

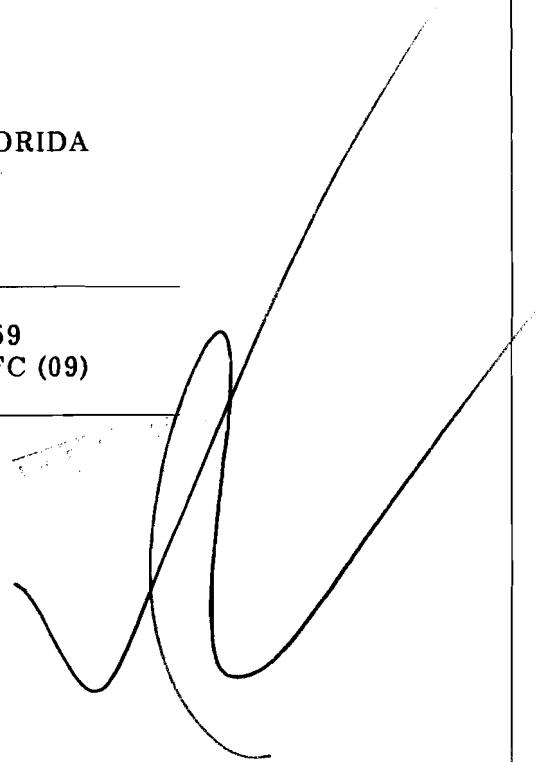
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,922

District Court Case No. 87-259
Circuit Court Case No. 86-33473 FC (09)

MELYANA KLUKEWICH, :
 :
 Petitioner, :
 :
 vs. :
 :
 JOHN B. HOWENSTINE, :
 :
 Respondent. :
 :



On Petition for Discretionary Review From the
District Court of Appeal, Third District

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner/Appellant/Plaintiff MELYANA KLUKEWICH will be referred to on appeal as "Ms. Klukewich." Respondent/Appellee/Defendant JOHN B. HOWENSTINE will be referred to as "Mr. Howenstine."

All relevant records documents are contained in an appendix annexed to this brief. The following symbols will be used:

RA. - Respondent's Appendix
Br. - Petitioner's Brief on the Merits

All emphasis is ours unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Melyana Klukewich instituted a statutory paternity and ancillary child support action against Mr. Howenstine on July 30, 1986. (RA. 1-2). The complaint alleged that Mr. Howenstine was the father of Ms. Klukewich's child born out of wedlock, that the child was conceived and born in Florida and that Mr. Howenstine did not reside in Florida. (RA. 1).

Respondent filed a Motion to Dismiss and Quash together with an affidavit stating that he was a Texas resident. (RA. 3-6). Mr. Howenstine argued that Florida lacked in personam jurisdiction to adjudicate the paternity and child support claim. The trial court dismissed the paternity and child support action holding:

[N]either a nonresident's act of sexual intercourse within the state of Florida resulting in conception of a child, nor the failure to support an illegitimate child prior to a determination of paternity, are tortious acts sufficient to confer jurisdiction under section 48.193(1)(b) of the Florida long-arm statute.

* * *

The Court . . . additionally concludes that application of the long-arm statute would violate the due process guarantees found in the federal and state constitutions.

(RA. 8). Ms. Klukewich appealed (RA. 9) and the Third District Court of Appeal unanimously affirmed, holding in part:

We align ourselves with the well-reasoned opinion of the Second District in *Wright* and acknowledge direct conflict with the First District in *Bell*. There is no basis to conclude that consensual sex amounts to tortious activity. Accordingly, we hold that no tortious act has been committed which would confer jurisdiction . . .

(RA. 11).

Petitioner seeks review of the decision of the Third District Court of Appeal on the ground that it expressly and directly conflicts with the decision of the First District Court of Appeal in Bell v. Tuffnell, 418 So.2d 422 (Fla. 1st DCA 1982).

SUMMARY OF ARGUMENT

A nonresident putative father of an illegitimate child allegedly conceived and born in the State of Florida cannot as a matter of statutory construction or constitutional analysis be subjected to the personal jurisdiction of a Florida court to adjudicate a statutory paternity and ancillary child support claim.

The only basis alleged for asserting long-arm jurisdiction over Mr. Howenstine is that he committed a tort within the State of Florida. Consensual intercourse between adults is not a tortious act within the meaning of Florida Statute §48.193(1)(b), thus there is no statutory basis upon which to assert personal jurisdiction over a nonresident putative father to adjudicate a paternity or child support claim.

In addition, the failure of a nonresident putative father to support an illegitimate child to which he owes no legal duty is not a tortious act within the meaning of Florida Statute §48.193(1)(b). Again, there is no statutory authority upon which to assert personal jurisdiction to adjudicate a paternity or child support claim.

If Florida Statute §48.193(1)(b) is found applicable, the assertion of personal jurisdiction over a nonresident defendant whose only contact with the forum is consensual intercourse with an adult nonetheless offends the constitutional due process guarantees found in the constitutions of the United States and Florida.

ARGUMENT

I.

A NONRESIDENT PUTATIVE FATHER OF AN ILLEGITIMATE CHILD ALLEGEDLY CONCEIVED AND BORN IN THE STATE OF FLORIDA CANNOT AS A MATTER OF STATUTORY CONSTRUCTION BE SUBJECTED TO THE PERSONAL JURISDICTION OF A FLORIDA COURT TO ADJUDICATE A STATUTORY PATERNITY AND ANCILLARY CHILD SUPPORT CLAIM.

A dual inquiry is necessary to determine whether Florida may assert in personam jurisdiction over Mr. Howenstine. The initial determination is whether Florida statutory law provides for the assertion of jurisdiction in the factual context of this case. If this question is answered affirmatively, the question then arises whether the exercise of such jurisdiction is constitutionally permissible. Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1975).

Petitioner first contends that Mr. Howenstine's failure to support her illegitimate child is a "tortious act" providing jurisdiction under the Florida Long-Arm Statute. Reliance is placed solely upon Florida Statute §48.193(1)(b) (1985), which states as follows:

- (1) Any person, whether or not a citizen or resident of the state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:
 - (b) Committing a tortious act within this state.

(Br. 6). Ms. Klukewich next contends that the act of sexual intercourse between the parties in Florida gives rise to constitutionally sound jurisdiction under Section 48.193(1)(b). (Br. 11).

Respondent respectfully submits that the reasoning upon which Petitioner's conclusions are based is logically flawed for the following reasons: (a) consensual intercourse between adults is not a tortious act within the meaning of 48.193(1)(b), thus there is no statutory basis upon which to assert personal jurisdiction over a nonresident putative father to adjudicate the paternity or child support claim; (b) the failure of a nonresident putative father to support an illegitimate child to which he owes no legal duty is not a tortious act within the meaning of 48.193(1)(b), thus there is no statutory authority upon which to assert personal jurisdiction to adjudicate the paternity or child support claim; (c) there is no nexus between the alleged contact and the claim for relief; and (d) the assertion of personal jurisdiction over a nonresident whose only contact with the forum is consensual intercourse with an adult offends the constitutional requirements of due process.

A. CONSENSUAL INTERCOURSE BETWEEN ADULTS IS NOT A TORTIOUS ACT WITHIN THE MEANING OF SECTION 48.193(1)(b), FLORIDA STATUTES (1985).

The definition of "tort" or "tortious act" has been defined in this legal context as:

[A]ny act committed in this state which involves a breach of duty to another and makes the one committing the act liable to respondent in damages . . . *Poindexter v. Willis*, 87 Ill. App.2d 213, 217-218, 231 N.E.2d 1, 3 (1967).

See also, Restatement (Second) of Torts §6 (1965); Prosser, Torts §1, at 1-2 (3d ed. 1964).

Consensual intercourse between adults is not a tortious act. State, Dept. of Health and Rehabilitative Services, Office of Child Support Enforcement ex rel. Luke v. Wright, 489 So.2d 1148 (Fla. 2d DCA 1986), rev. pending, (Case No.

69,050). All other courts addressing this issue have reached the same conclusion. See State ex rel. Garcia v. Dayton, 102 N.M. 327, 695 P.2d 477, 479 (1985) ("we cannot hold that voluntary intercourse is a 'tortious act' within the long arm statute); Howard v. County Court of Craighead County, 272 Ark. 205, 613 S.W.2d 386, 387 (1981) ("the act of sexual intercourse between consenting adults does not fall within the numerous definitions of a tort under the most liberal rules of construction"); State ex rel. Larimore v. Snyder, 206 Neb. 64, 291 N.W.2d 241, 242 (1980) ("act of sexual intercourse between consenting adults does not constitute an act 'causing tortious injury' in this state"); Taylor v. Texas Dept. of Public Welfare, 549 S.W.2d 422, 424 (Tex. Civ. App. 2d Dist. 1977) ("sexual intercourse between consenting adults was not a tort"); Barnhart v. Madvig, 526 S.W.2d 106, 108 (Tenn. 1975) ("by application of the most liberal rules of construction none of the numerous definitions of a 'tort' and a 'tortious act' would tolerate the inclusion of an act of sexual intercourse between consenting adult parties"); State ex rel. Carrington v. Schutts, 217 Kan. 175, 535 P.2d 982, 986 (1975) ("the most liberal rules of construction of phrase 'tortious act' would not tolerate the inclusion of an act of sexual intercourse between consenting parties"); A.R.B. v. G.L.P., 180 Colo. 439, 507 P.2d 468, 469 (1973) ("we have considered the numerous definitions of a 'tort' and a 'tortious act' and none of them . . . would tolerate the inclusion of an act of sexual intercourse between consenting adult parties"); State ex rel. McKenna v. Bennett, 28 Or. App. 155, 558 P.2d 1281, 1283 (Or. Ct. App. 1977) ("the conceptual act of intercourse, without some additional facts such as force, is not itself a tort"); Anonymous v. Anonymous, 104 Misc.2d 611, 428 N.Y.S.2d 608, 611 (N.Y. Fam. Ct. 1980) ("nor is there any New York case law to support an interpretation of the act of impregnation as a 'tortious act' absent an allegation of

assault"). Respondent has been unable to locate any contrary authority on this point of law.¹

Ms. Klukewich's allegation that her child was conceived in Florida (RA. 1) is thus insufficient to bring the paternity and child support claim within the purview of Section 48.193(1)(b).

B. FAILURE OF A NONRESIDENT PUTATIVE FATHER TO SUPPORT AN ILLEGITIMATE CHILD TO WHICH HE OWES NO LEGAL DUTY IS NOT A TORTIOUS ACT WITHIN THE MEANING OF SECTION 48.193(1)(b), FLORIDA STATUTES (1985).

Whether a nonresident putative father commits a "tortious act" by failing to support an illegitimate child prior to a determination of paternity is the issue which the First District Court of Appeal in Bell v. Tuffnell, 418 So.2d 422 (Fla. 1st DCA 1982), rev. denied, 427 So.2d 736 (1983) and the Second District Court of Appeal in State, Dept. of Health and Rehabilitative Services, Office of Child Support ex rel. Luke v. Wright, 489 So.2d 1148 (Fla. 2d DCA 1986), rev. pending, (Case No. 69,050) reached opposite results.²

¹ The appellant in Bell v. Tuffnell, 418 So.2d 422 (Fla. 1st DCA 1982), rev. denied, 427 So.2d 736 (1983), argued that sexual intercourse between consenting adults is not a tortious act. The First District Court of Appeal neither accepted nor rejected the argument and instead based its decision upon a holding that the "failure by a putative father to fulfill the duty of support is alone sufficient to constitute a tortious act . . ." *Id.* at 243. The fallacy of this conclusion is addressed in the next section of the Argument. *Infra* p. 13.

² This Court has accepted jurisdiction to review and presently has under consideration the appellate court's decision in Luke. Respondent urges a further consideration of the issues as this section attempts to directly confront several of the questions raised during oral argument addressed to Amicus Curiae John B. Howenstine.

The seminal case which has been relied upon for the proposition that nonsupport is a "tortious act" is Poindexter v. Willis, 87 Ill. App.2d 213, 231 N.E.2d 1 (1967). There, a resident of Illinois alleged that she had been seduced by the defendant in Illinois and that her child was the product of this seduction. Defendant, a resident of Ohio, was served with process in Ohio by the Illinois court in a paternity action brought by the mother. He argued that the intercourse had been consensual and Illinois could not have jurisdiction over him in Ohio. The Illinois appellate court found that a tortious act had been committed in its jurisdiction. The court did not expressly define what the tortious act was or whether the act provided sufficient minimum contacts to satisfy a constitutional due process analysis.

In a suit brought in Ohio to stay the judgment of the Illinois court, Mr. Willis challenged that judgment on jurisdictional grounds. Since the Ohio court was bound by Illinois' interpretation of the Illinois long-arm statute, it only addressed the constitutional question of minimum contacts. Resolving the issue against the putative father the Ohio court stated:

For the purpose of this decision, the facts *unequivocally show that the defendant, by becoming the father of the illegitimate child born to the plaintiff brought into play the effect of the Illinois law.* (original emphasis) That law imposed upon him a duty to support his illegitimate child. This required performance in Illinois, that is, some measure of monetary support. His failure to do so was a breach of duty imposed by Illinois law and such failure obviously occurred in Illinois. The child could be supported nowhere else because it was a citizen and resident of Illinois.

Poindexter v. Willis, 23 Ohio Misc. 199, 209, 256 N.E.2d 254, 261 (Ohio Com. Pl. 1970). Thus, the Ohio court bootstrapped itself by presuming paternity (and the concomitant breach of duty) and finding contacts in support. However, paternity

and the existence of a legal duty to support were the very questions in issue.³ Several other jurisdictions including the First District Court of Appeal in Bell have nevertheless approved Poindexter and held that a nonresident putative father commits a "tortious act" by failing to support an illegitimate child prior to a determination of paternity. In re Custody of Miller, 86 Wash.2d 712, 548 P.2d 542 (1976); Gentry v. Davis, 512 S.W.2d 4 (Tenn. 1974); State ex rel. Nelson v. Nelson, 298 Minn. 438, 216 N.W.2d 140 (1974); Black v. Rasile, 113 Mich. App. 601, 318 N.W.2d 475 (Mich. Ct. App. 1980); Neill v. Ridner, 153 Ind. App. 149, 286 N.E.2d 427 (Ind. Ct. App. 1972).⁴

The Bell-Poindexter minority rule urged by Petitioner as the rule of law to be adopted by this Court has been harshly criticized and rejected by the Supreme Courts of New Mexico, Arkansas, Nebraska, Tennessee, Kansas, and Colorado and appellate courts in Washington and Oregon because it incorrectly assumes the putative father is the biological father of the illegitimate child with a legal duty of support prior to an adjudication of paternity. State ex rel. Garcia v. Dayton, 102 N.M. 327, 695 P.2d 477 (1985); Howard v. County Court of Craighead County, 272 Ark. 205, 613 S.W.2d 386 (1981); State ex rel. Larimore v. Snyder, 206 Neb. 64, 291 N.W.2d 241 (1980); Barnhart v. Madvig, 526 S.W.2d 106 (Tenn. 1975) (apparently receding from Gentry); State ex rel. Carrington v. Schutts, 217 Kan.

³ Had Ohio applied the Illinois definition of a "tortious act" which requires a breach of legal duty, *supra* at p. 4, it could not have reached this conclusion as it is undisputed that a putative father owes no duty to his illegitimate child. See Kendrick v. Everheart, 390 So.2d 53 (Fla. 1980); Clarke v. Blackburn, 151 So.2d 325 (Fla. 2d DCA 1963).

⁴ Illinois itself has somewhat retracted from the Poindexter ruling in People ex rel. Mangold v. Flieger, 106 Ill.2d 546, 478 N.E.2d 1366 (1985) where it was held that a father's failure to pay support within the state was not a sufficient contact.

175, 535 P.2d 982 (1975); A.R.B. v. G.L.P., 180 Colo. 439, 507 P.2d 468 (1973); Bershaw v. Sarbacher, 40 Wash. App. 653, 700 P.2d 347 (Wash. Ct. App. 1985) (distinguishing and receding from In re Custody of Miller); State ex rel. McKenna v. Bennett, 28 Or. App. 155, 558 P.2d 1281 (Or. Ct. App. 1977). This assumption is illogical and in simple terms puts the cart before the horse:

Petitioner relies heavily upon Poindexter v. Willis, 87 Ill. App.2d 213, 231 N.E.2d 1 (1967) to support her contention that the trial court did acquire personal jurisdiction of the respondent. That case seems to go off on the premise that failure to support (original emphasis) was a wrong which the legislature intended to include within the meaning of 'tortious act' but failure to support is actually only an ancillary issue in a paternity case, where the main question for determination is: Is the respondent the father of the child? If a respondent is found to be the father, then it automatically follows that he has violated his responsibility for support. Therefore, we do not regard Poindexter as a viable case upon which to rely for the resolution of the issue posed here.

A.R.B., 507 P.2d at 469. See also, Anonymous v. Anonymous, 49 Misc.2d 675, 268 N.Y.S.2d 710 (N.Y. Fam. Ct. 1966).

The Second District Court of Appeal in State, Dept. of Health and Rehabilitative Services, Office of Child Support Enforcement ex rel. Luke v. Wright, 489 So.2d 1148 (Fla. 2d DCA 1986) expressly considered and likewise rejected the Bell-Poindexter rule as being legally illogical:

We agree with the latter line of cases which reason that failure to provide child support is only an ancillary issue in a paternity proceeding and that the first issue to be determined is whether the named defendant is the father of the child. In doing so, we disagree with the holding of the First District Court of Appeal in Bell v. Tuffnell, 418 So.2d 422 (1st DCA 1982), petition for review denied, 427 So.2d 736 (Fla. 1983). A court cannot, as an initial matter, assume that a defendant is the father of a child so that it can adjudicate the matter of nonsupport, and upon finding nonsupport, use such "tortious" conduct as the basis of jurisdiction to adjudicate paternity. Until determination of parenthood has been made, a putative

father owes no duty of support to his illegitimate child.
See *T.J.K. v. N.B.*.

489 So.2d at 1150-1151. The trial court found this reasoning persuasive. (RA. 8). The appellate court likewise found this reasoning compelling. (RA. 11). The rationale underlying this conclusion is that the purpose of a paternity action is to convert a natural and moral obligation of a father to support his illegitimate offspring into a legal obligation. *Kendrick v. Everheart*, 390 So.2d 53 (Fla. 1980). Therefore, the failure of a putative father to pay support cannot be a "tortious act" because he owes no legal duty to pay support prior to an adjudication of paternity.⁵

A historical analysis of the underpinnings of a paternity action further supports a conclusion that a child support demand ancillary thereto is not a tort claim. At common law a child born out of wedlock is said to be silius nulus, the child of nobody, and under the common law, the putative father owes no duty of support to his illegitimate child. This burden rests solely with the mother. Paternity "[bastardy] proceedings are purely statutory in nature, and the remedy given by the statute must measure the rights and liabilities of the parties." *T.J.K. v. N.B.*, 237 So.2d 592 (Fla. 4th DCA 1970). See *DeCosta v. North Broward Hospital District*, 497 So.2d 1282 (Fla. 4th DCA 1986). Florida statutes expressly state that a paternity claim and a child support demand incident thereto is not an action at law in tort but is an equitable proceeding:

⁵ In a published law review article, Associate Professor Martin Levy has written that "to find a tort in support when the issue of paternity has not yet been adjudicated is illogical and improper." Levy, *Asserting Jurisdiction Over Nonresident Putative Fathers in Paternity Actions*, 45 U. Cin. L. Rev. 207 (1976).

Any woman who shall be pregnant or delivered of a child may bring proceedings in the circuit court, in *chancery*,⁶ to determine the paternity of such child.

Section 742.011, Fla. Stat. (1985).

The failure to support a legitimate child is similarly not a tortious act but gives rise to an equitable proceeding:

Proceedings under this chapter [dissolution of marriage; support, custody] are in *chancery*.

Section 61.011, Fla. Stat. (1985).

Legislative acknowledgment that the failure to support a legitimate child is not a tort came with the enactment of subsections (1)(b) and (e) to 48.193 which provides as follows:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(b) Committing a tortious act within this state.

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirements for filing an action for dissolution of marriage.

⁶ *Chancery* is defined as "equity" or "equitable jurisdiction." *Black's Law Dictionary*, 5th Ed. (1979). This is in direct contrast to a tort claim which has its jurisdiction in law and not equity.

⁷ *Id.*

Had the legislative intent been to include support claims as a tort action within subsection (1)(b) there would have been no need to enact subsection (1)(e). See generally, City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985) ("in construing legislation, court should not assume legislature acted pointlessly"). A judicial interpretation that the failure to support an illegitimate child constitutes a tortious act would not only be repugnant to Section 742.011, but would result in an irreconcilable inconsistency with Section 48.193(1)(e). If Petitioner and Respondent were married, subsection (e) would apply and subsection (b) would not have been applicable.⁸

An action for child support based upon an allegation that a putative father breached his duty to support his child is not maintainable under the long-arm statute and such an action would have been dismissed because Florida was never the parties' domicile (matrimonial or otherwise). Yet the Bell-Poindexter rule would permit the absurd result of conferring jurisdiction over a nonresident nonspouse to adjudicate paternity and child support claims based solely upon an allegation of a breach of duty to support an illegitimate child, not yet found to be the putative father's.

The legislative intent of a statute should be gathered from consideration of the statute as a whole rather than from any one part thereof. Florida Jai-Alai, Inc. v. Lake Howell Water and Reclamation District, 274 So.2d 522 (Fla. 1973). When the long-arm statute is read as a whole, section 48.193(1)(b) cannot be interpreted to apply to a nonresident putative father such as Mr. Howenstine.

⁸ Federal courts have denominated paternity and child support claims as ecclesiastical actions and thus as a rule have abstained from hearing them in diversity of citizenship cases. In comparison, true tort actions arising from family matters have been heard on the merits. *See Kirby v. Mellenger, 830 F.2d 176 (11th Cir. 1987); McIntyre v. McIntyre, 771 F.2d 1316 (9th Cir. 1985).*

Petitioner attempts to circumvent the inescapable logic of the conclusion reached in Luke by arguing that 48.193(1)(b) must apply because she has suffered an "injury, including the bearing of the child and the continued trauma of rearing it alone . . . and the financial burden of rearing the child." (Br. 11). This is irrelevant in determining the scope of the long-arm statute. Respondent submits that only the legislature can fill what may be a statutory gap if it deems the result unfair. It is not the function of this Court to stretch 48.193(1)(b) beyond all reasonable bounds to achieve what Petitioner believes is just.⁹

Since the failure of a nonresident father to support an illegitimate child is not a "tortious act" there can be no assertion of jurisdiction over Mr. Howenstine to adjudicate the paternity or child support claim.

C. ASSUMING THAT THE FAILURE OF A NONRESIDENT PUTATIVE FATHER TO SUPPORT AN ILLEGITIMATE CHILD IS A TORT, THERE IS NO CONNEXITY BETWEEN THE ALLEGED CONTACT WITH THE FORUM (I.E., CONSENSUAL INTERCOURSE) AND THE TORT.

Personal jurisdiction over nonresident defendants in Florida is limited to situations where the cause of action directly arises from the specified act enumerated in the long-arm statute:

⁹ There are both proposed and enacted legislative provisions to provide long-arm jurisdiction under these circumstances. The Uniform Parentage Act §8(b) provides for the exercise of jurisdiction over a "person who has sexual intercourse in this State" as to an "action brought under this Act with respect to a child who may have been conceived by that act of intercourse." Similarly, Louisiana provides that a court may exercise personal jurisdiction over a nonresident as to the nonresident's "parentage and support of a child who was conceived by the nonresident while he resided in or was in this state." LA.REV.STAT.ANN. §13:3201(g) (1984). Florida has not adopted the Uniform Parentage Act or a statutory provision comparable to subsection (g) of Louisiana's long-arm statute. This further supports the conclusion that Florida's present statutory scheme does not contemplate the assertion of jurisdiction over a nonresident putative father to adjudicate paternity or child support claims. For a general discussion as to the constitutionality of a long-arm statute contemplated by the Uniform Parentage Act or that enacted by Louisiana which expressly provides for jurisdiction over a nonresident putative father where his only contact is consensual intercourse within the state, see *infra* pp. 12-15.

- (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts . . .

Section 48.193(1), Fla. Stat. (1985). This has been described as the "connexity" requirement that must be met before jurisdiction can be sustained. Nicolet, Inc. v. Benton, 467 So.2d 1046 (Fla. 1st DCA 1985); Polskie Linie Oceaniczne v. Seasafe Transport A/S, 795 F.2d 968 (11th Cir. 1986).

The contact with the forum (i.e., intercourse in the state) could furnish a basis for a tort directly arising therefrom, such as a battery, if the intercourse was nonconsensual or fraud under the emerging theory of liability for the infliction of contagious venereal diseases. Since there is no connexity between consensual intercourse and the duty to pay child support, there can be no statutory assertion of long-arm jurisdiction pursuant to 48.193(1)(b).

II.

THE ASSERTION OF PERSONAL JURISDICTION OVER A NONRESIDENT PUTATIVE FATHER WHOSE ONLY CONTACT WITH THE FORUM IS CONSENSUAL INTERCOURSE WITH THE MOTHER OFFENDS STATE AND FEDERAL CONSTITUTIONAL DUE PROCESS GUARANTEES.

The Due Process Clause of the United States Constitution protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has no meaningful "contacts, ties or relations." International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). Respondent submits that the act of consensual intercourse with an adult is not a sufficient contact, tie or relation with this state so as to enable the constitutional exercise of jurisdiction over a putative father to adjudicate paternity and child support claims. As the second step in the dual inquiry, there is no need to address this

issue unless this Court initially determines that Section 48.193(1)(b), Fla. Stat. (1985), provides for the statutory assertion of jurisdiction over Mr. Howenstine.

The constitutional touchstone for this analysis is whether the nonresident defendant purposefully established "minimum contacts" in the forum state. International Shoe Co. at 316. The foreseeability that is critical to due process analysis is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980). This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts. A single or "isolated act" related to the forum may not be sufficient to establish jurisdiction if "the nature and quality and the circumstances of the commission" create only an "attenuated" affiliation with the forum. International Shoe Co. at 318. Once it has been decided that a defendant has purposefully established minimum contacts within the forum state, the contacts must still be analyzed in light of all other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." Id. at 320. Where the defendant's activities are not continuous and systematic, jurisdiction depends on the relationship between the cause of action on the one hand and the nature and quality of defendant's activities on the other hand. McGee v. International Life Insurance Co., 355 U.S. 220 (1957); Rubail v. Lakewood Pipe of Texas, Inc., 695 F.2d 541 (11th Cir. 1983).¹⁰

The Supreme Court of the United States recently applied these broad principles in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). The precise

¹⁰ This is a constitutionally mandated connexity test statutorily required by §48.193(1), Fla. Stat. (1985). *See supra* pp. 13 - 14.

issue was whether Section 48.193(1)(g), Fla. Stat. (Supp. 1984), was constitutional as applied to a nonresident franchisee who had allegedly breached a franchise agreement with Burger King Corporation which was headquartered in Florida. The court held that "an individual's contract with an out-of-state party *alone* can [not] automatically establish sufficient minimum contacts" (original emphasis). Application of 48.193(1)(g) was nevertheless found constitutional because Rudzewicz "deliberately reached out beyond Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization."

Neither Bell v. Tuffnell, 418 So.2d 422 (Fla. 1st DCA 1982), rev. denied, 427 So.2d 736 (1983), nor State of Florida, Dept. of Health and Rehabilitative Services, Office of Child Support Enforcement ex rel. Luke v. Wright, 489 So.2d 1148 (Fla. 2d DCA 1985), rev. pending, (Case No. 69,050), expressly addressed the constitutionality of 48.193(1)(b) as applied to a nonresident putative father whose only contact with the state is consensual intercourse with an adult.¹¹ Respondent concedes that all other reported state court jurisdictions addressing the issue, of which he is aware, have determined that the application of their long-arm statutes on similar facts would not offend the Due Process Clause. See In re Custody of Miller, 86 Wash.2d 712, 548 P.2d 542 (1976); Gentry v. Davis, 512 S.W.2d 4 (Tenn. 1974); State ex rel. Nelson v. Nelson, 298 Minn. 438, 216 N.W.2d 140 (1974); Black

¹¹ There is no question that the failure to pay support to a child residing in Florida without more is an insufficient minimum contact. Kulko v. Superior Court of California, 436 U.S. 84 (1978); Lightell v. Lightell, 394 So.2d 41 (Ala. Civ. App. 1981); People ex rel. Mangold v. Flieger, 106 Ill.2d 546, 478 N.E.2d 1366 (1985).

v. Rasile, 113 Mich. App. 601, 318 N.W.2d 475 (Mich. Ct. App. 1980); Neill v. Ridner, 153 Ind. App. 149, 286 N.E.2d 427 (Ind. Ct. App. 1972).¹²

But none of these cases had the benefit of the Burger King analysis which supports the proposition that an isolated contact such as one act of sexual intercourse in the state which allegedly results in the birth of a child is constitutionally insufficient. The singular act which may have given rise to the birth of an illegitimate child, like a singular contract, is an "attenuated" contact.

It is also no longer reasonably foreseeable that a act of intercourse has a probability of resulting in the birth of a child and the filing of a paternity action in a foreign forum. One reason is that over 64% of all women in the United States utilize systematic birth control measures.¹³ From the nonresident putative father's perspective, he is being haled into a foreign jurisdiction to answer for a result that was not reasonably foreseeable.

Secondly, the contact with the forum (consensual intercourse) does not relate to the tort allegedly sued upon under state law (breach of duty to pay child support).

In sum, an act of intercourse with a consenting adult is an insufficient contact with Florida and thus the application of 48.193(1)(b) to Mr. Howenstine would offend the constitutional due process guarantees found in the state and federal constitutions.

¹² These decisions are from the same courts which erroneously held that the failure of a putative father to support an illegitimate child is a "tortious act." The contrary cases cited by Respondent did not address the constitutional issue because they found no statutory basis upon which to assert personal jurisdiction.

¹³ Population Reference Bureau, *Understanding U.S. Fertility*, page 20 (1982). This includes sexually active and inactive women. The statistic if only sexually active women were the sample population would probably be higher.

CONCLUSION

The Supreme Court of New Mexico has eloquently summarized the result that must be reached by this Court:

We sympathize with the plight of [the mother] in the costs and inconvenience of proceeding in a foreign state. However, petitioner is not cut off from all recourse because the long arm statute does not reach the alleged nonresident father. She may bring her action in Texas.

This court has strongly expressed its concern for the support of the minor child by stating that it is the *most important single obligation* of the parent. However, we cannot create personal jurisdiction where none exists.

(Original emphasis) (citations omitted). State ex rel. Garcia v. Dayton, 695 P.2d at 480.

For the reasons expressed, the Respondent requests that the foregoing conclusion be embraced by this Court and that the Third District Court of Appeal's ruling under review and the Second District Court of Appeal's ruling in Luke be approved.

Respectfully submitted,

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By _____


GLEN RANKIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 2nd day of December, 1987 to: BRIAN R. HERSH, ESQ., Law Offices of Brian R. Hersh, Attorneys for Petitioner, Suite 602, Biscayne Building, 19 West Flagler Street, Miami, Florida 23130.

By


GLEN RAFFIN