guaranteed. (Citing *Union Cent. Life Ins. Co. v. Carlisle*, 593 So.2d 505 (Fla. 1992)). The test to determine what interest entitles a party to intervene was set forth in *Morgareidge v. Howey*, 75 Fla. 234, 238-39, 78 So. 14, 15 (Fla. 1918):

> The interest which will entitle a person to intervene … must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof...

See also; *Kissoon v. Araujo*, 849 So. 2d 426 (Fla. 1st DCA 2003). It is suggested that if a legal father cannot meet this criteria for intervention, then his interest in the litigation also is not sufficient to require his joinder as an indispensable party.

DOR argued that § 742.09, F.S., bars a newspaper or other publication from publishing the names of parties to a paternity action. Such a prohibition would limit DOR's ability to perfect constructive service by publication if a legal father must be joined as a party to a paternity action. The respondents counter, "[i]t 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". (Citing, *Doe v American Lawyer Media, L.P.*, 639 So.2d 1021 (Fla 3d DCA 1994)). However, *Doe* involved a tort action alleging invasion of privacy brought by the mother in a paternity action against the publisher. § 742.09 provides

that criminal sanctions can be applied to a publisher who violates the publication prohibition of the statute. This distinctively differentiates *Doe* from the argument made by DOR. It does not matter that a paternity file is a public record that has not been filed. The statue does not distinguish between paternity actions in which the file has been sealed and those in which it has not. The statute prohibits publication, and therefore, constructive service cannot occur without violation of the statute.

The respondent also argues that § 742.09 does not apply because DOR's paternity actions were brought pursuant to § 409.2564, F.S., rather than chapter 742. This is not accurate. All judicial proceedings for paternity establishment brought by DOR are brought pursuant to chapter 742. § 742.10, F.S., provides, "This chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock." That DOR brings its paternity actions pursuant to chapter 742 is further illustrated by the fact that the chapter includes a provision specifically addressing DOR's involvement in paternity proceedings under the chapter. (See § 742.045, F.S., barring the award of attorney's fees against DOR acting in Title IV-D capacity.) Accordingly, the paternity actions in the present appeal, and all judicial paternity proceedings are brought pursuant to chapter 742. Accordingly, § 742.09 does apply.

The respondents discuss the Uniform Parentage Act (UPA). DOR contends

the discussion is irrelevant to this appeal. As acknowledged by the respondents, the UPA has not been adopted by the Florida Legislature.

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.

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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 3rd day of February, 2005.

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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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