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II. The demographic dispersion in family structure

The past fifty years have seen dramatic changes in sexual behavior, patterns of reproduction, and family life. Fewer people are getting married, cohabitation is on the rise, divorce is commonplace, extra-marital sex is pervasive, and out-of-wedlock childbearing has grown steadily for decades.¹ These general developments mask important trends well known to professional demographers: the composition of families has diverged dramatically by social class, income, education, and race. This segmentation is the product of three interrelated trends. First, although marriage rates have dropped across the board and people are marrying later, the retreat from marriage is far more pronounced among the less privileged and some minorities, especially blacks. As a general matter, "[t]he higher the level of education, the more likely people [are] to wed, and the less likely they [are] to live together."² Between 1950 and 2008, according to one estimate, the percentage of 40-year old white female high school dropouts who were married declined by 13%, while the percentage of white female married colleges graduates increased by
16% – a reversal of historic trends. For white men, the percentage of married 40-year-olds declined twice as fast among high school graduates as among the college educated.

For blacks the retreat from marriage was more significant and affected every social class. During this period, rates of marriage for college educated black women under 40 decreased by 10 percent, but by 44 percent for high school dropouts; for men, the corresponding declines were 20% and 55%, respectively. Currently, only 65% of black male high school graduates are married by age 40, and marriage rates among black high school dropouts have fallen to half their previous rates over this period.

Likewise, patterns of divorce have shifted decisively. After an initial surge in divorce across the board starting in the 1960s, recent data reveals widening disparities in the risk of divorce by level of education, with divorce rates among college educated white women dropping steadily since 1980, and rising among less educated whites and blacks in all social groups. Although the divorce rate among whites in the early part of this decade stood at 47% overall, the rate was 60% for high school dropouts as compared to 36% among college graduates. Although blacks marry less often than other major American groups, they also divorce more frequently, with divorce rates increasing among all educational groups over the past 50 years. About 70% of black women's first marriages now end in divorce, with rates remaining high across the board.

The drop in marriage rates has fueled a shift to single motherhood, with 40% of all births in 2007 to unmarried women. This figure masks significant sociodemographic disparities, with "the least educated women . . . six times as likely as the most educated women to have a baby outside of marriage." Those ratios are primarily the product of a rapid increase in single motherhood among the less-privileged. There has been little change since 1965 in the rate of extra-marital births for women with a college degree or
more, with the percentage of children born to unmarried white college educated mothers remaining under 5%\textsuperscript{8}. The rise in single parent families among blacks has been even more dramatic, with lower marriage rates in this group generating an explosion in extra-marital births. The most recent census figures reveal that about 72% of black children are now born out of wedlock.\textsuperscript{9} Finally, family disintegration is proceeding apace among Hispanics, with extra-marital births now standing at 45% overall, and the trend towards single parent families accelerating faster than for other racial groups.\textsuperscript{10}

These developments, which have been exhaustively documented by demographers and social scientists, are confirmed by recent data gleaned from the 2006-2007 Current Population Survey (CPS). These are analyzed and summarized in the attached figures.\textsuperscript{11} As these show, large differences in women's marital and reproductive behavior persist by race and class. White female college graduates are significantly more likely to be married than women from less educated groups.\textsuperscript{12} Correspondingly, the percentage of never married women among the least-educated (those with no more than 12 years of education) is far higher than for those with a bachelor's degree or more. (See figures a & b). For white women who had children in this period, the ratio of married to single mothers increases dramatically with more years of education. Although married mothers are a significant presence in every group, the contrasts are stark: about half of all white mothers without a high school degree are unmarried, whereas white mothers with a college degree almost always marry before having children. Even in this recent cohort, almost 95% of white mothers who completed college were married at the time of their child's birth. (See figures c & d).

For black women, out-of-wedlock childbearing is more evenly distributed by level of education than among whites, with the ratio of single to married women higher for all levels of education (see figures e & f), and the proportion of women giving birth outside
of marriage uniformly larger (see figures g & h). In contrast with white women, never-married women are in the majority regardless of level of education, with black high school graduates more likely to be married than women with more or less schooling, and only a small percentage of high school dropouts ever getting married. It is not surprising, then, that giving birth outside of marriage is the most common pattern for all black women except the most educated, with the percentage of extra-marital births well over 50% for women without a college degree. Even among black college graduates, almost a third were unmarried, in contrast with about 7% of similarly educated white mothers – a ratio of almost 5 to 1.

Hispanics likewise have relatively high rates of out of wedlock childbearing, with 45% of births to single mothers. Although most Hispanic mothers are currently married, over one-third of Hispanic mothers in 2006-2007 with 12 or fewer years of schooling were single. (See figures I & j). The combination of higher birth rates and lower college attendance rates for Hispanic women has fueled a rapid increase in the rate of extra-marital births in this group.14

The result of these developments is that well-off whites have largely maintained traditional patterns of family, while the less privileged and minorities live in less stable arrangements. (See figures k and l). Fatherless or blended families are relatively uncommon for women who have completed four years of college or more, and the children of white college educated parents are significantly more likely to spend their childhood living continuously with their married biological parents.15 In contrast, only a small percentage of black children are raised by married biological parents.16 As Jonathan Rauch has noted, marriage is now a significant marker as well as a powerful predictor of social inequality. "America's families and children may be splitting into two
increasingly divergent and self-perpetuating streams — two social classes, in other words — with marriage as the dividing line." Some children will "grow up in a culture where marriage is taken for granted," whereas others will find themselves "in a culture where marriage is a pipe dream and deadbeat dads and impoverished kid's are the norm."17
Emma POSIK, Appellant,

695 So.2d 759 (5th DCA 1997)

HARRIS, Judge.

Emma Posik and Nancy L.R. Layton were close friends and more. They entered into a support agreement much like a prenuptial agreement. The trial court found that the agreement was unenforceable because of waiver. We reverse.

Nancy Layton was a doctor practicing at the Halifax Hospital in Volusia County and Emma Posik was a nurse working at the same facility when Dr. Layton decided to remove her practice to Brevard County. In order to induce Ms. Posik to give up her job and sell her home in Volusia County, to accompany her to Brevard County, and to reside with her "for the remainder of Emma Posik's life to maintain and care for the home," Dr. Layton agreed that she would provide essentially all of the support for the two, would make a will leaving her entire estate to Ms. Posik, and would "maintain bank accounts and other investments which constitute non-probatable assets in Emma Posik's name to the extent of 100% of her entire non-probatable assets." Also, as part of the agreement, Ms. Posik agreed to loan Dr. Layton $20,000 which was evidenced by a note. The agreement provided that Ms. Posik could cease residing with Dr. Layton if Layton failed to provide adequate support, if she requested in writing that Ms. Posik leave for any reason, if she brought a third person into the home for a period greater than four weeks without Ms. Posik's consent, or if her abuse, harassment or abnormal behavior made Ms. Posik's continued residence intolerable. In any such event, Dr. Layton agreed to pay as liquidated damages the sum of $2,500 per month for the remainder of Ms. Posik's life.

It is apparent that Ms. Posik required this agreement as a condition of accompanying Dr. Layton to Brevard. The agreement was drawn by a lawyer and properly witnessed. Ms. Posik, fifty-five years old at the time of the agreement, testified that she required the agreement because she feared that Dr. Layton might become interested in a younger companion. Her fears were well founded. Some four years after the parties moved to Brevard County and without Ms. Posik's consent, Dr. Layton announced that she wished to move another woman into the house. When Ms. Posik expressed strong displeasure with this idea, Dr. Layton moved out and took up residence with the other woman.
Dr. Layton served a three-day eviction notice on Ms. Posik. Ms. Posik later moved from the home and sued to enforce the terms of the agreement and to collect on the note evidencing the loan made in conjunction with the agreement. Dr. Layton defended on the basis that Ms. Posik first breached the agreement. Dr. Layton counterclaimed for a declaratory judgment as to whether the liquidated damages portion of the agreement was enforceable.

The trial judge found that because Ms. Posik's economic losses were reasonably ascertainable as to her employment and relocation costs, the $2,500 a month payment upon breach amounted to a penalty and was therefore unenforceable. The court further found that although Dr. Layton had materially breached the contract within a year or so of its creation, Ms. Posik waived the breach by acquiescence. Finally, the court found that Ms. Posik breached the agreement by refusing to continue to perform the house work, yard work and cooking for the parties and by her hostile attitude which required Dr. Layton to move from the house. Although the trial court determined that Ms. Posik was entitled to quantum meruit, it also determined that those damages were off-set by the benefits Ms. Posik received by being permitted to live with Dr. Layton. The court did award Ms. Posik a judgment on the note executed by Dr. Layton.

Although neither party urged that this agreement was void as against public policy, Dr. Layton's counsel on more than one occasion reminded us that the parties had a sexual relationship. Certainly, even though the agreement was couched in terms of a personal services contract, it was intended to be much more. It was a nuptial agreement entered into by two parties that the state prohibits from marrying. But even though the state has prohibited same-sex marriages and same-sex adoptions, it has not prohibited this type of agreement. By prohibiting same-sex marriages, the state has merely denied homosexuals the rights granted to married partners that flow naturally from the marital relationship. In short, "the law of Florida creates no legal rights or duties between live-ins." This lack of recognition of the rights which flow naturally from the break-up of a marital relationship applies to unmarried heterosexuals as well as homosexuals. But the State has not denied these individuals their right to either will their property as they see fit or to privately commit by contract to spend their money as they choose. The State is not thusly condoning the lifestyles of homosexuals or unmarried live-ins; it is merely recognizing their constitutional private property and contract rights.

Even though no legal rights or obligations flow as a matter of law from a non-marital relationship, we see no impediment to the parties to such a relationship agreeing between themselves to provide certain rights and obligations. Other states have approved such individual agreements. [quoting, inter alia, Marvin v. Marvin]. . . .
In a case involving unmarried heterosexuals, a Florida appellate court has passed on the legality of a non-marital support agreement. In Crossen v. Feldman, 673 So.2d 903 (Fla. 2d DCA 1996), the court held:

Without attempting to define what may or may not be "palimony," this case simply involves whether these parties entered into a contract for support, which is something that they are legally capable of doing.

Addressing the invited issue, we find that an agreement for support between unmarried adults is valid unless the agreement is inseparably based upon illicit consideration of sexual services. Certainly prostitution, heterosexual or homosexual, cannot be condoned merely because it is performed within the confines of a written agreement. The parties, represented by counsel, were well aware of this prohibition and took pains to assure that sexual services were not even mentioned in the agreement. That factor would not be decisive, however, if it could be determined from the contract or from the conduct of the parties that the primary reason for the agreement was to deliver and be paid for sexual services. This contract and the parties' testimony show that such was not the case here. Because of the potential abuse in marital-type relationships, we find that such agreements must be in writing. The Statute of Frauds (section 725.01, Florida Statutes) requires that contracts made upon consideration of marriage must be in writing. This same requirement should apply to non-marital, nuptial-like agreements. In this case, there is (and can be) no dispute that the agreement exists.

The obligations imposed on Ms. Posik by the agreement include the obligation "to immediately commence residing with Nancy L.R. Layton at her said residence for the remainder of Emma Posik's life...." This is very similar to a "until death do us part" commitment. And although the parties undoubtedly expected a sexual relationship, this record shows that they contemplated much more. They contracted for a permanent sharing of, and participating in, one another's lives. We find the contract enforceable.

We disagree with the trial court that waiver was proved in this case. Ms. Posik consistently urged Dr. Layton to make the will as required by the agreement and her failure to do so was sufficient grounds to declare default. And even more important to Ms. Posik was the implied agreement that her lifetime commitment would be reciprocated by a lifetime commitment by Dr. Layton—and that this mutual commitment would be monogamous. When Dr. Layton introduced a third person into the relationship, although it was not an express breach of the written agreement, it explains why Ms. Posik took that opportunity to hold Dr. Layton to her express obligations and to consider the agreement in default.

We also disagree with the trial court that Ms. Posik breached the agreement by
refusing to perform housework, yard work, provisioning the house, and cooking for the parties. This conduct did not occur until after Dr. Layton had first breached the agreement. One need not continue to perform a contract when the other party has first breached.

We also disagree that the commitment to pay $2,500 per month upon termination of the agreement is unenforceable as a penalty. We agree with Ms. Posik that her damages, which would include more than mere lost wages and moving expenses, were not readily ascertainable at the time the contract was created. Further, the agreed sum is reasonable under the circumstances of this case. It is less than Ms. Posik was earning some four years earlier when she entered into this arrangement. It is also less than Ms. Posik would have received had the long-term provisions of the contract been performed. She is now in her sixties and her working opportunities are greatly reduced.

We recognize that this contract, insisted on by Ms. Posik before she would relocate with Dr. Layton, is extremely favorable to her. But there is no allegation of fraud or overreaching on Ms. Posik's part.

Contracts can be dangerous to one's well-being. That is why they are kept away from children. Perhaps warning labels should be attached. In any event, contracts should be taken seriously. Dr. Layton's comment that she considered the agreement a sham and never intended to be bound by it shows that she did not take it seriously. That is regrettable.

We affirm that portion of the judgment below which addresses the promissory note and attorney's fees and costs associated therewith. We reverse that portion of the judgment that fails to enforce the parties' agreement.

PETERTON, Chief Judge, concurring specially.

In the instant case, two persons entered into a lifetime personal services contract--Posik managed a household exclusively for Layton, who was engaged in a demanding medical practice, and Layton was to provide monetary support and living quarters for Posik, who sacrificed her own professional career as a nurse to manage a household. Posik's reward, if she outlived Layton, and if Layton fared well in her professional endeavors, was a golden parachute--Layton's assets upon Layton's death. Each and every term of this agreement could have been included in one between a single invalid or an elderly married couple who seek the companionship and household services of a housekeeper, cook or a practical or professional nurse, in which no sexual
relationship was involved.

The result reached by us in this case should not be interpreted as anything more than a recognition that legally competent individuals may exercise their constitutional private property and contract rights. Much has been included in the opinion about the lifestyles of the litigants in this case because of arguments presented at trial and on appeal. But as Judge Harris accurately points out, neither this contract, nor the parties' testimony, reflects that the reason for this agreement was the delivery and payment for a sexual relationship or a same sex marriage, both of which are not recognized by the laws of Florida.
DENNIS JACOBS, Chief Judge:

Plaintiff Edith Windsor sued as surviving spouse of a same-sex couple that was married in Canada in 2007 and was resident in New York at the time of her spouse's death in 2009. Windsor was denied the benefit of the spousal deduction for federal estate taxes solely because Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, defines the words “marriage” and “spouse” in federal law in a way that bars the Internal Revenue Service from recognizing Windsor as a spouse or the couple as married. The text of § 3 is as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. At issue is Windsor’s claim for a refund in the amount of $363,053, which turns on the constitutionality of that section of federal law.

For the reasons that follow we hold that:

I. Windsor has standing in this action because we predict that New York would have recognized Windsor and Thea Clara Spyer as married at the time of Spyer’s death in 2009, so that Windsor was a surviving spouse under New York law.

II. Windsor’s suit is not foreclosed by Baker v. Nelson, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), which held that the use of the traditional definition of marriage for a state’s own regulation of marriage status did not violate equal protection.

III. Section 3 of DOMA is subject to intermediate scrutiny under the factors enumerated in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), and other cases.
IV. The statute does not withstand that review.

* * *

On June 6, 2012, the United States District Court for the Southern District of New York (Jones, J.) granted summary judgment in favor of Windsor. “We review a district court’s grant of summary judgment de novo, construing the record in the light most favorable to the nonmoving party.”.

DISCUSSION

I

For the purpose of federal estate taxes, the law of the state of domicile ordinarily determines whether two persons were married at the time of death. At the time of Spyer’s death in 2009, New York did not yet license same-sex marriage itself. A separate question—decisive for standing in this case—is whether in 2009 New York recognized same-sex marriages entered into in other jurisdictions.

When we are faced with a question of New York law that is decisive but unsettled, we may “predict” what the state’s law is, consulting any rulings of its intermediate appellate courts and trial courts, or we may certify the question to the New York Court of Appeals. We decline to certify.

. . .Second, rulings of New York’s intermediate appellate courts are useful and unanimous on this issue. It is a “well-established principle that the ruling of an intermediate appellate state court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.” . . .Given the consistent view of these decisions, we see no need to seek guidance here. Because Windsor’s marriage would have been recognized under New York law at the time of Spyer’s death, she has standing.

II

In Baker v. Nelson, an appeal from a Minnesota Supreme Court decision finding no right to same-sex marriage, the Supreme Court issued a summary dismissal “for want of a substantial federal question.” 409 U.S. 810 (1972). The Minnesota Supreme Court had held that “[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state’s classification of persons authorized to marry. According to BLAG, Baker compels the inference that Congress may prohibit same-sex marriage in the same way under federal law without offending the Equal Protection Clause. We disagree.

“The Supreme Court has long recognized that the precedential value of a summary dismissal is limited to ‘the precise issues presented and necessarily decided by’ the dismissal.”. The question whether the federal government may constitutionally define marriage as it does in Section 3 of DOMA is sufficiently distinct from the question in Baker: whether same-sex marriage may be constitutionally restricted by the states. After
all, Windsor and Spyer were actually married in this case, at least in the eye of New York, where they lived. Other courts have likewise concluded that Baker does not control equal protection review of DOMA for these reasons.

Even if Baker might have had resonance for Windsor's case in 1971, it does not today. “[I]nferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.” In the forty years after Baker, there have been manifold changes to the Supreme Court's equal protection jurisprudence.

The First Circuit has suggested in dicta that recognition of a new suspect classification in this context would “imply[ ] an overruling of Baker.” We disagree for two reasons that the First Circuit did not discuss. First, when it comes to marriage, legitimate regulatory interests of a state differ from those of the federal government. Regulation of marriage is “an area that has long been regarded as a virtually exclusive province of the States. . . Therefore, our heightened scrutiny analysis of DOMA's marital classification under federal law is distinct from the analysis necessary to determine whether the marital classification of a state would survive such scrutiny.

Second, the Supreme Court's decision to apply rational basis review in Romer does not imply to us a refusal to recognize homosexuals as a quasi-suspect class. We are satisfied, for these reasons, that Baker has no bearing on this case.

III

“In deciding an equal protection challenge to a statute that classifies persons for the purpose of receiving [federal] benefits, we are required, so long as the classifications are not suspect or quasi-suspect and do not infringe fundamental constitutional rights, to uphold the legislation if it bears a rational relationship to a legitimate governmental objective.” Of course, “a bare ... desire to harm a politically unpopular group cannot constitute a legitimate government interest.” Romer v. Evans. So while rational basis review is indulgent and respectful, it is not meant to be “toothless.”

The district court ruled that DOMA violated the Equal Protection Clause for want of a rational basis. But the existence of a rational basis for Section 3 of DOMA is closely argued. BLAG and its amici proffer several justifications that alone or in tandem are said to constitute sufficient reason for the enactment. Among these reasons are protection of the fisc, uniform administration of federal law notwithstanding recognition of same-sex marriage in some states but not others, the protection of traditional marriage generally, and the encouragement of “responsible” procreation.

Windsor and her amici vigorously argue that DOMA is not rationally related to any of these goals. Rational basis review places the burden of persuasion on the party challenging a law, who must disprove “every conceivable basis which might support it.”. So a party urging the absence of any rational basis takes up a heavy load. That would seem to be true in this case—the law was passed by overwhelming bipartisan majorities
in both houses of Congress; it has varying impact on more than a thousand federal
laws; and the definition of marriage it affirms has been long-supported and encouraged.

On the other hand, several courts have read the Supreme Court's recent cases in
this area to suggest that rational basis review should be more demanding when there
are “historic patterns of disadvantage suffered by the group adversely affected by the
statute. Proceeding along those lines, the district court in this case and the First Circuit
in Massachusetts both adopted more exacting rational basis review for DOMA. See
Massachusetts, 682 F.3d at 11 (describing its “more careful assessment”); Windsor,
833 F.Supp.2d at 402 (noting that “rational basis analysis can vary by context”). At
argument, counsel for BLAG wittily characterized this form of analysis as “rational basis
plus or intermediate scrutiny minus.”

The Supreme Court has not expressly sanctioned such modulation in the level of
rational basis review; discussion pro and con has largely been confined to concurring
and dissenting opinions. We think it is safe to say that there is some doctrinal instability
in this area.

Fortunately, no permutation of rational basis review is needed if heightened
scrutiny is available, as it is in this case. We therefore decline to join issue with the dissent,
which explains why Section 3 of DOMA may withstand rational basis review.

Instead, we conclude that review of Section 3 of DOMA requires heightened
scrutiny. The Supreme Court uses certain factors to decide whether a new classification
qualifies as a quasi-suspect class. They include: A) whether the class has been
historically “subjected to discrimination”; B) whether the class has a defining
characteristic that “frequently bears [a][sic: should be “no”] relation to ability to perform
or contribute to society,” C) whether the class exhibits “obvious, immutable, or
distinguishing characteristics that define them as a discrete group and D) whether the
class is “a minority or politically powerless.”. Immutability and lack of political power are
not strictly necessary factors to identify a suspect class. . . .Nevertheless, immutability
and political power are indicative, and we consider them here. In this case, all four
factors justify heightened scrutiny: A) homosexuals as a group have historically endured
persecution and discrimination; B) homosexuality has no relation to aptitude or ability to
contribute to society; C) homosexuals are a discernible group with non-obvious
distinguishing characteristics, especially in the subset of those who enter same-sex
marriages; and D) the class remains a politically weakened minority.

A) History of Discrimination
It is easy to conclude that homosexuals have suffered a history of discrimination.
Windsor and several amici labor to establish and document this history, but we think it is
not much in debate.

. . .
B) Relation to Ability

Also easy to decide in this case is whether the class characteristic “frequently bears [a] relation to ability to perform or contribute to society.” Cleburne, 473 U.S. at 440–41, 105 S.Ct. 3249; see Frontiero, 411 U.S. at 686, 93 S.Ct. 1764 (“[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”).

There is no such impairment here. There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them. The aversion homosexuals experience has nothing to do with aptitude or performance.

C) Distinguishing Characteristic

We conclude that homosexuality is a sufficiently discernible characteristic to define a discrete minority class.

This consideration is often couched in terms of “immutability.” BLAG and its amici argue that sexual orientation is not necessarily fixed, suggesting that it may change over time, range along a continuum, and overlap (for bisexuals). But the test is broader: whether there are “obvious, immutable, or distinguishing characteristics that define ... a discrete group.”. Classifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny, even though these characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference. What seems to matter is whether the characteristic of the class calls down discrimination when it is manifest.

Thus a person of illegitimate birth may keep that status private, and ensure that no outward sign discloses the status in social settings or in the workplace, or on the subway. But when such a person applies for Social Security benefits on the death of a parent (for example), the illegitimate status becomes manifest. The characteristic is necessarily revealed in order to exercise a legal right. Similarly, sexual preference is necessarily disclosed when two persons of the same sex apply for a marriage license (as they are legally permitted to do in New York), or when a surviving spouse of a same-sex marriage seeks the benefit of the spousal deduction (as Windsor does here).

The class affected by Section 3 of DOMA is composed entirely of persons of the same sex who have married each other. Such persons constitute a subset of the larger category of homosexuals. Married same-sex couples like Windsor and Spyer are the population most visible to the law, and they are foremost in mind when reviewing DOMA’s constitutionality.

We therefore conclude that sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals.

D) Political Power
Finally, we consider whether homosexuals are a politically powerless minority. We conclude that homosexuals are still significantly encumbered in this respect.

The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination.

There are parallels between the status of women at the time of *Frontiero* and homosexuals today: their position “has improved markedly in recent decades,” but they still “face pervasive, although at times more subtle, discrimination ... in the political arena.”

In sum, homosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.

* * *

Analysis of these four factors supports our conclusion that homosexuals compose a class that is subject to heightened scrutiny. We further conclude that the class is quasi-suspect (rather than suspect) based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect. While homosexuals have been the target of significant and long-standing discrimination in public and private spheres, this mistreatment “is not sufficient to require ‘our most exacting scrutiny.’”

The next step is to determine whether DOMA survives intermediate scrutiny review.

IV

To withstand intermediate scrutiny, a classification must be “substantially related to an important government interest.”. “The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”.

BLAG advances two primary arguments for why Congress enacted DOMA. First, it cites “unique federal interests,” which include maintaining a consistent federal definition of marriage, protecting the fisc, and avoiding “the unknown consequences of a novel redefinition of a foundational social institution.” Second, BLAG argues that Congress enacted the statute to encourage “responsible procreation.”.

A) Maintaining a “Uniform Definition” of Marriage

Statements in the Congressional Record express an intent to enforce uniform eligibility for federal marital benefits by insuring that same-sex couples receive—or lose—the same federal benefits across all states. However, the emphasis on uniformity is suspicious because Congress and the Supreme Court have historically deferred to state domestic relations laws, irrespective of their variations.

To the extent that there has ever been “uniform” or “consistent” rule in federal law
concerning marriage, it is that marriage is “a virtually exclusive province of the States.”. DOMA was therefore an unprecedented intrusion “into an area of traditional state regulation.” This is a reason to look upon Section 3 of DOMA with a cold eye. “The absence of precedent ... is itself instructive; [d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”

Moreover, DOMA’s sweep arguably creates more discord and anomaly than uniformity, as many amici observe. Because DOMA defined only a single aspect of domestic relations law, it left standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity.

Because DOMA is an unprecedented breach of longstanding deference to federalism that singles out same-sex marriage as the only inconsistency (among many) in state law that requires a federal rule to achieve uniformity, the rationale premised on uniformity is not an exceedingly persuasive justification for DOMA.

B) Protecting the Fisc

Another professed goal of Congress is to save government resources by limiting the beneficiaries of government marital benefits. But the Supreme Court has held that “[t]he saving of welfare costs cannot justify an otherwise invidious classification.”

. . .Furthermore, DOMA is so broad, touching more than a thousand federal laws, that it is not substantially related to fiscal matters. DOMA impairs a number of federal laws (involving bankruptcy and conflict-of-interest) that have nothing to do with the public fisc. DOMA transcends a legislative intent to conserve public resources.

C) Preserving a Traditional Understanding of Marriage

Congress undertook to justify DOMA as a measure for preserving traditional marriage as an institution. 150 Cong. Rec. 14951. But “[a]ncient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis.” A fortiori, tradition is hard to justify as meeting the more demanding test of having a substantial relation to an important government interest. Similar appeals to tradition were made and rejected in litigation concerning anti-sodomy laws. See Lawrence. .

Preservation of a traditional understanding of marriage therefore is not an exceedingly persuasive justification for DOMA.

D) Encouraging Responsible Procreation

Finally, BLAG presents three related reasons why DOMA advances the goals of “responsible childrearing”: We agree that promotion of procreation can be an important government objective. But we do not see how DOMA is substantially related to it.

All three proffered rationales have the same defect: they are cast as incentives for heterosexual couples, incentives that DOMA does not affect in any way. DOMA does
not provide any incremental reason for opposite-sex couples to engage in “responsible procreation.” Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.

DOMA is therefore not substantially related to the important government interest of encouraging procreation.

* * *

DOMA’s classification of same-sex spouses was not substantially related to an important government interest. Accordingly, we hold that Section 3 of DOMA violates equal protection and is therefore unconstitutional.

V

Our straightforward legal analysis sidesteps the fair point that same-sex marriage is unknown to history and tradition. But law (federal or state) is not concerned with holy matrimony. Government deals with marriage as a civil status—however fundamental—and New York has elected to extend that status to same-sex couples. A state may enforce and dissolve a couple’s marriage, but it cannot sanctify or bless it. For that, the pair must go next door.

CONCLUSION

For the foregoing reasons, we AFFIRM the grant of Windsor’s motion for summary judgment.

STRAUB, Circuit Judge, dissenting in relevant part

The majority holds DOMA unconstitutional, a federal law which formalizes the understanding of marriage in the federal context extant in the Congress, the Presidency, and the Judiciary at the time of DOMA’s enactment and, I dare say, throughout our nation’s history. If this understanding is to be changed, I believe it is for the American people to do so.

Furthermore, it is argued here that we are to disregard this binding precedent and the traditionally applicable rational basis standard of review and, instead, now create a new type of suspect classification requiring a heightened level of scrutiny in respect of the federal definition of marriage. The Supreme Court has never done so, while reminding us to be wary of creating any new such classification and itself not having created any in decades. I believe it would be imprudent to do so in this case. Eleven of our nation’s federal Circuit Courts of Appeals have not utilized an elevated form of scrutiny as to sexual orientation discrimination. Most recently, the First Circuit went to the extreme of creating a new, increased level of rational basis analysis. This appears to be the first case in which this Court is asked to do the same or more, and the majority is the first to apply intermediate scrutiny to invalidate the federal definition of marriage as between a man and a woman. The discrimination in this case does not involve a recognized suspect or quasi-suspect classification. It is squarely about the preservation
of the traditional institution of marriage and its procreation of children. DOMA centers on legitimate state interests that go beyond mere moral disapproval of an excluded group. DOMA's classification is to be reviewed on the basis of whether it has a rational relation to any legitimate end. Utilizing that standard, I conclude that DOMA is constitutional. The rational basis standard is most deferential to the determinations of the Congress. Such may be conclusory and are not to be tried in the traditional fact-oriented process. The public policy choice set forth in DOMA is to be made by Congress, not the Judiciary. In DOMA, Congress has set the boundaries for marriage—all in keeping with American society’s historical view of a marriage as being between a man and a woman. This is not the first time the Congress has signaled its intentions in various definitions of eligibility for federal purposes as to children, marriage, and domestic relations. These have at times conflicted with state laws but the federal law has always prevailed for federal purposes.

... My final observation relates to the Attorney General's current position. His assertion that sexual orientation is a suspect classification and that DOMA fails to pass strict scrutiny is recently minted, and is contrary to an established body of cases to the contrary. The Attorney General's position is unprecedented in its departure from the Department of Justice's long-standing policy of defending federal statutes even if the President disagrees as a matter of policy.

At bottom, the issue here is marriage at the federal level for federal purposes, and not other legitimate interests. The Congress and the President formalized in DOMA, for federal purposes, the basic human condition of joining a man and a woman in a long-term relationship and the only one which is inherently capable of producing another generation of humanity. Whether that understanding is to continue is for the American people to decide via their choices in electing the Congress and the President. It is not for the Judiciary to search for new standards by which to negate a rational expression of the nation via the Congress.

DISCUSSION

...
incentivizing the raising of children by their biological parents, and (6) encouraging childrearing in a setting with both a mother and a father.

. . . Even now the Department of Justice acknowledges that “a reasonable argument for Section 3’s constitutionality may be proffered under” the rational basis standard, and that there exists “substantial circuit court authority applying rational basis review to sexual-orientation classifications.” At argument, the Department of Justice summarized its most recent arguments for DOMA’s rational basis as “maintaining the status quo” and achieving “a degree of uniformity for federal benefits, coupled with preserving room for state policy development.”

As explained above, only if there is no conceivable legitimate governmental interest, or DOMA is not rationally related to any such interest, will the statute be unconstitutional under rational basis review.

A. Responsible Procreation and Childrearing by Biological Parents

In enacting DOMA, Congress sought to explicitly recognize, for federal purposes, the biological component of the marital relationship and the legal responsibility of rearing the offspring of such a union. Numerous state high courts have accepted this as a rational basis for excluding same-sex couples, even legally recognized same-sex parents, from the institution of civil marriage. DOMA advances the governmental interest in connecting marriage to biological procreation by excluding certain couples who cannot procreate simply by joinder of their different sexual being from the federal benefits of marital status.

. . .

The interest in recognizing the connections between marriage and childrearing by biological parents can be broken down into several components. First, DOMA expresses Congressional recognition that “responsible begetting and rearing of new generations is of fundamental importance to civil society.” Because the state has an interest in children, the state is thus also interested in preventing “irresponsible procreation,” a phenomenon implicated exclusively by heterosexuals. Because of these legitimate interests, reserving federal marriage rights to opposite-sex couples “protect[s] civil society,” because without the inducement of marriage, opposite-sex couples would accidentally procreate, giving rise to unstable and unhealthy families. Marriage thus plays the important role of “channel[ing] opposite-sex sexual desires” which, in the absence of marriage, would result in unstable relationships, which have been documented to be harmful to children.

As stated by BLAG, “[m]arriage attempts to promote permanence and stability, which are vitally important to the welfare of the children of the marriage.” That is, marriage works to combat the risk of instability which is characteristic of inherently procreative opposite-sex relationships, but absent from same-sex relationships. DOMA advances this interest, in that the state only needs to provide incentives to opposite-sex couples in the form of marriage, because only opposite-sex couples have unintended, unplanned, unwanted children. Same-sex couples, by contrast, reproduce only
“deliberately choosing to do so and by devoting a serious investment of time, attention, and resources.”

... DOMA furthers the interest in recognizing the link between marriage and procreation for the reasons noted by the Maryland Court of Appeals:

[S]afeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest. The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link.... This “inextricable link” between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding).

Another component of the procreation and childrearing rationale for restricting federal rights to opposite-sex marriage is the Congressional desire to have children raised in families with only biological mothers and fathers, which same-sex couples cannot provide. Thus, BLAG contends that DOMA “offer[s] special encouragement for relationships that result in mothers and fathers jointly raising their biological children,” an interest which “simply does not apply to same-sex couples.” DOMA accomplishes this encouragement by limiting federal marriage rights to opposite-sex couples.

Congress might well have enacted DOMA after consulting “the entire history of civilization” regarding the “problems” that arise when there is no institution to encourage biological parents to remain together. This, too, has been accepted as a rational reason for excluding same-sex couples (including legally recognized same-sex parents) from civil marriages. . . .I agree with BLAG that the evidence offered by Windsor and the professional organizations and child welfare amici who advocate for affirmance does not make Congress's “common sense” regarding the needs of children a forbidden governmental interest under rational basis review.

. . .DOMA’s exclusion of married same-sex couples, under the rational basis review where means and ends need not match, is sufficiently related to the federal interest in recognizing the link between the marital relationship and the rearing of its offspring.

**B. Maintaining the Status Quo of Uniformity**

BLAG contends that DOMA is rationally related to the legitimate governmental “interest in uniform eligibility for federal marital benefits.” Congress, it is argued, has a “long history of enacting federal definitions of marriage that do not simply incorporate state definitions and inevitably will conflict with some of them.” A uniform federal definition of marriage “ensures that similarly-situated couples will have the same benefits regardless of which state they happen to live in.” The District Court expressed
skepticism regarding the legitimacy of this end, but principally rejected this justification because DOMA “intrude[s] upon the states' business of regulating domestic relations.” Windsor and various amici argue that “[t]he federal government [has always] accepted states' determinations of who was validly married—no matter how far states' criteria for validity diverged from one another,” and that the promulgation of a federal definition of marriage “injects the federal government into domestic relations law and works to delegitimize both the lawful marriages of thousands of same-sex couples and the considered judgments of ... [s]tates to sanction same-sex marriages, ... intrud[ing] on core state powers.”

The subject of domestic relations, including marriage, has been the province of the states. But DOMA does not change this, and does nothing to strip the status that states confer on couples they marry. Instead, DOMA limits the federal benefits, rights, privileges, and responsibilities of marriage to a subset of those deemed married under state law.

That the federal government often defers to state determinations regarding marriage does not obligate it to do so. While a state may be perfectly disinterested in prying into the reasons a couple marries, the federal government remains deeply and properly concerned with the reason(s) why a couple weds. The statutes and programs that section 3 governs are federal regimes such as social security, the Internal Revenue Code and medical insurance for federal workers; and their benefit structure requires deciding who is married to whom.”)

... 

DOMA alters the general, but by no means unyielding, practice of the federal government accepting marriages recognized by state law. However, at the time Congress acted, all states recognized only opposite-sex marriages, and the fact that Congress chose to maintain that status quo in response to this new, evolving social issue does not invalidate its legislative interest. It may be that, prior to DOMA, any federal “definition” of marriage was limited to advancing the targeted goal of a particular federal program, not a blanket, undifferentiated policy choice imposed on statuses created by states. But this fact does not render the asserted interest in uniformity illegitimate or so lacking a “footing in the realities of the subject addressed by the legislation” as to fail rational basis review.

...

VI. Appropriate Level of Review for Sexual Orientation Discrimination

The Supreme Court has reserved heightened scrutiny for a small number of subject classifications—principally race, alienage, nationality, sex, and illegitimacy. Heightened scrutiny attaches in recognition that these traits have been used to impose, and are therefore closely associated with, social inequality. Therefore, government conduct that employs these classifications is suspect and must have more than a legitimate or merely permissible justification.
The question of the appropriate level of scrutiny for laws that discriminate in respect of the definition of marriage on the basis of sexual orientation is an issue of first impression in this Circuit.

... Until the majority's opinion, DOMA had never been held by the Supreme Court or any Circuit Court to involve a suspect or quasi-suspect classification. Indeed, in light of the Supreme Court's reluctance to apply heightened scrutiny to new categories of discrimination, and in consideration of the fact that it declined to do so in *Romer*, eleven other circuits have also not taken this step. In *Massachusetts v. HHS*, the First Circuit rejected the application of strict and intermediate scrutiny, recognized that DOMA satisfies rational basis review, and yet went on to create a novel “plus” level of scrutiny applicable to DOMA. Such judicial impositions of new levels of review deprive the American people of further consideration of DOMA through their democratically elected representatives.

... Therefore, I would join these eleven circuits, driven not only by a reluctance to do that which the Supreme Court itself has not undertaken when given the chance, but also out of routine respect for extant precedent. Subjecting the federal definition of marriage to heightened scrutiny would defy or, at least, call into question the continued validity of *Baker*, which we are not empowered to do. *Baker* involved a law that prohibited same-sex marriage, and thus discriminated on the basis of sexual orientation. Holding that sexual orientation merits heightened scrutiny would be substantively inconsistent with *Baker* since (1) any legislative action faces a high likelihood of invalidation under heightened scrutiny, and (2) it would be curious to apply heightened scrutiny to a form of discrimination that does not raise a substantial federal question of constitutional law. See *Massachusetts v. HHS*, 682 F.3d at 9 (“[T]o create such a new suspect classification for same-sex relationships would have far-reaching implications—in particular, by implying an overruling of Baker, which we are neither empowered to do nor willing to predict.”). Any such development must come from the elected representatives of the American people.

I respectfully dissent from the majority opinion to the extent it holds otherwise.
GRIMES, Chief Justice.

We have for review Southwest Florida Regional Medical Center, Inc. v. Connor, 643 So.2d 681 (Fla. 2d DCA 1994), which certified conflict with the following district court decisions: Waite v. Leesburg Regional Medical Center, Inc., 582 So.2d 789 (Fla. 5th DCA), review denied, 592 So.2d 683 (Fla.1991); Heinemann v. John F. Kennedy Memorial Hospital, 585 So.2d 1162 (Fla. 4th DCA 1991); Faulk v. Palm Beach Gardens Community Hospital, Inc., 589 So.2d 1029 (Fla. 4th DCA 1991); and Halifax Hospital Medical Center v. Ryals, 526 So.2d 1022 (Fla. 5th DCA 1988). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Southwest Florida Regional Medical Center sued Kenneth Connor and his wife Barbara Connor in 1993 for payment of medical services the hospital had rendered to Kenneth. The trial court dismissed the hospital's complaint against Barbara Connor on the ground that she had not executed an agreement to pay for the services rendered to Kenneth Connor. In so doing, the trial court declined to expand the doctrine of necessaries to hold the wife responsible for her husband's medical bills. The district court of appeal reversed and remanded, thereby giving the hospital a cause of action against Barbara Connor.

This case involves what is known as the doctrine of necessaries. At common law, a married woman's legal identity merged with that of her husband, a condition known as coverture. She was unable to own property, enter into contracts, or receive credit. A married woman was therefore dependent upon her husband for maintenance and support, and he was under a corresponding legal duty to provide his wife with food, clothing, shelter, and medical services. The common law doctrine of necessaries mitigated the possible effects of coverture in the event a woman's husband failed to fulfill his support obligation. Under the doctrine, a husband was liable to a third party for any necessaries that the third party provided to his wife. Because the duty of support was uniquely the husband's obligation, and because coverture restricted the wife's access to the economic realm, the doctrine did not impose a similar liability upon married women.

In Shands Teaching Hospital & Clinics, Inc. v. Smith, 497 So.2d 644 (Fla.1986), this Court declined to hold a wife liable for the husband's hospital bills. In reaching our decision, we first stated that it was an anachronism to hold the husband responsible for the necessaries of the wife without also holding the wife responsible for the necessaries of her husband. We also acknowledged that the respective arguments of both parties had merit. However, we concluded that because the issue had broad social implications and the judiciary was the branch of government least capable of resolving
the question, it was best to leave to the legislature the decision of whether to modify the common law doctrine of necessaries.

Following our opinion in Shands, an equal protection issue was raised by a husband who suffered a judgment which required him to pay his wife's hospital bill. Webb v. Hillsborough County Hosp. Auth., 521 So.2d 199 (Fla. 2d DCA 1988). The court ruled that the doctrine of necessaries remained viable so as to obligate a husband to pay for his wife's necessaries and went on to hold that the duty was reciprocal between spouses. In two subsequent decisions, the Fourth District Court of Appeal disagreed with Webb and held that a wife could not be held responsible for her husband's necessaries.

The case before us today is in essentially the same posture as Shands. Yet, we are faced with a series of cases in which the parties agree that husbands and wives must be treated alike but disagree over whether the doctrine of necessaries should be applied to both spouses or simply abolished. Therefore, we have concluded that we must now address this issue in the context of equal protection considerations. Mrs. Connor contends that with the removal of coverture, the doctrine of necessaries is no longer justifiable because wives are now freely able to enter into contracts and obtain their own necessaries. Southwest posits that while the initial reason for the doctrine has disappeared, it now serves the important function of promoting the partnership theory of marriage and should be expanded so that both men and women are liable to third-party creditors who provide necessaries to their respective spouses.

The courts of other states have split on the proper remedy to adopt. . . . Legislative action in this area has been just as diverse. Oklahoma and Kentucky have codified the doctrine in its original common law form, while the Georgia Legislature repealed the doctrine in 1979. . . . Somewhere in the middle of these two extremes are those jurisdictions that have retained the doctrine in a modified form. For example, North Dakota imposes joint and several liability for debts incurred by either spouse for the necessaries of food, clothing, fuel, and shelter, but excludes medical care.

The fact that courts and other legislatures have treated this problem in different ways illustrates the lack of consensus regarding the doctrine's place in modern society and reinforces the position we took in Shands. Yet, our legislature has not chosen to address this issue, and we know of no circumstances occurring since our decision in Shands which would suggest that we were wrong in refusing to hold the wife liable for the husband's necessaries. Because constitutional considerations demand equality between the sexes, it follows that a husband can no longer be held liable for his wife's necessaries. We therefore abrogate the common law doctrine of necessaries, thereby leaving it to the legislature to determine the policy of the state in this area. We do not make a judgment as to which is the better policy for the state to adopt. We merely leave it to the appropriate branch to decide this question.

It is so ordered.
OVERTON, Justice, dissenting.

I dissent. The common law doctrine of necessaries was born of the need to provide a legal means to protect and enforce the moral terms of the marital obligation. I find that the doctrine is just as important today, under the partnership theory of marriage, as it was when the doctrine was created under the unity theory of marriage. In this day and age, we should not weaken the obligations of marriage by eliminating the spousal duty to care for one another. However, that is exactly what the majority opinion does, and, by doing so, it places this Court in the minority of state supreme courts that have addressed this issue.

I agree that the common law doctrine of necessaries in its present form violates the equal protection clause by imposing a duty of spousal support only on the husband. However, unlike the majority, I conclude that this Court, as a matter of policy, should extend the doctrine to apply to both spouses rather than abrogate it entirely. In doing so, I would make the spouse who incurred the debt primarily liable.

The majority's decision to abrogate the doctrine is premised on the theory that altering the doctrine would have broad social implications and, as such, is a task best left to the legislature. If the legislature disagreed with the policies behind the doctrine of necessaries, it has had ample opportunity during the last one hundred years to abolish the doctrine. Instead, the legislature has left the doctrine intact. This legislative inaction implies an agreement with the current, judicially-created policy regarding the doctrine of necessaries. The majority's abrogation of the doctrine of necessaries appears to shift the policy of this state by, in effect, requiring each spouse to take care of himself or herself. It also reduces the legal obligations of the marriage contract.

... 

The majority's determination that a lack of consensus exists among other states regarding the proper role of the doctrine of necessaries is, in my view, incorrect. ... Approximately sixteen state courts have addressed the issue of whether the doctrine of necessaries should be modified or abrogated. ... 

The twelve state courts that have extended the doctrine to both spouses have done so in three ways. First, two courts have extended the doctrine to apply to both spouses equally by imposing joint and several liability on each spouse. Second, eight of the state courts extending the doctrine of necessaries to both spouses have imposed primary liability on the spouse who incurred the debt and secondary liability on the other spouse. ... Creditors in these states must first seek compensation from the spouse who incurred the debt and may only turn to the other spouse if the creditor can show that the spouse who incurred the debt is unable to fulfill the obligation. Third, two courts have extended the doctrine of necessaries by imposing primary liability on the husband and secondary liability on the wife.

Only four state courts have abrogated the doctrine of necessaries. ... Courts in this
category have uniformly held that expanding the doctrine of necessaries to both spouses is "a matter of such fundamental policy that it should be determined by the legislature."

In the instant case, the majority relies on our decision in Shands Teaching Hospital & Clinics, Inc. v. Smith, 497 So.2d 644 (Fla.1986). . . . Since this Court failed to reach the equal protection argument in Shands, the majority's reliance on that case is misplaced, and neither the reasoning nor the holding of that case should be controlling.

I would follow the majority of other jurisdictions by extending the doctrine of necessaries to both spouses, and I would make the spouse who incurred the obligation primarily liable. I reach this conclusion because, while Florida has moved from a unity theory of marriage to a partnership theory of marriage, the partnership theory of marriage is fully consistent with the underlying principles of the doctrine of necessaries.

. . . I submit that the application of the doctrine is just as necessary in today's society as it was one hundred years ago. It is my strong belief that we should not repeal this doctrine; we should simply refine it to meet equal protection requirements, and, by doing so, strengthen the marital obligation.

This Court, in other areas of the law, has modified common law policies to reflect the partnership theory of marriage and to apply it in a proper way to today's society. . . . How can there be a partnership in marriage where neither spouse is obligated to take care of the necessaries of the other spouse? . . .

I believe that extending the doctrine of necessaries to apply to both spouses is the best, most logical, and least destructive method of altering the doctrine to comply with the equal protection clause. I would make the spouse who incurred the obligation primarily responsible. Extending the doctrine in this manner would further both a long-standing obligation of spousal support and the needs of our changing society. It would also advance a policy that acknowledges the partnership theory of marriage and the social value inherent in requiring marital partners to support one another.
KOGAN, Justice.

We have for review Waite v. Waite, 593 So.2d 222 (Fla. 3d DCA1991), which certified the following question of great public importance:
Whether Sturiano v. Brooks, permits a claim by a former spouse for battery against the other spouse, committed during the marriage, and prior to the effective date of section 741.235, Florida Statutes (1985) . . .
We rephrase the question as follows:
Does the doctrine of interspousal immunity remain a part of Florida's common law?

In 1984, Joyce Waite and other members of her family were attacked by her husband, who inflicted substantial injuries upon them with a machete. He subsequently was convicted of several crimes, including attempted murder. Joyce Waite divorced him. Later, she filed suit seeking a recovery of damages against a homeowner's insurance policy. On the husband's motion, the trial court dismissed the cause as being barred by the doctrine of interspousal immunity. The Third District . . .

In Sturiano, 523 So.2d at 1128, we held that the doctrine of interspousal immunity no longer is applicable when the public policy reasons for applying it do not exist. These policy reasons are judicial avoidance of acts that could disrupt the family or foster marital discord, or where there is a strong possibility of fraud or collusion between husband and wife. Based on this holding, we found in Sturiano that the doctrine did not bar a wife's claim filed against the insurer of a deceased husband when the factual claim before us arose from the same accident in which the husband died and when the claim did not exceed the limits of liability.

Since Sturiano was issued, this Court and its advisory commissions have had an opportunity to review legal issues relevant to the doctrine of interspousal immunity. As a result of that review, we now find that there no longer is a sufficient reason warranting a continued adherence to the doctrine of interspousal immunity. As we previously have held, the common law will not be altered or expanded by this Court unless demanded by public necessity or to vindicate fundamental rights. Here, we find that both public necessity and fundamental rights require judicial abrogation of the doctrine.

First, we find no reason to believe that married couples are any more likely to engage in fraudulent conduct against insurers than anyone else. An otherwise meritorious claim should not be foreclosed simply because a person is married to a wrongdoer.

The fact is that when couples collude in a fraud, many devices exist to detect the deception whether or not the couples are married. Insurance companies can and do
hire their own lawyers and investigators to examine suspicious claims. When testifying, the claimants are subject to impeachment and discrediting because of their own financial stake in the outcome. They are subject to the court’s contempt power, to the criminal laws for perjury and various forms of fraud, to civil lawsuit, and even to the racketeering and forfeiture statutes authorizing (among other things) the seizure of property used to further their crimes. If these other devices are adequate for unmarried couples, then we believe they also must be equally adequate for those with a marriage license. See Art. I, § 2, Fla. Const.

Second, we do not believe that the types of lawsuits prohibited by the doctrine of interspousal immunity, if allowed, are likely to foster unwarranted marital discord. Under present law, for example, an abused spouse still might file criminal charges against the abuser, can sue in equity over property interests, and can file for an injunction for protection. We believe that marital disharmony will not be increased merely because of the addition of a lawsuit for the various types of personal injury at issue here.

Finally, we note that thirty-two states have abrogated the doctrine of interspousal immunity completely, leaving Florida in a shrinking minority. The doctrine also has been resoundingly rejected by the single most respected authority on American tort law. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 122, at 902-04 (5th ed. 1984). . . . We also find absolutely no evidence that fraud and collusion have been promoted or encouraged to any undue extent in the majority of states that have abrogated the doctrine, some many decades ago.

For the foregoing reasons, the result reached below is approved and the certified question as rephrased here is answered in the negative.

It is so ordered.

BARKETT, C.J., and SHAW, J., concur.

HARDING, J., concurs with an opinion in which KOGAN, J., concurs.

McDONALD, J., concurs in result only with an opinion in which OVERTON, J., concurs.

GRIMES, J., concurs in part and dissents in part with an opinion in which OVERTON, J., concurs.

McDONALD, Justice, concurring in result only.

The majority now accepts the position urged by the dissent in Raisen v. Raisen, 379 So.2d 352 (Fla.1979). As I did in Raisen, I continue to believe that there are societal advantages of maintaining interspousal immunity as a concept. I am willing to, and have, examined particular circumstances to determine in a given situation whether an exception to this historical doctrine should be made. The question as certified by the
district court of appeal is such a situation. I do not agree, however, that the doctrine should be completely abolished. . . .

I am firmly convinced that the unfettered ability of one spouse to sue the other can, and likely will, place an undue strain on a marriage relationship. A spouse’s threat to file such an action can equally do so. Finally, if a marriage does culminate in divorce, I can foresee multiple counts for damages being claimed by each spouse against the other for events that occurred during their marriage. The fault concept which was discarded in no fault dissolution proceedings will have a rebirth in a different form.

The step the majority takes is entirely too broad. The Legislature has abolished spousal immunity in intentional battery cases. Section 741.235, Fla.Stat. (1985). Had the Legislature felt it desirable to completely abolish the doctrine, it could have done so then. In any event, because of the action of the majority, I invite the Legislature to reexamine this issue and take whatever action it deems appropriate.

I would allow Joyce Waite’s suit to proceed because this was an intentional battery, now legislatively excepted from immunity, and because the parties are now divorced.

GRIMES, Justice, concurring in part, dissenting in part.

I agree with the abolition of interspousal immunity for intentional torts and therefore concur with the result reached in this case. However, I believe that the doctrine continues to serve a useful purpose in negligence actions.

This Court has emphasized that the purpose of interspousal immunity is to protect family harmony and resources. Hill v. Hill, 415 So.2d 20 (Fla.1982). If one spouse sues another to obtain damages for negligent injuries and there is no liability insurance, how can it be said that such a lawsuit will not severely disrupt family harmony? While family harmony may suffer less when liability insurance is involved, the temptation for collusion will dramatically increase. Compensation for injuries caused by the negligence of a person’s spouse should come from medical and disability insurance or some other form of first-party insurance so that the question of fault does not become involved. . .

While discussions of interspousal immunity usually focus on personal injury actions, I also foresee a spate of lawsuits between spouses covering a wide range of torts including defamation, conversion, fraud, and property damage, and perhaps more creatively the negligent infliction of a disease, such as AIDS.

Despite continued academic criticism of the doctrine of interspousal immunity, the Legislature has declined to intervene, except for the passage of a recent statute abolishing the doctrine with respect to battery. I would prefer to leave the question of whether one spouse can sue another in negligence to the Legislature which is better equipped to consider the ramifications which may result from permitting it.
EHRLICH, Justice.

We have before us a property distribution scheme entered pursuant to a marital dissolution proceeding. On this occasion we review Noah v. Noah, 467 So.2d 426 (Fla. 4th DCA 1985), wherein the district court certified the following question of great public importance:

DOES THE WILLIAMSON DECISION PERMIT A TRIAL JUDGE TO MAKE A DISTRIBUTION OF VIRTUALLY ALL THE ASSETS TO A FAITHFUL WIFE, IN PART BECAUSE HER HUSBAND HAS BEEN UNFAITHFUL?

We have jurisdiction, article V, section 3(b)(4), Florida Constitution, and answer the question in the negative.

The facts in this cause are undisputed. The marriage dissolved below was of ten years duration. Both parties are employed by the same major corporation, the wife as a typist, the husband as a financial analyst. The husband is in good health but the wife has major health problems. The five principal assets of value were:

A condominium having a $35,300 equity.
A house having a $61,000 equity.
Furniture valued at $9,000.
Her automobile, equity $600.
His automobile, equity $3,300.

The equity in these joint assets totaled approximately $109,000, all of which were awarded to the wife, as a lump sum alimony, with the exception of the husband's automobile valued at $3,300.

In the final judgment, the trial court stated:

Because the wife was a good wife, in view of her contributions to the marriage, the disparity in the parties' income, the husband's ability to pay alimony, the wife's inability to earn a sum sufficient to support herself, the parties' ages, the length of the marriage, the wife's ill health, and because of the husband's gross marital misconduct, the court will award the wife a combination of permanent and lump sum alimony.

The district court was particularly troubled, as we are, that the distribution was predicated in part on the husband's adulterous affair, and concluded that this distribution was an abuse of discretion by the trial court. The district court felt that the . . . utilization of the husband's adultery was contrary to our decision in Williamson v. Williamson, 367 So.2d 1016 (Fla.1979).

Williamson involved our review of an alimony award to the wife which was partially based on the finding that the wife's strained financial situation had been caused by the husband abandoning her, "taking with him a considerable portion of the family savings." 367 So.2d at 1017. . . . Our discussion in Williamson centered on the proper
interpretation of section 61.08(1), Florida Statutes (1973), which provided, in relevant part:

The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded to such spouse.

We approved the district court's conclusion that the statute allows a trial court to refuse to consider the adultery of a non-alimony seeking spouse when this evidence is offered by an alimony seeking spouse solely to obtain or increase an award of alimony.

The answer to the certified question now before us is controlled by our decision in Williamson:

[I]t must be remembered that the primary standards to be used in determining a proper alimony award are the demonstrated need of the spouse seeking alimony and the demonstrated ability of the other spouse to pay.... [A]limony is not a weapon to be used solely to punish an errant spouse.

367 So.2d at 1018.

We candidly acknowledge that although Florida has a so-called no-fault divorce system, section 61.08(1) does appear to retain a vestige of fault by allowing the trial court to consider the adultery of an alimony-seeking spouse. Why this one factor, as opposed to physical abuse, alcoholism, or a multitude of other factors, is included in the statute is not an issue before us. We reaffirm, however, our holding in Williamson that the primary standards to be used in fashioning an equitable alimony award are the needs of one spouse and the ability of the other to pay.

During oral argument before this Court, counsel for petitioner intimated that the pleadings in marital dissolution cases are lengthening and appear to be regressing to the point where the fault of the parties is once again playing a prominent role. In response to this alleged trend, we repeat our admonition in Williamson.

For a trial court to perform routinely a balancing act with testimony of alleged marital misconduct of the parties would be a step backward to the days of threats and insinuations which plagued our courts before our no-fault system was enacted and would be directly contrary to express legislative policy.

367 So.2d at 1019. Some of the uses one spouse's adulterous conduct may play in determining entitlement to alimony have previously been discussed. Another permissible use, and one more apparently relevant . . . has more recently been set forth in Langer v. Langer, 463 So.2d 265 (Fla. 3d DCA 1984). . . . In reversing the trial court on this point, the district court stated:

In this case, both the adultery and drug use, if as longstanding and extensive as proffered, may have contributed to the depletion of the financial resources of the family and should be admitted on remand.

Id. at 267.

Sub judice, evidence of the adulterous activity of the respondent husband appears to have been presented solely to obtain an increase in the award of alimony. Friends of
petitioner testified that news of respondent's adultery "devastated" petitioner. There is, however, neither evidence that this devastation translated into petitioner's greater financial need, nor that the adultery depleted family resources, as in Langer. . . . [W]e can discern no reason why respondent's adultery should have played a part in fashioning an equitable alimony award. It is apparent from the record that the petitioner's health is poor and that her earning capacity is substantively less than respondent's, thus supporting a distribution skewed in petitioner's favor. However, we are compelled to conclude that the trial court's awarding petitioner roughly 97% of the marital assets, in part because of respondent's adultery, makes this distributional scheme appear to be inequitable. . . .

Accordingly, we answer the certified question in the negative, quash the decision of the district court, and remand for proceedings consistent with this opinion.
The former husband appeals a final dissolution order and raises two issues. We find the award of permanent periodic alimony in need of reversal and affirm the order in all other respects.

Before we begin our analysis, we pause to acknowledge the work of the trial judge in this case. This judge worked diligently, capturing all relevant facts, and dissected this complicated dissolution with the skill of a surgeon. It is obvious to us that great thought was given to the court's decision. The trial judge dedicated long hours to articulating its ruling. We also acknowledge counsel for restricting their arguments on appeal to essential points and for arguing their respective positions in a clear and professional manner.

With that said, we are compelled to reverse the award of permanent periodic alimony to the former wife.

Permanent periodic alimony is used to provide the needs and the necessities of life to a former spouse as they have been established during the marriage of the parties. In determining whether to award permanent periodic alimony, the court must consider the needs of the spouse requesting the alimony and the ability of the other spouse to make alimony payments.

The Florida Legislature has identified the criteria to use in making this determination: the standard of living established during the marriage, duration of the marriage, age and physical and emotional condition of the parties, financial resources of each party, time necessary to acquire sufficient education or training, contribution to the marriage, and all sources of income available to either party.

It is not within our purview to reweigh the facts. This trial court did an excellent job at that. Nevertheless, it is the trial court's specific findings of fact that drew our attention to the error in its conclusion.

The trial court specifically found the following:

1) The marital estate is worth several millions of dollars.
2) The parties have had plentiful domestic and childcare assistance for the bulk of the marriage.
3) Even though the wife claims to have worked only 15 hours per week, the home and childcare providers remained on staff for the great part of the week.
4) A review of the exhibits generated by both accountants causes the court to conclude that the figures of ... the husband's accountant, are more in line with credible and non-recurring expenses.
5) Husband's accountant suggests the Wife's monthly personal expenses are $18,289.00....
6) The length of this marriage is in the "grey area" for purposes of considering permanent periodic alimony.
7) The wife is forty nine.
8) An objective evaluation of the credible evidence suggests a desire on the part of the wife for a voluntary lifestyle change.

... 
11) The assets and resources of the parties are commensurate with one another based upon equitable distribution [$6,750,947.50] per spouse.
12) The evidence presented is not overwhelming to suggest that the wife made personal sacrifices in her career to promote or benefit the husband's career.
13) Working full time as a non-surgical ophthalmologist, her wages in the short run would not likely exceed $130,000.00. Her annual wages in the long run of $200,000.00 to $300,000.00 (three to five years) will still never approach that of her husband. However, her ability to reach that level of earnings do not require her to re-train for surgical skills.
14) The primary factor weighing in favor of permanent periodic alimony is the income disparity.

With all of these findings, the court awarded a permanent periodic alimony of $20,000.00 a month, taxable to the wife. We cannot reconcile this conclusion with the court's finding of the wife's need being $18,289.00. This is especially true in light of the passive income to be generated from the equitable distribution to the wife and the wife's earning capacity now and in the future. The figures simply do not compute.

We are mindful of the narrow scope of our review--abuse of discretion. Nevertheless, the numbers and the findings do not add up to $20,000.00 a month in permanent periodic alimony.

Absent special circumstances which do not appear in the judgment, an alimony award should not exceed a spouse's need.

Disparity in income alone does not justify an award of permanent periodic alimony. Yet, this seems to have been the court's primary reason for its award.

. . Then, near the end of the discussion of alimony, the trial court wrote: "The primary factor weighing in favor of permanent periodic alimony is the income disparity." . . .It is in this conclusion that we find error.

The purpose of permanent periodic alimony is not to divide future income to establish financial equality. It "is to provide for the needs and necessities of life for a former spouse as they were established during the marriage of the parties." Mallard v. Mallard, 771 So.2d 1138, 1140 (Fla.2000). In Mallard, the supreme court rejected the idea that, by including a savings component, an alimony award could exceed the recipient spouses's current needs and necessities, where the couple routinely saved 25% of their
income during the marriage. *Id.* at 1140-41. We read *Mallard* as forbidding a court from using alimony as a tool to forge economic equality, without regard to the needs of the recipient spouse.

We remand to the trial court for reconsideration of the award of alimony, while removing income disparity from the equation. The husband's income is relevant, since it establishes his ability to pay any award up to the dollar amount of the wife's need as determined in the trial court's order. This remand is not an invitation for these litigious parties to relitigate the issue of alimony. We contemplate that the trial judge will be able to use the extensive findings in its original order to come to a decision.

Upon remand, the trial court should consider its existing findings concerning the wife's current and future earning capacity and passive income in relation to the court's finding of her need. The court may then fashion alimony (rehabilitative or permanent periodic) to bridge the gap between her current and future earning capacity (including passive income) and the standard of living established during the course of the marriage to insure that her needs are met.

We reverse and remand the award of permanent periodic alimony and affirm the judgment in all other respects.
The inter-related prayers to stay the trial of the instant action and for leave to call Dr. Arthur J. Matas as an expert witness are premised on what defense counsel characterizes as the “measurable (monetary) value” of the kidney donated by the defendant to his wife in 2001. It is in that context that the defendant seeks to call Dr. Matas, whose impressive and extensive curriculum vitae attests to his standing in the field of transplantation, to amplify the defendant’s claim that the donated organ should be construed as a marital asset and valued accordingly.

The confluence of several factors leads this Court to withhold the leave sought and to preclude the defendant from calling Dr. Matas as an expert witness.

Initially, the Court finds no support for the proposition the defendant asserts and notes the conspicuous absence of any such authority within his submissions.

At its core, the defendant’s claim inappropriately equates human organs with commodities.

Although precedent provides that interspousal gifts made during the tenure of a marriage are marital assets subject to equitable distribution, public policy acts to circumscribe its application.

While the term “marital property” is elastic and expansive, consisting of a “wide range of intangible interests” its reach, in this Court’s view, does not stretch into the ethers and embrace, in contravention of this State’s public policy, human tissues or organs.

In pertinent part Public Health Law § 4307, the controlling statute, provides:

“It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer for valuable consideration any human organ for use in human transplantation. The term human organ means the human kidney, liver, heart, lung, bone marrow, and any other human organ or tissue as may be designated by the commissioner but shall exclude blood. *** Any person who violates this section shall be guilty of a class E felony.”
Thus, the defendant’s effort to pursue and extract “monetary compensation therefore” not only runs afoul of the statutory proscription, but conceivably, may expose the defendant to criminal prosecution thereunder.

That human organs listed on a popular internet auction site have generated bids exceeding five (5) million dollars, as has been widely reported, rather than attenuating the efficacy of New York’s comprehensive organ donor scheme, illustrate, in concrete terms, the lengths to which some people, perhaps fearful of their own mortality, may be driven by desperation, and underscore the beneficent purpose for which the legislation was designed.

**Division of the Marital Assets – Does that Include a Donated Kidney?**

By now, many have heard a story that made national news just last month concerning a husband who while divorcing his wife demanded that she either return the kidney he donated to her or pay him $1.5 million dollars for its value. You can read more about the story here. In 1990, Dr. Richard Batista and his wife got married. In 2001, Dr. Batista donated his kidney to her. However, in 2005, Batista's wife filed for divorce, and the proceeding is still ongoing. While Dr. Batista's lawyer argues that her client wants the value of the kidney he donated to his wife, this issue raises a broader question concerning the division of marital assets and turns on whether a kidney should be classified as something other than marital property. Many divorce lawyers have stated that a donated organ is not a marital asset to be divided, but what exactly does that mean, and would this reasoning carry over in the state of Florida?

Like many states around the nation, Florida is an equitable distribution state, requiring that upon dissolution of marriage proceeding, the court will distribute the marital assets and liabilities between the parties equally. As this policy suggests, this equitable division relies on the court's determination of what may be considered marital property. In Florida, marital assets and liabilities include the following: (1) assets acquired and liabilities incurred during the marriage by either spouse; (2) enhancement in value of nonmarital assets resulting from efforts of either spouse during the marriage; (3) interspousal gifts during marriage; and (4) and benefits, rights, and funds accrued during the marriage. Florida law dictates the trial court must separately classify property as marital or nonmarital where it is not included in the 4-factor list previously mentioned. Where exactly does a donated organ fit in this scheme? If classified as marital property, then its "value" will get divided. If classified as nonmarital property, then the donated organ's value will not get factored into any divorce settlement that is reached. Because
it does not neatly fit into any one of the four categories, it is likely the trial court judge would make the ultimate classification. The Florida courts have never faced such a tough and unique situation. If it ever does, perhaps it will follow what the New York State Supreme Court, New York’s trial court, has ultimately concluded. Just two days ago, the New York State Supreme Court marital referee Jeffrey Grob stated that it was not legal to place a monetary value on a human organ. The court held that human organs were not pieces of property to be divided like other marital property during divorce. Dr. Batista has appealed this decision.

What is to be learned from this case and its implications? Before going through a divorce, know what property is subject to equitable distribution. If you have any questions concerning what property will be divided between you and your spouse upon divorce, its best to simply consult an attorney.

[from http://www.floridafamilylawyerblog.com/2009/03/division_ofthe_marital_assets.html]
**FULLMER**, Acting Chief Judge.

Derek Doig ("the Husband") appeals the final judgment dissolving his marriage to Richelle Doig ("the Wife"). He argues that the trial court erred in invalidating a prenuptial agreement and awarding the Wife $28,500 as one-half of the enhancement value of the marital home. We reverse the trial court's ruling that the agreement was invalid.

In the final judgment of dissolution, the trial court invalidated the parties' prenuptial agreement based on the following four findings: (1) The Husband presented the agreement to the Wife ten days before the wedding, and the Wife was advised not to sign the agreement by a lawyer she consulted; (2) the Husband did not fully disclose his financial condition to the Wife such that she could make an informed decision about the agreement; (3) although the parties had discussed the possibility of an agreement a reasonable time before the wedding, the Wife was given no time to ask sufficient questions of the Husband or make her own investigation because the written agreement was presented to her after all the wedding and travel arrangements had been made; and, (4) the agreement unfairly limited the Wife's share of marital assets and was executed under duress given the circumstances set forth above.

When considering the validity of an antenuptial agreement, a trial court must determine whether the agreement contains fair and reasonable provisions for the spouse waiving his or her rights or else whether the spouse obtaining the waiver of rights made a full and fair disclosure of assets to the other spouse. *Del Vecchio v. Del Vecchio*, 143 So.2d 17, 20 (Fla.1962).

Inadequacy of provision for the wife does not in itself vitiate an antenuptial agreement. If, when she signed the contract freely and voluntarily, she had some understanding of her rights and had been fully informed by the husband as to his property or if, notwithstanding the husband's failure to disclose, she had or reasonably should have had a general and approximate knowledge of the character and extent of his property she will be bound. *Id. at 20.*

We have reviewed the testimony and evidence relevant to the validity of the prenuptial agreement and conclude that the trial court's first finding is supported by the record but the remaining three findings are not. The evidence at trial showed that the Husband
and Wife resided together approximately five years prior to the marriage and the Husband did fully disclose his financial condition by affidavit at the time the agreement was signed. At no time did the Wife testify or even raise as an issue at trial that the Husband failed to fully disclose his financial condition.

The Wife also never testified that she had insufficient time to ask questions or make her own investigation regarding the agreement. Her testimony was essentially that, when asked by her counsel whether she signed the agreement freely and voluntarily, she answered, "No." When asked if she signed the agreement under duress, she answered, "Yes." The only testimony the Wife ever presented to explain why she signed the agreement or why she felt that she had no choice but to sign was that the Husband would not marry her unless she signed the agreement. It is undisputed that the Husband made it clear that without the agreement there would be no wedding. However, this ultimatum does not, in itself, constitute duress.

Affirmed in part, reversed in part, dismissed in part, and remanded with directions.
We affirm the trial court's order upholding the validity of an antenuptial agreement.

We recognize that the result in this dissolution after eighteen years of marriage is harsh. Wife has not worked full time in thirteen years, while Husband is now making a very large salary and has a net worth of over three million dollars. As a result, Husband is left with considerable wealth and income, while Wife waived all rights to alimony and equitable distribution by signing an antenuptial agreement. It is undisputed that the agreement is patently unreasonable. However, if an unreasonable agreement is freely entered into, it is enforceable. Casto v. Casto, 508 So.2d 330, 334 (Fla.1987).

The primary issue considered in this appeal is whether Husband made a full and fair disclosure of his net worth and income to Wife at the time of the antenuptial agreement, allowing Wife to make a free and voluntary relinquishment of her property rights to Husband's assets. As there is substantial, competent evidence supporting the trial court's decision, we find no abuse of discretion.

The parties decided to get married after living together for six months. The marriage date was set to be six weeks after their decision. Husband had been previously married and divorced. Due to the prior divorce experience, Husband insisted upon an antenuptial agreement. Wife, a native of Morocco, was 34-years-old when she decided to marry Husband. In the face of conflicting testimony, the trial court expressed reluctance to believe Wife's evidence as to the extent to which she understood English. Husband testified that English was the only language spoken by the couple throughout the relationship. Although Wife spoke four languages, English was the only language Husband understood. Wife also obtained a “GED” degree and passed a cosmetology exam and a licensing exam for insurance sales agents in English.

At no time prior to, or during, the signing of the agreement did Wife indicate that she did not understand the legal consequences and terms of the agreement. The agreement provided that Husband was entitled to all the property he currently owned and “any hereinafter acquired, including any salary or income or dividends from such assets or interests.” Similarly, Wife was to retain all the property she owned and any later acquired property. The agreement also stated that in the event the marriage dissolved, neither party would be entitled to any sort of monetary support from the other.

Exhibit A to the antenuptial agreement is a list of assets owned by Husband. This list included all of Husband's assets with their corresponding values. Several of the assets, however, although described, did not include an expressed valuation, but stated: “value unknown as of the date hereof,” “exact value unknown,” or “value unknown and undetermined.” Two such valuation descriptions applied to Husband’s interest in two businesses that have never had any
significant value and are essentially moot. However, a major asset with such non-stated value was the interest Husband owned in America's #1 Life and Health Insurance, Inc., the company where he worked. The agreement recognized that Husband owned a 25% interest, soon to be 33 1/3% interest, in that business. At trial, a certified public accountant, called by Husband, testified that at the time of the marriage, the value of Husband's interest in the business was $386,000.

The antenuptial agreement was prepared two weeks before the wedding date. Both parties were represented by counsel when the antenuptial agreement was executed, although Wife selected her attorney from a list of names suggested by Husband's attorney. Wife's attorney testified that he did not specifically remember her, but is certain of his representation because he signed the certificate of attorney. He confirmed the accuracy of his certificate, essentially stating that the attorney went over the antenuptial agreement with Wife and that he advised her of the legal significance of the agreement and its impact on her property rights.

In its ruling, the trial court emphasized it did not find Wife's testimony credible and concluded: First, that the subject antenuptial agreement was not the product of fraud, overreaching, misrepresentation, undue influence, duress or coercion by Husband. Second, that Wife had a reasonable and proximate knowledge of Husband's net worth and income based upon the information provided to the Wife by Husband at the time the antenuptial agreement was signed.

We initially conclude that the trial court did not abuse its discretion in rejecting Wife's claim that the agreement was induced by duress and coercion. Wife claims her case is similar to *Hjortaas v. McCabe*, 656 So.2d 168 (Fla. 2d DCA 1995). In *Hjortaas*, the wife was asked to sign a prenuptial agreement two days before the wedding, leaving her “only one day to seek counsel from her own attorney, to make an independent evaluation of the contract, or to cancel her wedding.” *Id.* Further, she did not previously know the agreement's terms and no information was in the agreement regarding her husband's finances. *Id.* “The timing of the signing of the document indicates that ... [the wife's] signature was the product of duress.” *Id.*

This case is clearly distinguishable. Here, Wife received the agreement two weeks before the wedding; Husband had told Wife about the proposed terms long before the agreement was prepared; he made a list of his assets and showed them to Wife before contacting a lawyer to draft the antenuptial agreement.

Further, here, Husband told Wife that before they could get married, there would have to be an antenuptial agreement in which she would agree that she would not receive anything from him. There is also testimony that even if the parties did not get married because Wife did not agree to sign the antenuptial agreement, Husband would not have terminated the relationship and the couple would have continued to live together. Furthermore, unlike *Hjortaas*, the actual agreement in this case does contain Husband's financial information.

Wife also argues that the agreement was a product of overreaching. However, we find each of the authorities relied on to be distinguishable.

Unlike *Tenneboe*, this case does not involve a situation where Wife agreed to pay her income to Husband. At the most, this agreement withdraws Husband's support from Wife, anticipating that she would support herself. Here, also, Wife was represented by counsel and she has not made any allegations that Husband, or his attorney, made misrepresentations to her.
This court has previously recognized that even though an agreement is one-sided and unfair, that alone does not make it the result of overreaching.

Wife asserts that even if she does not prevail as a result of her claims of duress, coercion, and overreaching, she is entitled to prevail under the second ground recognized in Casto and Del Vecchio v. Del Vecchio.

**FN1.** We note that Casto and Del Vecchio involved post-nuptial agreements. They are, nevertheless, controlling as to pre-nuptial agreements. See Posner v. Posner.

Del Vecchio and Casto, require that, under these circumstances, the challenging spouse have “a general and approximate knowledge of ... [the other spouse's] property and resources,” Here, there is no dispute that Wife had knowledge of Husband's income at the time of execution. Therefore, our focus is on whether there is record support for a conclusion that Wife had a general and approximate knowledge of Husband's property and resources.

Under this second ground, to establish that an agreement is unenforceable, the challenging spouse must satisfy a two-prong test. First, that the agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties. Second, after establishing the agreement is unreasonable, a rebuttable presumption arises conceding that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached. The presumption shifts the burden to the defending spouse, who may rebut these presumptions by showing that there was either:

(a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all marital property and the income of the parties, or 

(b) a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties.

In this case, the antenuptial agreement was indisputably unfair and unreasonable, and the agreement is certainly “disproportionate to the means” of Husband. Therefore, the first prong of the test is satisfied and the presumption arises that Husband attempted to conceal his finances or that Wife had no knowledge of Husband's finances. The burden, then, falls on Husband to prove that he disclosed his assets or that Wife had knowledge of them.

As to the disclosure, “there must be a full, frank disclosure as to the value of all the marital property.” Casto, 508 So.2d at 330. This includes a “good faith disclosure by the prospective husband of the material facts relating to the character and value of his property.” Stated otherwise, Husband is required to disclose such information regarding his assets as to provide Wife with:

a general and approximate knowledge by her of the prospective husband's property. The term “approximate” is, for this purpose, held synonymous with “near”, “close to” or “approaching” .... And while the disclosure should be full, fair, and open, it need not be minutely detailed nor exact. The test is the adequacy of the knowledge of the woman-she must have had some understanding of her rights and a general and approximate knowledge of his property and resources. The basic issue is concealment, not the absence of disclosure, and the wife may not repudiate if she is not prejudiced by lack of information.
The disclosure is necessary to show that the spouse “possessed such general and approximate knowledge of his property as to enable [the spouse] to reach an intelligent decision to enter into the agreement.”

Here, Husband listed the actual value of his various accounts and holdings except for his three business interests. As to the only one of significant value, the question is whether the following language may be construed by the trial court as a full, frank disclosure:

25% interest soon to be 33 1/3% interest in America's No. Life and Health Agency, Inc., which has an address of 4624 Hollywood Boulevard, Hollywood, Florida

* * *

Exact value unknown but see note below:

* * *

* * Stock ownership interest:

Note on America's No. 1 Life and Health Agency, Inc.-Corporation itself makes approximately $750,000.00, a year gross on renewal commissions on current policies, deductions are made from the gross commissions to pay the respective agents their proportionate or required commissions. Corporation makes approximately $1,000,000.00 a year gross on new policies, but from these sums payments are made to cover, salaries, office overhead, and general operating expenses of the office.

Here, as Wife knew that Husband owned part of the business and knew his income, the remaining question is whether her general knowledge was sufficient for one to obtain a value “by reasonable means.” Significantly, there is no indicationin the record that Husband had any more information as to valuation than that disclosed to Wife, and there is no suggestion that any equity or assets of the business were in any way secretly set aside for the future benefit of Husband. Here, also, Wife did not make trade offs in the agreement, or otherwise rely upon misleading disclosure information to her detriment. Wife also never sought clarification or additional information. The court could conclude from the record that, whatever an appraised value might be, Wife accepted that she would receive nothing.

Further, the record reflects that an expert would have been needed to accurately value the business. We do not read into Del Vecchio or Casto a requirement imposing a duty on Husband to hire an expert to determine a valuation of his interest in the agency before the parties could marry. To so hold would mandate that all parties entering into such agreements first obtain a professional appraisal of business or professional interests, even without proof that such appraisal could be accomplished within the time remaining prior to the marriage, and at reasonable cost, and with the data and information available.

We cannot conclude, on this record, that the court could not reasonably conclude that Wife was provided with sufficient general and approximate knowledge of Husband’s net worth and income, or that the order is an abuse of discretion.

Therefore, the order is affirmed.
G.F.C., Appellant,
v.
S.G. and D.G., Appellee.

686 So.2d 1382
Fifth District Court of Appeal

ANTOON, Judge.

G.F.C. appeals the trial court's order dismissing his petition to establish paternity. G.F.C. contends that pursuant to section 742.011, Florida Statutes (1995), he has the right to challenge the paternity of a child born during an existing marriage. We disagree and affirm.

At the time of conception, the mother and her husband were living together and they have continued to live together since the birth of the child. At the time of birth, the husband's name was placed on the birth certificate as the child's father and he has at all times acknowledged the child to be his own. To this end, the husband also filed an affidavit acknowledging paternity.

G.F.C. petitioned the trial court to adjudicate him the biological and legal father of the child. The petition alleged that G.F.C. was the biological father of the child but contained no allegations that the mother's husband was deficient in carrying out the responsibilities of a father or that G.F.C. had an established relationship with the child.

After G.F.C. filed suit for paternity, the mother and her husband moved to dismiss the petition on the basis that G.F.C. had no cause of action because the child was born to a marriage, and, as a result, was presumed to be legitimate. Before ruling on the motion to dismiss, the trial court appointed a guardian ad litem for the child and ordered that blood tests be performed to determine whether G.F.C. was the child's biological father. The HLA test results indicated that G.F.C. was in fact the child's biological father. A subsequent hearing was held on the motion to dismiss at which time the trial court heard from the guardian ad litem who reported that he favored leaving the family (husband, mother and child) intact. The mother and her husband again urged the court to dismiss the action, arguing that G.F.C. had no right to maintain the action because the husband was the child's legal father and G.F.C.'s biological connection to the child was irrelevant. The trial court dismissed the action without allowing G.F.C. to present evidence as to whether he would be a better functional father than the husband.

According to G.F.C., dismissal of this petition was improper because he has the legal
right to seek an adjudication of paternity and legal fatherhood over the objection of the child's mother and her husband pursuant to section 742.011. G.F.C. argues further that the trial court erred in not conducting an evidentiary hearing to determine whether it would be in the child's best interest to shift legal fatherhood to him. We disagree. G.F.C. had no right to institute this paternity action either under the common law, the Florida statutes, or the state and federal constitutions.

Florida's common law viewed any action challenging a child's legitimacy with great disfavor. In fact, at common law only a husband had the right to challenge paternity of a child born during the marriage. However, there was little likelihood for his success. There existed an almost irrebuttable presumption that the husband was the father of his wife's children, a presumption which could be overcome only upon a showing that the husband either was impotent or lacked access to his wife at the time of conception. So focused was the law on preserving the legitimacy of children and the sanctity of the family that it declared the husband and the wife to be incompetent to testify regarding the husband's access.

Our supreme court recently reaffirmed the common law presumption of legitimacy in Department of Health & Rehabilitative Services v. Privette, 617 So.2d 305 (Fla.1993). In Privette, HRS sued Privette for support of a child born to a woman married to another man. The birth certificate named the husband as the child's father. When Privette was ordered to submit to a human leukocyte test, he petitioned the district court for a common law writ of certiorari. The district court granted the petition, reasoning that Privette's privacy rights and the best interests of the child should have been weighed by the trial court before ordering a human leukocyte test. Privette v. State Department of Health and Rehabilitative Services, 585 So.2d 364, 366 (Fla. 2d DCA 1991). Upon review, the supreme court expressed great concern about impugning the legitimacy of the child and the parental rights of the child's legal father. The court defined a "legal father" as the man to whom the mother was married when the child was born and whose name appears on the birth certificate. 617 So.2d at 307. The court held that, before a blood test can be ordered in this type of case, the trial court is required to hear argument of the parties, including the legal father, if he chooses to appear, and a guardian ad litem appointed to represent the child." Id. at 308.

Nothing in Privette suggests that the supreme court was concerned with the rights of a man purporting to be the biological father. On the contrary, throughout its opinion, the court expressed a strong commitment to protecting the legitimacy of children and the interests of legal fathers. Justice Kogan wrote:

Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their own best interest. Art. I, § 9, Fla. Const. The child's legally recognized father likewise has an unmistakable interest in maintaining the relationship with his child unimpugned, (citations omitted) such that his opposition to the blood test and reasons for so objecting would be relevant evidence in determining the child's best interests. (Footnote omitted.)
Unwed mothers were eventually granted the statutory right to institute suit to establish paternity and to seek child support. The right to sue for paternity was later expanded, on equal protection grounds, to married mothers. See also § 742.011, Fla.Stat. (1983). More recently, our legislature provided that, under certain circumstances, men also have the right to sue for paternity. See § 742.011, Fla.Stat. (Supp.1986). However, this statute does not expand this right to a man such as G.F.C. who declares himself to be the father of a child born to an intact marriage.

[1] In this regard, section 742.011 narrowly defines those who can sue to establish paternity, stating "any man who has reason to believe that he is the father of a child ... may bring proceedings ... to establish paternity of a child." G.F.C. argues that by enacting this statute the legislature created a statutory cause of action for a putative father seeking an adjudication of paternity of a child born to the mother during her marriage to another man. However, in so arguing, G.F.C. fails to recognize that this statutory provision must be read in conjunction with the remainder of Chapter 742, including section 742.10, which states that "[t]his chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock." (Emphasis added).

Furthermore, as noted above, section 742.011 provides that a paternity action may be brought so long as paternity has not already been established "by law or otherwise." Paternity would be established "by law" when there has been an adjudication of paternity or by the filing of affidavits or stipulation acknowledging paternity as provided in section 742.10. Paternity would "otherwise" be established when a child is born to an intact marriage and recognized by the husband and the mother as being their child. In such a case, the husband would be the child's "legal father" to the exclusion of all others. Under any other interpretation, a husband could never be more than a presumptive father absent an adjudication of paternity. Had the legislature intended such a drastic departure from the common law, it would have specifically provided that a man believing himself to be the father of a child born during the mother's marriage to another man has the right to sue to establish his paternity. Thus, the trial court properly dismissed G.F.C.’s petition because Chapter 742 does not afford G.F.C. the statutory right to sue for paternity since the child in question here was not born "out of wedlock" and the paternity of the child had been "otherwise" established.

We also reject G.F.C.’s claim of a constitutional right to assert paternity. A similar claim was rejected by the United States Supreme Court in Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). . . .

We note parenthetically that a man claiming to be the biological father of a child born to an intact marriage may have a right, notwithstanding Michael H., to pursue an adjudication of paternity under the due process clause of our state constitution. However, if such a right exists, it is limited. In our view, such paternity claims should be recognized only in those circumstances where there is a claim of a developed
relationship between the putative father and the child. In this regard, in order for a man to institute an action for paternity of a child born during a marriage, the man would be required to at least allege that a developed relationship exists between himself and the child; an allegation of a mere biological link to the child would not suffice. . . .

We note that, even if G.F.C. had alleged sufficient facts to assert a constitutionally based cause of action in paternity, he would not, as he contends, be entitled to receive a best interest hearing. . . . We do not read the holding in Privette as entitling G.F.C. to receive a best interest hearing to determine whether the status of legal father should be shifted to him. The purpose of the best interest predicate for the blood test described in Privette is the protection of the child's legitimacy and the legal father's interest in his relationship with the child. The best interest inquiry is not for the benefit of the man in G.F.C.'s position seeking to advance his claim of paternity to a child born in wedlock.

In the instant case, a best interest hearing would require the trial court to designate either the husband or G.F.C. as the child's "legal father." Only one could be chosen because there is no such thing as dual fathership. If the trial court determined that it was in the child's best interest that G.F.C. be designated the "legal father" the result would be the termination of the husband's parental rights without there ever having been an allegation that the husband failed in any way to fulfill his responsibilities as a father. Certainly, more is required. The supreme court, weighing the rights of the legal father against those of the putative biological father, made this clear:

. . .there must be a clear and compelling reason based primarily on the child's best interest to overcome the presumption of legitimacy even after the legal father is proven not to be biological father. This is at least the equivalent of the burden of proof required that would exist in proceedings to terminate the legal father's parental rights.

Privette, 617 So.2d at 309.

. . . Here, G.F.C.'s petition fails to assert any compelling reason based on the best interest of the child to disturb the presumption of legitimacy. It is irrelevant that the trial court ordered the blood test before determining whether such tests would be in the best interest of the child because G.F.C.'s petition failed to state a cause of action to terminate the legal father's status. Under Florida statutes and Privette, more than a mere allegation of biological fatherhood is necessary to terminate one's status as "legal father." It follows that a scientific determination that a man other than legal father is the child's biological father is irrelevant.

In closing, we recognize that Florida's courts will continue to be confronted with many similar delicate issues relating to children. Eventually, the legislature may further clarify the state's policy with regard to the rights of children and fathers. Until then, we are reluctant to legally recognize lawsuits instituted by those simply professing to be biological fathers which impugn the legitimacy of children and disrupt families' lives.
AFFIRM.
In re the ADOPTION OF BABY E.A.W.
G.W.B., Petitioner,
v.
J.S.W., et ux., et al., Respondents.

658 So.2d 961 (Fl. S.Ct. 1995)

HARDING, Justice.

G.W.B. is the birth father of Baby E.A.W., a child born out of wedlock in 1992 and placed with adoptive parents shortly after her birth. This case concerns whether G.W.B. abandoned the child and, ultimately, whether she was available for adoption. Without abandonment, G.W.B.’s consent was required for Baby E.A.W.’s adoption. See § 63.072(1), Fla. Stat. (1991).

The trial court initially found no abandonment, but reversed its decision on rehearing. On appeal, a three-judge panel of the Fourth District Court of Appeal voted two to one that G.W.B. did not abandon Baby E.A.W. On rehearing en banc, the court found abandonment by a vote of six to five. E.A.W., 647 So.2d 918.

Section 63.032(14), Florida Statutes (Supp. 1992), allows a court to consider the father’s conduct toward the child’s mother—not toward the child, as the certified question says—during the pregnancy. [FN1] We decide whether section 63.032(14) allows a trial court to consider lack of emotional support and/or emotional abuse in evaluating the conduct of the father toward the child’s mother during pregnancy.

FN1. Section 63.032(14), Florida Statutes (Supp. 1992), says:
"Abandoned" means a situation in which the parent or legal custodian of a child, while being able, makes no provision for the child’s support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If, in the opinion of the court, the efforts of such parent or legal custodian to support and communicate with the child are only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. In making this decision, the court may consider the conduct of a father toward the child’s mother during her pregnancy.

We answer the reframed certified question in the affirmative because we find that the legislature’s use of the word "conduct" in section 63.032(14) encompasses a father’s lack of emotional support and/or emotional abuse toward the mother during her pregnancy.

G.W.B. raises two other issues. . . . Second, while we do not reweigh the evidence
taken by the trial court, we find the evidence supports the trial court's determination that
there was clear and convincing evidence that G.W.B. abandoned Baby E.A.W.

I. FACTS

G.W.B. and the birth mother had lived together for some months when she became

The birth mother's testimony was that G.W.B. had very little reaction when she told him
during Christmas 1991 that she was pregnant. She was employed and paid her own
expenses during December 1991 and part of January 1992, but could not work after an
accident in January 1992. From that point on, she was lonely and received little
financial support from G.W.B. She bought food with food stamps and gave a
government aid check to G.W.B. for her expenses.

The birth mother's doctor testified that the birth mother was emotional and having
trouble at home during this time. G.W.B. did not accompany the birth mother to any of
the doctor visits. The birth mother testified that G.W.B. did accompany her on one visit,
but that he was an "ice cube."

The birth mother gave further testimony that she received little, if any, emotional
support from G.W.B. from February through June 1992. G.W.B. once grabbed her,
shook her, and spit at her because she used his razor. He called her names and
verbally abused her. In addition, G.W.B. had a drinking problem.

The birth mother moved out of G.W.B.'s home in June 1992. Sometime before this,
she told G.W.B. that she was considering adoption. He told her to "do whatever you
have to do." Based on this response, she followed through with the adoption process.

From the time the birth mother moved out until Baby E.A.W. was born, the birth mother
received neither financial nor emotional support from G.W.B. The only phone calls she
received from G.W.B. came early in the morning and apparently were made to annoy
her.

G.W.B.'s testimony was that he earned $300 to $400 a week during this time and that
he effectively paid for food and shelter for the birth mother and her son from another
relationship. He was overjoyed about becoming a father. During the pregnancy, he
bought one pair of stretch pants for the birth mother and, using money from his mother,
bought a crib. He spoke with the birth mother several times after she moved out.

G.W.B. testified further that Charlotte Danciu, an attorney-intermediary in the adoption
proceedings, contacted him in July 1992. He told Danciu that he would not give up the
child for adoption and then sought legal representation.

After reciting its findings of fact, the trial court found clear and convincing evidence that
G.W.B. financially and/or emotionally abandoned the birth mother during her pregnancy.
The judge found that even if he accepted G.W.B.'s testimony that he paid for more than half of the couple's expenses, "there can be no doubt that he was living off of her food stamps and demanding her Aid to Dependent Children check to supplement his earnings." The judge found that the birth mother was on her own emotionally during the pregnancy. G.W.B. even resumed a sexual relationship with a former girlfriend while the birth mother was pregnant.

In addition, the trial court found almost no testimony to establish that G.W.B. exhibited any feeling for the unborn child. It appeared, in fact, that if Danciu had not contacted him, he would have continued his passive stance. Notified that the birth mother planned to put the baby up for adoption, he sought counsel. The trial court noted, "More importantly, it is a simple fact that during the time he was seeking a lawyer, he was still completely out of contact with the natural mother and the unborn infant, both financially and emotionally."

In determining that G.W.B. did not provide emotional or financial support to the birth mother, the trial court concluded in its September 1993 order:

The marginal effort of the natural father does not evince a settled purpose to assume all parental responsibilities and the Court, therefore, declares that the child was abandoned (Florida Statute 63.032(14)). Therefore, the prospective adoptive parents are directed to apply to this Court for an appropriate ex parte hearing on the question of the finalization of the adoption.

A three-judge panel of the Fourth District Court of Appeal reversed the trial court's finding of abandonment. The court found the evidence in conflict, but determined that G.W.B. supported the birth mother while he lived with her and objected to the adoption before the birth of Baby E.A.W. The court also concluded that emotional support could not be used to determine abandonment.

After rehearing en banc, the district court reversed the panel decision and found that G.W.B. abandoned Baby E.A.W. both financially and emotionally.

II. THE CERTIFIED QUESTION

We conclude that a trial court, in making a determination of abandonment, may consider the lack of emotional support and/or emotional abuse by the father of the mother during her pregnancy.

This Court first recognized in In re Adoption of Doe, 543 So.2d 741, 747 (Fla.) that evidence of a parent's prebirth conduct is relevant to whether a parent has abandoned a child. Doe concerned an unmarried father who was financially able to--but did not--support his child prenationally. The Court found that, by his behavior, he waived his right to consent to the adoption of the child. Although Doe primarily concerned the father's ability to provide financial support to the mother, the Court also noted:

A finding of abandonment under chapter 63 means, for whatever reason, the parent or parents have not provided the child with emotional and financial sustenance and,
consequently, the well-being of the child requires severing the parent's legal custody or relationship with the child.

When this Court decided Doe, chapter 63 did not include a definition of abandonment. . . After Doe, the Legislature amended section 63.032 to define abandonment. The definition tracks the one in section 39.01(1) (juvenile proceedings), but adds a sentence that is critical to the instant case: "In making this decision [of abandonment], the court may consider the conduct of a father toward the child's mother during her pregnancy." § 63.032(14).

We find that by this language the Legislature clearly did not limit "conduct" to financial support. Conduct generally connotes behavior. Dictionary definitions of "conduct" include the act, manner, or process of carrying out a task and a mode or standard of personal behavior. Webster's Third New International Dictionary 473-74 (1961).

Because we find the statute clear and unambiguous, we need not resort to rules of statutory interpretation and construction. Thus, we conclude that the Legislature's use of the general term "conduct" in section 63.032(14) allows a court to consider prebirth conduct such as emotional support and/or abuse by the father of the mother during pregnancy.

While conceding that section 63.032(14) allows a court to consider emotional support in making its determination of abandonment, G.W.B. urges this Court to quantify how much weight a court may give to a father's lack of emotional support during the mother's pregnancy. We are not in a position to assign weight in this manner. The determination of abandonment is fact-specific and, absent direction from the Legislature, we cannot dictate to trial courts precisely how to evaluate the factors that go into making this decision.

IV. ABANDONMENT

The United States Supreme Court has held that natural parents have a fundamental liberty interest in the care, custody, and management of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982).

The liberty interest is not absolute, however. The Court has distinguished between married and unwed fathers, noting that "the mere existence of a biological link does not merit equivalent constitutional protection." Lehr v. Robertson, 463 U.S. 248, 261, 103 S.Ct. 2985, 2993, 77 L.Ed.2d 614 (1983). The substantial due process protection attaches only when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in raising his child. Id.

We recognize the sanctity of the biological connection, and we look carefully at anything that would sever the biological parent-child link. To terminate a parent's right in a natural child, the evidence must be clear and convincing.
This Court has defined clear and convincing evidence as an intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. In re Davey, 645 So.2d 398, 404 (Fla.1994). . . . As we said in Davey, the evidence must be sufficient to convince the trier of fact without hesitancy. 645 So.2d at 404.

. . .[O]ur task on review [however] is not to conduct a de novo proceeding, reweigh the testimony and evidence given at the trial court, or substitute our judgment for that of the trier of fact. Instead, we will uphold the trial court's finding "[i]f, upon the pleadings and evidence before the trial court, there is any theory or principle of law which would support the trial court's judgment in favor of terminating ... parental rights."

Our review of the record shows substantial competent evidence to support the trial judge's finding of clear and convincing evidence that G.W.B. abandoned Baby E.A.W. The evidence in the record reveals that G.W.B. showed little to no interest in the birth mother or the unborn child. Once the birth mother moved out of the home, he provided no financial or emotional support. As the trial court noted, the evidence suggests that G.W.B. might have continued his passive stance toward the birth mother and the child had Danciu not contacted him about adoption. Even then, the record shows that G.W.B. still did not make any move to provide financial or emotional support to the birth mother or the unborn child. We therefore approve the district court's decision affirming the trial court's finding of abandonment.

V. CONCLUSION

Accordingly, we answer the reframed certified question in the affirmative and approve the decision in Baby E.A.W. finding that G.W.B. abandoned Baby E.A.W. Thus, G.W.B.'s consent was not required before Baby E.A.W. could be placed for adoption.

It is so ordered.

KOGAN, Justice, concurring in part, dissenting in part.

I must begin by noting that this case involves a putative father not married to the biological mother, a major distinguishing fact. Florida law presumes that a man married to the biological mother is in fact the legal father of the child, based in part on the child's interest in legitimacy. Department of Health & Rehabilitative Servs. v. Privette, 617 So.2d 305 (Fla.1993). A corresponding enforceable duty arises for the legal father to support the child. But unwed fathers enjoy no such presumption and owe no automatic duty of support to the child. In a real sense, the unwed father's interest with respect to the child is less certain than that of the legally recognized father. It is this uncertainty that is the focus of this case; and the difficult nature of this uncertainty cannot be understood apart from its historical development.
Until quite recently unwed fathers were regarded as having few if any rights with respect to their offspring. That situation did not substantially change until the United States Supreme Court issued its 1972 opinion in Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). . . .

Indeed, American law on this question is most notable today for its confusing nature. It is clear that the law now at least gives the unwed father a chance to be heard prior to the adoption, but beyond that, little is certain. In broad terms the national controversy now involves two competing approaches, along with variations of them. These are: (1) the "biological rights" standard, which places heavy emphasis on the rights of genetic parents; and (2) the "best interests" standard, which tends to favor the "psychological parent"--the adult who has created a stable home environment and whom the child thus has psychologically come to view as its parent. . . .

While the Uniform Adoption Act obviously has not been adopted in Florida, it nevertheless represents a considered view by noted scholars. And its attempt to combine the two competing standards into a single analysis suggests a very important point: that both may actually have some relevance to these cases.

This last conclusion also finds support in opinions of the United States Supreme Court. In 1983, for example, the Court found that unwed putative fathers possess only what may be called an "opportunity interest" in establishing legal fatherhood. Like the UAA, the Court used an analysis suggesting that the best interests of the child may factor into the equation whenever an adoption is challenged, although the emphasis here is somewhat different.

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Lehr v. Robertson.

These statements are important, first, because they indicate that the unwed putative father has merely an inchoate right to establish legal fatherhood, which he may exercise or neglect as he sees fit. Second, they suggest that the father's "opportunity interest" matures into a due process right if he "accepts some measure of responsibility for the child's future." Third, the quoted material also indicates that the "child's best interests" are to some degree relevant. This is so, the Court indicated, because society's interest in the establishment and support of a stable home environment for the child deserves consideration along with the interests of blood kinship. The Lehr Court regrettably was
silent as to how we should balance "best interests" against kinship rights when the two are in irreconcilable conflict, as they are here.

[On the basis of the law discussed, I conclude that] the best interests of the child will seldom defeat a timely and legally sufficient challenge by the biological father made before or shortly after the child's birth.

Nevertheless, Lehr teaches that the child's best interests at least sometimes will be relevant. And I think that psychological and legal concerns as well as simple fairness compel this same conclusion. In Privette, for example, we ourselves noted an overriding policy concern in a similar context:

It is conceivable that a man who has established a loving, caring relationship of some years' duration with his legal child later will prove not to be the biological father. Where this is so, it seldom will be in the children's best interests to wrench them away from their legal fathers and judicially declare that they now must regard strangers as their fathers. The law does not require such cruelty toward children. Privette, 617 So.2d at 309. While Privette is distinguishable because the father there had legally recognized parental rights, it nevertheless indicates a major point: The passage of time factors into this equation in an important way. Biological parents, in other words, must assert their rights early in the child's life.

The most reasonable interpretation of the various cases described above is that the child's best interests become more relevant as the period of time increases between the child's birth and the date the biological father's legal challenge is filed. And this in turn implies that there is an early period during which the child's best interests are less relevant absent some unusual factor. This period precisely corresponds with the time during which the biological father must act upon his opportunity interest or forever lose it. In other words, challenges made very early in the child's life will be gauged more by the "biological rights" standard, but the standard then will shift toward a "best interests" analysis as time passes. . . .

In the interest of more certain application, I think it reasonable to fix a point in time at which the child's best interests first become relevant in the normal case. The six-month postnatal period suggested by the UAA is reasonable and not inconsistent with the Florida statute, and I therefore would adopt it as the demarkation point. Thus, for challenges made by a biological father less than six months after birth, the best interests of the child will have only minimal if any relevance. For challenges made more than six months after birth, I believe the best interests of the child would then become a relevant factor, weighing more heavily with the trial court as the child bonds with its adoptive family. A point would soon be reached where the child's interest in remaining with its "psychological parents" would become so compelling as to wholly defeat any countervailing interest the biological father has. . . .Yet another legal problem must be addressed, and it is one that I think reflects unfavorably on the way the courts are handling these cases. The typical pattern we see in all the adoption cases discussed above is that the mother gives the child for adoption,
the child is placed with its potential adoptive parents, and the biological father promptly challenges the adoption. For both legal and psychological reasons, I seriously question the validity of placing the child with its potential adoptive parents despite the biological father's challenge, even though this seems a common practice. Such action may in fact be unconstitutional, and it certainly contributes to the horrendous psychological damage done to the child when and if it must be returned to the biological parent.

My objection is this: The fact that unwed biological fathers have a constitutionally protected "opportunity interest" in their offspring necessarily implies that they must at least be given the "opportunity" to exercise it, absent adequate proof of prenatal abandonment. This in turn means there must be a period of time after birth during which such a biological father has a right of access to the child. This might include a tentative placement with the biological father or some kind of visitation rights, depending on the facts before the trial court. Visitation by the potential adoptive parents also may be permissible. In some situations, the child could be placed in a neutral foster arrangement with visitation by both the potential adoptive parents and the biological parent.

Many conclusions flow from the above analysis. First, it leads me to disagree with the majority's interpretation of section 63.032(14), Florida Statutes (Supp.1992), which I fear extends state law into the realm of the unconstitutional. I do not propose that the prenatal "conduct of [the] father toward the child's mother" is irrelevant evidence, but merely that it is relevant solely to the extent it demonstrates abandonment of the child. This is the only view that harmonizes the statute with case law and hence with the Fourteenth Amendment. The very fact the Supreme Court has recognized the biological father's "opportunity interest" necessarily means he must at least be given that opportunity if he has sincerely expressed interest in exercising it. And this would be true even if the biological father and mother have irreconcilable differences. Absent conduct detrimental to the fetus, hatred of the mother does not necessarily imply hatred of the child.

Moreover, I am entirely unwilling to say that purely prenatal conduct ever can demonstrate abandonment with respect to the child absent clear and convincing proof that the biological father either (a) unequivocally, by word or deed, indicated a complete and unconditional prenatal abandonment of the child upon which others have reasonably relied, or (b) recklessly or intentionally engaged in conduct that posed a significant risk of detriment to the fetus above and beyond what may be attributable to simple lack of socioeconomic resources. In the absence of such evidence I believe the father must be given a postnatal chance to exercise his opportunity interest under any appropriate supervision that may be necessary.

Turning now to the facts, I think the present record demonstrates more than amply that the biological father had assumed "some responsibility" (in keeping with Lehr) for this child's future, and also that he had indicated a desire to exercise his opportunity interest. At least four facts demonstrate this: (1) he paid part of the couple's joint living
expenses when they lived together; (2) the father promptly and prenatally informed the
attorney-mediator he would oppose the adoption and seek legal rights to the child; (3)
the father attended one of the mother's visits to a health-care provider during her
pregnancy; and (4) the father purchased a crib for his baby.

Thus, we have a biological father here who clearly had shown at least some prenatal
interest in the child. Evidence supporting prenatal abandonment--including all of that
cited by the trial court and the majority--is at best equivocal and therefore uncompelling. Nothing in the record indicates any conduct on his part likely to be
detrimental to the fetus apart from his poverty, even though I acknowledge his
interpersonal skills with respect to the mother were lacking. . . .

I cannot overlook the terrible consequences that now have flowed from the trial court's
initial error. The record before us poses an unambiguous nightmare: potential adoptive
parents who have had custody of the child for years and are emotionally invested in her,
a little girl who knows no one else as her parents, a father whose rights were improperly
terminated and who has had no opportunity to bond with his child, and a lawsuit that
leaves this Court with nothing but sickening choices. Worse still, the record before us is
sufficiently equivocal that I might have been inclined to relinquish jurisdiction for a
proper and expedited determination in the trial court under the analysis I have set forth
here, except for the case's odd posture. Sadly, relinquishment is pointless now,
because the first six months of the child's life are over and she already has bonded with
her potential adoptive parents. Because the biological father was unlawfully denied
access to his child from her birth and soon thereafter filed this challenge, the only
remedy is to return her to him. [FN19]

FN19. This would not necessarily be true had the biological father's challenge
been made more than six months after the child's birth, under the analysis
developed above.

I must voice another concern. The majority opinion goes to some pains to stress that
both financial and emotional abandonment combined are dispositive here. I do not find
that the record sufficiently supports financial abandonment, since the facts it contains as
well as those recited by the trial court are entirely consistent with a couple living in
poverty. I am utterly unpersuaded by the "finding" that the mother was "supporting
herself" because she paid half of the couple's joint expenses. I heartily doubt that any
court would say an unwed professional father earning $50,000 a year has abandoned
his unborn child merely because the mother also earns $50,000 and they equally divide
living expenses. How, then, is the situation different when both merely earn a few
hundred each month?

Unexamined assumptions can be a poison lurking in the midst of judicial opinions. And
the assumption I find here is that an unwed father who lacks means has fewer rights
than one with money. By any standard, poverty cannot equate to abandonment.
Otherwise our society effectively would claim the right to take children away from the
poor, which would constitute an appalling perversion of the law.
As to the second factor, I find the lack of emotional support toward the mother to be a very slim reed on which to hang a legal doctrine that forever parts father from child. This conclusion is all the more compelling where, as here, the trial court's own order contains findings showing that this father assumed some responsibility for the child's future—which is all the Supreme Court appears to have required. And I am even more uneasy when the evidence actually supporting the trial court's findings is seriously conflicting and not necessarily relevant, as it is here.

In all candor, I also must add that this is a conclusion in which I find no joy. However much we dance through the hoops of legal doctrine, the bitter fact remains that this is a case about a small child named Baby Emily. With that image in mind, I cannot suppress a sense of abiding outrage at what our legal and governmental system has done to her. She was born August 28, 1992, and even today her legal fate is not finalized. For some three years she has known only one family—that of the potential adoptive parents—yet her biological father's rights over her have not been satisfactorily ended, at least to my mind.

In a real sense, the most victimized party here is the child. Where does the fault lie?—It rests on inadequate laws, procedural rules incapable of recognizing the needs of a small growing child, state agencies too unmindful of the biological father's rights, parties too eager to litigate, judges and lawyers who let the child's fate bog down in a quagmire of legal technicality. We all have failed Baby Emily. And while I wish the law could magically rescue her from the legal conundrum in which she lies, I see no solution that is free of tragedy. Taking her from her psychological family unquestionably will scar her, as the record itself indicates. Such a result can only be described as horrible.

Yet leaving Baby Emily with her adoptive family will set a precedent I find damaging to our society's traditional concept of a family based on blood kinship—something the nation's highest Court has clothed with significant legal protections. Our decision today may well reverberate for years to come in countless other adoptions, affecting many other biological fathers. And I genuinely believe that a concept like "lack of emotional support of the mother" can too easily lead to abusive applications selectively discriminating against the less fortunate, in favor of the privileged. This is a broader and more insidious impact that I find even more horrible for a very basic reason: It suggests that the well-to-do can come to Florida to shop for babies among an underclass unschooled in vaguely defined middle-class values underlying a concept like "emotional support."

All of this points only to a single indisputable conclusion: There is a pressing need for reforming the way these cases are handled, at least to lessen the delays and the damage they bring to children. I personally urge the Family Law Rules Committee of The Florida Bar and the Florida Legislature to study possible methods of expediting review of disputes between biological and adoptive parents. Clearly the present framework in which the courts operate is worsening the problem through long and largely pointless delays only too well demonstrated here. [FN22] We can only guess
how this case might have ended had the issues been resolved quickly. But there can be no doubt this Court would not have faced so terrible a choice as it must make today: to select between hurting a helpless child or further eroding the institution of the kinship family. Because the latter is the greater evil, I dissent as to the result. But I must add that returning Baby Emily to her biological parent at this late date is an image that would haunt me for my remaining days.
PENNY KAZMIERAZAK,
v.
PAMELA S. QUERY

736 So 2d 106
4th DCA 1999

GUNYHER, J.

Appellant seeks reversal of the trial court's orders dismissing her petition for custody and denying her motion for temporary visitation of appellee's biological child. The trial court denied the requested relief on the grounds that appellant failed to state a cause of action and lacked standing to seek custody or visitation. We affirm.

Appellant argues that she is entitled to an evidentiary hearing to establish that she is a "psychological parent" of appellee's biological child. As a psychological parent, she contends that she has parental status equal to the appellee, the biological mother, which gives her standing to seek custody or visitation of appellee's child over appellee's objection. In her petition the appellant alleges that the appellee "may not be a fit and proper person to retain custody of the minor," and "it is in the best interests of the minor" that custody be granted to appellant. Appellant, however, does not seek relief under any statutory scheme nor does she allege that the child is suffering any demonstrable harm or that it will be detrimental to the child to deny her custody or visitation. Moreover, she does not contend that a psychological parent has any rights recognized at common law.

Initially, appellant's petition confronts a procedural hurdle in that she is not seeking relief pursuant to any statute. Under Florida law, to invoke the jurisdiction of the court, a non-parent may petition for custody or visitation of another's child under the statutory authority of Chapter 39, 61, or 63. See Russo v. Burgos, 675 So. 2d 216, 217 (Fla. 4th DCA 1996); In re C.M. and F.M., 601 So. 2d 1236 (Fla. 4th DCA 1992); MMMA v. Jonley, 677 So. 2d 343, 346 (Fla. 5th DCA 1996). Chapter 39 allows a non-parent to file a petition for dependency. See § 39.404(1). Chapter 61 allows a grandparent, in certain situations, to obtain custody or visitation during a divorce proceeding. See § 61.13(2)(b)2.c., (7). Further, under chapter 63, a non-parent may petition for adoption without the consent of the biological parent upon proof the biological parent has deserted or abandoned the child. See § 63.072(1). Although, in the present case, the appellant's petition was not filed under any of the available statutory schemes, the appellant argues that, as a psychological parent, her status is equivalent to that of a biological parent, thereby allowing her to petition for custody of the child outside of an existing statutory scheme.

As a non-adoptive or non-biological parent seeking custody from a biological parent, the appellant would also appear to be faced with Florida's constitutional right of privacy. See Art. I, § 23, Fla. Const.; Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998). . .
Concluding the [grandparent visitation] statute was unconstitutional, the Florida Supreme Court in Van Eiff reasoned that to justify state intervention, either through the legislature or the courts, into a parent's fundamental and constitutionally protected right of privacy, there must be a threshold showing of demonstrable harm to the child.

In an attempt to circumvent the appellee's right of privacy, appellant argues that she falls within the sphere of those protected by Florida's right to privacy. She makes this argument on the theory that as a psychological parent she is the equivalent of a biological parent and thus, has the same protected privacy rights as the appellee.

In essence, appellant's sole argument is that once she establishes that she is a psychological parent to appellee's biological child, she is on equal footing with the appellee and no longer confronts the aforementioned impediments to seeking custody or visitation with the child. Thus, the issue in this case is whether, under current Florida law, a psychological parent has the same rights as a biological parent.

This court has previously recognized the concept of a psychological parent. In support of her position, appellant relies on Wills v. Wills, 399 So. 2d 1130 (Fla. 4th DCA 1981), wherein this court affirmed the trial court's order granting temporary visitation to a step-mother during a dissolution action. See id. at 1131. In awarding visitation, the trial court had determined that the step-mother was the psychological mother of the child. See id. Acknowledging contrary authority and without any supporting authority, this court affirmed the lower court and provided,

It seems to us that if an adequate record can be made demonstrating that it is in the child's best interest that such visitation be authorized the judge's discretion in the matter is sufficiently broad to allow him to authorize visitation with a non-parent. Certainly this type of visitation, contrary to the wishes of the custodial parent, should be awarded with great circumspection. But if the welfare of the child is promoted by such visitation and there is no other substantial interest adversely affected the trial judge should be allowed that latitude.

Id.

In the Wills opinion, this court's reasoning turns on the concept of the best interests of the child without explicitly resolving the question of the standing of the psychological parent to seek visitation. Significantly, no mention is made of the father's fundamental and constitutionally protected right of privacy.

Also relied upon by the appellant is Heffernan v. Goldman, 256 So. 2d 522 (Fla. 4th DCA 1971), wherein custody was awarded to a step-mother despite the biological mother's petition for custody. See id. at 523. Affirming the award of the trial court, this court provided that "[i]t is not contrary to law to award custody of minor children to one other than the natural parent when to do so would be for the best interest and welfare of
the children." Id. However, similar to Wills and Simmons, the award of custody or visitation in this case was founded upon the "best interests of the child" rather than the status of the non-parent. Thus, the biological parent's right to privacy, as in the other cases cited by appellant, goes unresolved in our court's Heffernan opinion.

Although the above mentioned cases from this district have upheld custody and visitation awards to non-adoptive or non-biological parents in the past, their holdings must be reconsidered in light of recent precedent. Since these cases were decided, our supreme court, citing the fundamental and constitutional right of privacy, has unequivocally reaffirmed adoptive or biological parents' right to make decisions about their children's welfare without interference by third parties. See Von Eiff, 720 So. 2d at 514-15. Von Eiff stands for the proposition that the state cannot intervene into a parent's fundamental or constitutionally protected right of privacy, either via the judicial system or legislation, absent a showing of demonstrable harm to the child. See id. The grandparents in Von Eiff did not have a common law right, but rather were given a statutory right of visitation by the legislature upon establishing that such visitation would be in the "best interests of the child." See id. at 511. Our supreme court held this legislative interference in the family violated Florida's constitutional right to parental privacy because it did not require a showing of demonstrable harm to justify the state intervention. See id. at 514-15.

In this case, the appellant does not argue that as a psychological parent she has either a common law or statutory right to custody or visitation of the child. Rather, the appellant is urging this court to rely upon case law, decided prior to Von Eiff, to conclude that she has standing to seek relief on the grounds that she is a psychological parent with the same standing as the appellee. . . .We conclude, however, that in light of Von Eiff, the cases cited by the appellant cannot be construed as giving a psychological parent rights equivalent to a biological parent.

Moreover, our sister courts have rejected the argument that a psychological parent has standing to pursue custody or visitation of another person's adoptive or biological child. In Taylor v. Kennedy, 649 So. 2d 270 (Fla. 5th DCA 1994), the Fifth District rejected a claim for visitation made by an alleged "psychological parent" explaining,

The government of this state, exerting its will through the court system, has no authority to compel visitation between a child and one who is neither a parent, grandparent, nor great-grandparent. Visitation rights are, with regard to a non-parent, statutory, and the court has no inherent authority to award visitation. (Citations omitted.)

. . . With regard to appellant's loco parentis argument, this concept has arisen only in the context of a marital relationship. See Albert v. Albert, 415 So. 2d 818 (Fla. 2d DCA 1982); Taylor v. Taylor, 279 So. 2d 364 (Fla. 4th DCA 1973). The Second District has provided,

We agree that one who stands in loco parentis to a child has an obligation of support. However, the dissolution of the marriage terminated any relationship of in loco parentis
between the appellant and the child and accordingly terminated the obligation of
support. Albert, 415 So. 2d at 820. Further, this court has concluded, "dissolution of
marriage between appellee and the child's mother terminated any relationship of loco
parentis between appellee and the child." Taylor, 279 So. 2d at 366.

In sum, although this court has in the past recognized the concept of a psychological
parent, in light of Von Eiff, we cannot construe these cases as holding a psychological
parent is entitled to parental status equivalent to the biological parent. Furthermore, the
concept of loco parentis has appeared only in the context of a marital relationship, and
thus, is inapplicable to the present case. Without a status equivalent to the biological
parent, the appellant, in the present case, lacks standing to seek custody or visitation of
appellee's biological child against her wishes. Therefore, the trial court's dismissal of the
appellant's petition for lack of standing was proper. Accordingly, we affirm.

AFFIRMED.

GROSS, J., concurring specially.

As the majority notes, the landscape in this area of the law has changed since the
adoption of Article I, Section 23 of the Florida Constitution. In my view, the privacy
provision means that a stranger to the parent-child relationship cannot use the courts to
interfere with that relationship except under clearly defined procedural pathways
established by statute. Even a statute purporting to give visitation rights to a non-parent
must satisfy the compelling state interest test, by requiring a showing of demonstrable
harm to a child before intruding upon a parent's fundamental right. See Von Eiff v.
Azicri, 720 So. 2d 510 (Fla. 1998). A non-parent's lawsuit involving another's child is an
intrusion of privacy. In this aspect of life so protected by the right of privacy, courts
should not create poorly defined relationships such as "psychological parents," which
then confer rights on the recipients of the label against a natural parent. A court's power
to determine child-related issues should derive from its jurisdiction over dependency,
juvenile, dissolution of marriage, or adoption proceedings.

. . . .

Even under the case law preceding the privacy amendment, Heffernan appears to have
been wrongly decided. As the dissent in that case notes, the court awarded
custody to a woman who had been the children's stepmother for six months, instead of
their natural mother; those non-parents who had prevailed in prior cases were
grandparents or stepparents, who had enjoyed longer, more significant relationships
with the children. See Heffernan, 256 So. 2d at 524 (Cross, J., dissenting). Wills was a
case involving temporary visitation. I do not read that case as involving the creation of
rights in the stepmother as a "psychological parent" apart from her rights as a party to a
dissolution proceeding.

The real problem in this area is section 63.042(3), Florida Statutes (1997), which
prevents someone like appellant from creating that type of legal relationship with a child
that would confer legal rights and obligations. Neither this court nor the supreme court has ruled on the constitutionality of section 63.042(3) under the privacy amendment or the equal protection clause. State, Department of Health and Rehabilitative Services v. Cox, 627 So. 2d 1210 (Fla. 2d DCA 1993), passed on the constitutionality of the statute, but that case does not appear to be the last word on the issue. An important factor driving the decision in Cox was the absence of any evidence in the record in support of the parties' positions.
Lara Embry appeals an order dismissing with prejudice her petition for declaratory relief and petition to determine parental responsibility, contact and support as to her adopted daughter. The trial court dismissed the petitions after finding that the adoption judgment, which was entered in the state of Washington, need not be recognized in Florida. We reverse.

In 2000, Embry and Kimberly Ryan, the child's biological mother, were engaged in a romantic relationship while living in the state of Washington. Ryan gave birth to the child on February 12, 2000, and Embry adopted her on May 10, 2000. After moving to Florida, the parties ended their relationship in 2004. During that same year, the parties entered into a child custody, visitation and property settlement agreement. Apparently, the relationship between the parties further deteriorated, and in October 2007, Ryan refused to allow Embry to have any visitation with the child. Embry thereafter filed the petition for declaratory relief and petition to determine parental responsibility, contact and support. Ryan moved to dismiss Embry's petitions, arguing that Florida was not required to give full faith and credit to the Washington adoption because, Ryan alleges, it is contrary to the public policy of Florida prohibiting same-sex couple adoptions. We reverse because the trial court was required to give the Washington adoption judgment full faith and credit.

The United States Constitution's Full Faith and Credit Clause provides as follows: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. Const. art. IV, § 1. In interpreting the Full Faith and Credit Clause, the United States Supreme Court has held that “[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.” Further, the Court held that there are no public policy exceptions to the full faith and credit which is due to judgments entered in another state.

We note that Florida law specifically provides that adoption decrees from other states must be recognized in this state:

A judgment ... establishing the relationship [of parent and child] by adoption issued pursuant to due process of law by a court of any other jurisdiction within or without the United States shall be recognized in this state, and the rights and obligations of the parties on matters within the jurisdiction of this state shall be determined as though the judgment were issued by a court of this state.

§ 63.192, Fla. Stat. (2007) (emphasis added). Embry therefore must be given the same
rights as any other adoptive parent in Florida.

Therefore, regardless of whether the trial court believed that the Washington adoption violated a clearly established public policy in Florida, it was improper for the trial court to refuse to give the Washington judgment full faith and credit.

Accordingly, we reverse the order granting Ryan's motion to dismiss and remand for further proceedings consistent with this opinion.

FULMER, Judge, Specially concurring.
I agree that the trial court's order should be reversed. I write to address the argument that was advanced on appeal as an alternative basis to affirm the trial court's dismissal of Ms. Embry's petitions.

On appeal, Ms. Ryan acknowledges that the trial court was required to recognize the Washington judgment under the Full Faith and Credit Clause. However, Ms. Ryan advances the alternative argument that there is a distinction between recognition and enforcement of a judgment. Ms. Ryan argues that the trial court was not required to enforce the judgment because granting parental rights to a former same-sex partner contravenes section 63.042, Florida Statutes (2007), which prohibits adoption by a homosexual.

Ms. Ryan's argument lacks merit for several reasons. The issue before the trial court was not whether Ms. Embry should be allowed to adopt. It is undisputed that Ms. Embry adopted her child in the state of Washington where same-sex adoptions are allowed. Further, not only is Ms. Ryan's argument being raised for the first time on appeal, but, on the merits, Florida law expressly grants parental rights to any person who has obtained the status of parent by virtue of an adoption decree from a sister state.

As noted in the majority opinion, section 63.192 not only mandates recognition of adoption judgments issued by another state but further states that "the rights and obligations of the parties on matters within the jurisdiction of this state shall be determined as though the judgment were issued by a court of this state." In other words, Ms. Embry is entitled to the same rights and obligations that are granted to a person who became an adoptive parent by virtue of a Florida judgment of adoption. Unlike section 63.042, section 63.192 does not exclude homosexuals from its provisions. Thus, Ms. Embry's same-sex relationship with Ms. Ryan is irrelevant for the purpose of enforcing her rights and obligations as an adoptive parent.
The former wife appeals an order changing the primary residential custody of two of the parties' three minor children from her to the former husband. She essentially maintains that the trial court abused its discretion in granting the former husband's petition for modification of custody where the evidence relied upon by the trial court failed to establish a substantial change in circumstances and that the best interests of the two minor children would be served by the modification. We agree and reverse.

The parties were divorced in 1995. Pursuant to the terms of their marital settlement agreement, which was later incorporated into the final judgment of dissolution of marriage, the former wife was named the primary residential parent of the parties' three minor children. The marital settlement agreement also provided that "neither Party shall remove the permanent residence of the minor children from Dade, Broward or Palm Beach Counties, Florida, without the express written permission of the other Party or in the absence of an order issued by a court of competent jurisdiction."

In September 1996, the former husband agreed to the former wife's request to relocate with the children to Utah. Their agreement was duly reduced to writing entitled "Addendum and Modification to the Separation and Marital Settlement Agreement".

In reliance upon the addendum agreement, the former wife sold her Miami home, purchased 18 acres of land in Park City, Utah and commenced construction of a 12,000 square foot home thereon for herself and the three minor children. The former wife oversaw the construction of her Utah home and thus had numerous occasions to travel to and from Utah. During her travels to Utah, the minor children remained in Miami with the former husband, usually from Wednesdays through Mondays. According to the former husband, it was during this time that the children began to express their desires to remain in the Miami area. Thereafter, the former husband had the minor children, then ages 15, 12 and 9, write a letter stating their preference to remain in Miami and had his secretary present for the purpose of attesting to and notarizing the letter. The former husband then turned this letter over to his legal counsel.

There is no record evidence that this letter or its contents was ever disclosed to the
former wife by the former husband prior to the commencement of this proceeding. Rather, approximately two weeks prior to the agreed upon departure date for the former wife and children, the former husband filed a petition for modification of custody.

[The trial court found that:] “Moreover, the evidence unequivocally established that the former husband's primary motivation for seeking a change in custody was the children's preference and his belief that an urban area such as Miami offered a better cultured environment for the children than rural Utah. . . . [T]he trial court decided to interview each of the children separately, in camera, with the permission of both parents.

. . . After finding the children to be extremely articulate and intelligent and praising the parties for doing an excellent job in raising them, the trial court granted the former husband's petition as to the parties' two sons, but denied the petition as to their daughter. The court's decision was overwhelmingly based upon the articulated preference of each of the children. The court found the children's intelligence and maturation level to be sufficient enough for it to modify custody in accordance with their respective preference.

A parent seeking to modify a prior custody award bears the extraordinary burden of demonstrating a substantial change in circumstances since the entry of the initial custody decree and that the child's best interest or welfare will be promoted by the change. In applying this two-prong test for modification, it is insufficient that the petitioning parent may possess the superior financial resources or that the child may be "better off" with the petitioning parent. For that reason, for purposes of a modification of custody, Florida courts have required proof that a child's continuing residence with the custodial parent would be detrimental to or have an adverse impact upon the child. See Kilgore v. Kilgore, 729 So.2d 402, 406-07 (Fla. 1st DCA 1998) (modification order to father reversed where trial court made no findings that mother's relationships with several men had affected children in any way or any finding that mother's parenting skills had deteriorated since entry of the final judgment of dissolution); Enyeart v. Stull, 715 So.2d 320, 321 (Fla. 2d DCA 1998) (holding that "The petitioner must prove both that a substantial change in circumstances has occurred since the last permanent custody order, and that the custody modification would 'so clearly promote or improve the child's well-being ... that maintaining the status quo would be detrimental to the child's overall best interests.' ") (citation omitted, emphasis in the original).

Despite the special concurrence's protestations to the contrary, the requirement that the non-custodial parent demonstrate that a child will suffer detrimental harm if custody is not changed, does not somehow convert the well-established two-prong test for modification of custody into a three-part test. Rather, a showing of detriment or inadequacy of care has consistently been required by the courts of this state to effectuate a modification of custody and indeed has clarified for both the bench and the bar what actually constitutes a "substantial change in circumstances. . . .Indeed, we have located no Florida cases which have upheld a modification of custody in the absence of a showing of detriment and none of the cases relied upon by our colleague
in the specially concurring opinion supports a contrary conclusion.

Moreover, the special concurrence’s assertion that the detriment requirement would somehow encourage acrimony, is simply wrong. In fact, the opposite is true. "Unlike proceedings to modify awards of child support or alimony, the non-custodial parent seeking to modify a prior award of custody 'carries an extraordinary burden.'" The requirement that the non-custodial parent demonstrate detriment or harm to the child is the basis for this enhanced burden and is in accord with sound policy recognition that after a divorce and an initial award of custody, it is in the best interests of children to have as much stability in their lives as possible. A modification proceeding involving an otherwise fit custodial parent does not promote such stability. If, as in this case, the custodial parent remains perfectly fit and able to continue to provide for the needs and welfare of the minor children, the non-custodial parent should not be permitted to entice the children with certain benefits and advantages not readily accessible to the custodial parent. By eliminating the detriment requirement, as the concurring opinion seemingly suggests, we would actually be lowering the burden of proof for a modification petition and encouraging more modification proceedings between two otherwise fit parents in the process.

In this case, without question, the former husband's petition for modification of custody was motivated solely by his change of heart about the former wife's decision to relocate the children to Utah. In the absence of compelling circumstances, however, a custodial parent's move to a foreign state is not itself a substantial change of circumstances which would support a change of custody. . . .

After carefully reviewing the trial court's detailed order, it is abundantly clear to us that the court based its order primarily upon the articulated preferences of the parties' children.

. . . Generally speaking, the stated preference of a child in a modification proceeding is entitled to some weight if the child possesses sufficient maturity and understanding to make an intelligent choice. However, under Florida law, the stated preference of a child who possesses the requisite maturity to make an informed decision, without more, has never been found to be sufficient to sustain a change in primary residence. . . . As we explained in Elkins:

The law does not give children the unfettered discretion to choose the parent with whom they will live, or gratify the wishes of children at the expense of the rights of a parent. Were it otherwise, the law would encourage manipulation by both children and parents and foster a breakdown in discipline, neither of which is in the best interests of children.

433 So.2d at 1253 (citations omitted). The reasonable preference of a child is indeed but one of many factors to be considered by a court. Clearly then, the children's stated preferences in this case, without more, could not support the trial court's modification of custody order. Since there was no other viable or compelling reason relied upon by the court in this case, we find the court's modification order with regards to the parties' two
sons to be an abuse of discretion.

Reversed and remanded in part with directions and affirmed in part.

COPE, J. (specially concurring).

I agree with the result and with much of the reasoning of the majority opinion, but disagree with that part of the opinion which indicates that in order to obtain a change of child custody, it is necessary to show that the present placement is detrimental to the child.

I agree with the majority opinion that there is a two-part test for modification of child custody: the movant must demonstrate "[1] a substantial change in circumstances since the entry of the initial custody decree and [2] that the child's best interest or welfare will be promoted by the change."

I disagree with that part of the opinion which says "for purposes of a modification of custody, Florida courts have required proof that a child's continuing residence with the custodial parent would be detrimental to or have an adverse impact upon the child." . . .

The requirement that the moving party demonstrate "detriment" converts the two-part test for change of child custody into a three-part test: (1) substantial change of circumstances, (2) best interest of the child, and (3) detriment in the present placement. The only Florida jurisdiction to routinely apply that three-part test is the Second District. Neither the Florida Supreme Court nor this court have held that a showing of detriment is a required element in a motion for change of child custody.

. . . The detriment-to-the-child standard obviously conflicts with Florida's shared parenting law, which extends to both parents the same rights, interests, and control in the upbringing of their minor children. Moreover, it appears to turn the best interests standard on its head. One clearly could demonstrate that a change of custody would promote the child's best interest, thereby helping the child, while not having evidence that the current situation would be detrimental to the child. Furthermore, the detriment-to-the-child standard appears to encourage more acrimony in an already contentious area of child custody litigation, because an additional element of proof, in essence, would require evidence and testimony that the custodial parent was doing and would continue to do a poor job raising the child. The Florida Bar, Florida Dissolution of Marriage § 11.192, at 11-111 through 11-113 (5th ed.1998).

. . . By contrast, there are numerous Third District cases which have repeatedly stated that the test for change of child custody is the traditional two-part test--and make no reference to detriment. Plainly a showing of "detriment" is not a required element of a motion for modification in this district. . . .
The fact is that under our existing case law and the existing two-part test, we are obliged to reverse under *Elkins*. The discussion in the majority opinion regarding "detriment" is entirely unnecessary for the disposition of this case.

The injection of the concept of "detriment" into the law of this district, however, is quite harmful. The correct criterion is "best interest," not "detriment." To say it now for the third and final time, the requirement of a showing of detriment will encourage additional acrimony in child custody modification contests, because that element will "require evidence and testimony that the custodial parent was doing and would continue to do a poor job raising the child." The Florida Bar, *Florida Dissolution of Marriage* § 11.92, at 11-113.

We should adhere to the traditional two-part test for a change in child custody, and decide the case on that basis.
Nancy Jo FLINT, Appellant,

v.

Craig FORTSON, Appellee.

744 So 2d 1217

4 DCA 1999.

GROSS, J.

Nancy Jo Flint appeals a final judgment denying her request to relocate to Atlanta with the parties' children and reducing child support. We affirm the trial court's decision on the relocation issue and reverse that part of the final judgment reducing child support.

The parties were divorced in 1994. At that time, their minor daughters were ages 7 and 3. The final judgment of dissolution incorporated the parties' settlement agreement. Primary physical custody of the girls was with the wife; the husband was to have physical custody "between 8 and 12 days per month," and the parties agreed that the "[w]ife and children shall live no more than 70 minutes driving time by reliable surface transportation from the Husband's work place at Miami International Airport."

Flint attended the University of Miami Law School, where she excelled. She was a member of the law review. She ranked in the top one percent of her class. At the beginning of her third year, Flint filed a petition to modify the final judgment of dissolution so that she could relocate with the children to Atlanta, where she had been offered an associate position with a law firm practicing in the area of the law in which she desired to specialize. 

After a trial, the court denied Flint's request to relocate in a final judgment which discussed the six factors set forth in section 61.13(2)(d), Florida Statutes (1997).

If Mize v. Mize, 621 So.2d 417 (Fla.1993) and Russenberger v. Russenberger, 669 So.2d 1044 (Fla.1996), controlled this case, there would have been a presumption in favor of allowing Flint's relocation, since she was the primary residential parent. However, the legislature's passage of section 61.13(2)(d) eliminated this presumption. The effect of the statute is to remove from the relocation equation all bias in favor of the primary residential parent. The statute imposes an intensely fact specific framework on the relocation decision, where the trial judge may base a decision on what is best for the child, even though a result may not be best for the primary residential parent seeking to relocate. See § 61.13(2)(d), Fla. Stat. (1997).
Flint cites to a number of relocation cases which predate the enactment of section 61.13(2)(d). The standards of appellate review prevent us from reweighing the evidence and making the value judgments that are appropriate for the trial judge. Because there is substantial competent evidence to support the trial court's findings concerning the factors set forth in section 61.13(2)(d)1.-6., we must affirm the decision denying relocation. One view of the evidence is that relocation would so drastically curtail this father's active, ongoing participation in his daughters' lives that, in conjunction with other factors, the move was not in the best interest of the children.

Both at oral argument and in her brief, Flint forcefully attacked the procedure used by the trial court to prepare the final judgment. At the end of the trial, the judge asked that both parties submit proposed final judgments. The trial court signed the final judgment proposed by Fortson, making no changes to the first four and one half pages.

Flint argues that the trial judge failed to fulfill his responsibility as a finder of fact by delegating his decision making authority to the attorneys, such that the final judgment was the "equivalent of a legal argument written by an attorney and signed by a circuit judge." According to Flint, this defect alone requires reversal.

In a perfect world, family division trial judges would always draft their own final judgments with the eloquence of Cardozo and the economy of Holmes. We firmly believe that the desired practice is for trial judges to draft their own orders or dictate them for the record.

However, in the real world of a busy family division in south Florida, judges typically spend full days on the bench facing one crisis after another. Many judges are required to address domestic violence cases in addition to issues falling under Chapter 61 and Chapter 742 (dealing with determination of parentage). A difficult task of a family judge is allocating court time between the competing litigants vying for the court's attention. Both the time standards of Florida Rule of Judicial Administration 2.085(d)(1)(C) and practical experience with family cases favor expeditious resolution of domestic relations issues; a final decision allows litigants to move on to the next stage of their lives. For many diligent family division judges, time spent in the courtroom consumes much of the time that might otherwise be spent in chambers crafting final judgments and orders.

Exacerbating these time pressures, Chapter 61 cases are fact intensive. The statute often requires many specific factual findings to be included in the final judgment. Even where specific findings are not mandatory, they are always desirable and "helpful to reviewing courts."

Given this reality, we cannot foreclose the trial court's practice of requesting proposed final judgments from the parties. Such submissions can be useful to the trial judge in the decision making process by highlighting those specific factual disputes that require resolution. Even judges who draft their own final judgments find the parties' proposed orders to be useful. Between the time of a trial and the time a judgment is actually written, a judge may have heard a number of other cases presenting similar issues. A
proposed judgment is a valuable mnemonic tool to ensure that the judgment includes those rulings on property division, alimony, and child custody that a case requires. By using the attorneys’ submissions as a checklist, a judge can ensure that the final judgment is complete and avoid the necessity of motions for rehearing to correct omissions. Of course, another desirable practice, for those judges with the verbal facility to do so, is for “the trial court to indicate on the record its findings and conclusions.”

As the fifth district has recognized, what is critical for a reviewing court is that a final judgment reflect the trial judge's independent decision on the issues of a case, not that the judge used words drafted by one of the parties to express that decision.

The judgment in this case presents none of those indicia of an order that does not embody the actual decision of the court. There were no irregularities or conflicts between orders in the record. The trial judge made handwritten changes in the proposed judgment and his own findings of fact concerning the child support issues. For these reasons, White and Wattles do not compel reversal.

Affirmed in part, reversed in part, and remanded.
PER CURIAM.

The father of the parties' minor child appeals from an order granting the mother's petition for modification which permits her to relocate with the minor child to Puerto Rico. We affirm.

The parties were divorced in 1994 and the mother was designated as the primary residential parent of their minor child. In September 1999, the mother filed a Petition for Modification in which she sought to relocate to Puerto Rico with the minor child. Following an evidentiary hearing, the court granted the mother's request for relocation to Puerto Rico. This appeal follows.

The trial court did not abuse its discretion in granting the mother's request to relocate the child. See Canakaris v. Canakaris, 382 So.2d 1197 (Fla.1980); Matilla v. Matilla, 474 So.2d 306 (Fla. 3d DCA 1985). We affirm because there is substantial competent evidence to support the trial court's findings concerning the six statutory factors listed in section 61.13(2)(d), Florida Statutes (1997). Based on the evidence presented, the trial court determined that the quality of life for both the mother and the minor child would be likely to improve, as the mother and her husband have employment opportunities in Puerto Rico and there exists a significantly greater family network in Puerto Rico. The court also found that relocation will diminish the child's exposure to the continual embittered noncustodial litigation, and that although both parties have been guilty of obstructing the other with regard to visitation, the mother is likely to comply with the visitation arrangements. Next, the trial court found that the substitute visitation is adequate to foster a continuing relationship between father and child. [FN1] particularly as the father visits Puerto Rico often and has an operating farm there. The cost of transportation was not at issue. The trial court thus properly determined that, based on its findings in, and analysis of, the first five factors, relocation is in the best interests of the child.

[FN1] With regard to visitation, the father was granted two weekends per month (Thursday through Sunday), alternating holidays, and half of each summer vacation period. Additionally, upon 72 hours' notice the father is entitled to visit with the child for 24 hours any time he is in Puerto Rico.

AFFIRMED.
PARIENTE, Justice.

We have for review a decision certifying the following question to be of great public importance: . . . We rephrase the certified question as follows:

**IS SECTION 752.01(1)(a), FLORIDA STATUTES (1993), FACIALLY UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY INFRINGES ON PRIVACY RIGHTS PROTECTED BY ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION?**

As rephrased, we answer the certified question in the affirmative and quash the decision below. As we did in the similar case of Beagle v. Beagle, 678 So.2d 1271, 1272 (Fla.1996), we emphasize that our determination today is not a comment on the desirability of interaction between grandparents and their grandchildren. We focus exclusively on whether it is proper for the government, in the absence of a demonstrated harm to the child, to force such interaction against the express wishes of at least one parent....

**BACKGROUND**

At common law, grandparents had no legal right to visit their grandchildren if the child's parents opposed the visitation. . . .

In Florida, the first grandparent visitation legislation was enacted in 1978, in the context of dissolution of marriage actions. In Beagle, we outlined the historical development of the statutes concerning grandparent visitation in Florida, which culminated in the enactment of chapter 752.

Chapter 752, entitled "Grandparental Visitation Rights," provides grandparents with a freestanding cause of action, unconnected with a dissolution of marriage, for visitation rights with their minor grandchildren:

1. The court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:
   a. One or both parents of the child are deceased;
   b. The marriage of the parents of the child has been dissolved;
   c. A parent of the child has deserted the child;
   d. The minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in s. 742.091; or
   e. The minor is living with both natural parents who are still married to each other whether or not there is a broken relationship between either or both parents of the minor child and the grandparents, and either or both parents have used their parental
authority to prohibit a relationship between the minor child and the grandparents. § 752.01(1)(a)-(e), Fla. Stat. (1993) (emphasis supplied).

In Beagle, this Court concluded that subsection 752.01(1)(e) was facially unconstitutional because "the challenged paragraph infringes upon the rights of parents to raise their children free from government intervention." 672 So.2d at 1272. We find that the reasoning in Beagle compels the same conclusion as to subsection 752.01(1)(a), which mandates that the court "shall" award visitation to the grandparents when it is in the best interest of the child, if "one or both parents of the child are deceased."

FACTS

Philip and Luisa Von Eiff were married in 1990. In 1991, their daughter Kelly (child) was born. Luisa, the biological mother, died of cancer in December 1993. In July 1994, Philip remarried. His new wife, Cheryl Von Eiff, legally adopted the child several months later, in October 1994.

In December 1994, the Azicris, the child's biological maternal grandparents (grandparents), filed a petition for unsupervised visitation with the child, as authorized by subsection (1)(a), alleging that the biological father and adoptive mother (Von Eiffs) had refused reasonable visitation with the child, and that such visitation was in the child's best interests. The Von Eiffs countered that they had a fundamental privacy right to determine with whom the child associated and that subsection (1)(a) violated that right.

At a non-jury trial, the grandparents testified that they had played an active role in the first two years of the child's life, but that soon after the biological mother died they were denied unsupervised visitation with their grandchild. The Von Eiffs never refused the grandparents contact with the child, but insisted that one of them, or an acceptable third person, be present during any visit.

The grandparents offered various reasons why the arrangement was unacceptable. For example, they explained that it was painful to visit the home of their deceased daughter where Philip Von Eiff now lived with his new wife. They were also offended that the Von Eiffs would even question their right to be alone with their granddaughter. The Von Eiffs countered that, as the child's parents, they had a right to withhold or condition visitation. Philip testified to various attempts that had been made to allow the grandparents to visit the child. He and his wife ultimately decided that visitation should be supervised because of their concerns about the grandparents' demonstrated hostility towards the parents and lack of respect for their parental judgment. The trial court ruled in favor of the grandparents and ordered unsupervised visitation with the child. In so ruling, the trial court found that the Von Eiffs "are loving, nurturing, and fit parents for the minor child," but that their "substantive reasons ... for terminating all visitation or at the maximum permitting only supervised restricted visitation do not rise to the level of severity that can be regarded with credibility by this Court." The trial court determined that it was in the
best interests of the child to have a relationship with her maternal grandparents restored.

The Von Eiffs appealed to the Third District, which upheld the constitutionality of subsection (1)(a). . . .

ANALYSIS

The United States Supreme Court has recognized, as one aspect of the liberty interest protected by the Due Process Clause of the Fourteenth Amendment, "a right of personal privacy," which includes "the interest in independence in making certain kinds of important decisions." Carey v. Population Servs., Int'l, 431 U.S. 678, 684, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). . . .

In Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the United States Supreme Court specifically acknowledged the fundamental liberty interest of parents in the "care, custody and management" of their children. This Court has likewise on numerous occasions recognized that decisions relating to child rearing and education are clearly established as fundamental rights within the Fourteenth Amendment of the United States Constitution.

. . .

While an implicit right of privacy is recognized under our federal constitution, Floridians enjoy an explicit right of privacy under article 1, section 23 of the Florida Constitution, which provides in pertinent part that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life." In enacting this freestanding constitutional provision, the "citizens of Florida opted for more protection from governmental intrusion" than that afforded under our federal constitution. Beagle, 678 So.2d at 1275 (quoting Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla.1985)). . . .

When analyzing a statute that infringes on the fundamental right of privacy, the applicable standard of review requires that the statute survive the highest level of scrutiny:

The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Winfield, 477 So.2d at 547. . . .

In Beagle, we unequivocally announced that "the imposition, by the State, of grandparental visitation rights implicates the privacy rights of the Florida Constitution." 678 So.2d at 1275. Based on our State's constitutional privacy right, this Court then held that "the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm." Id. at 1276 (emphasis
We determined that subsection (1)(e) did not survive the stringent standard of the compelling state interest test because it did not require a showing of demonstrable harm to the child before the State's intrusion upon the parent's fundamental rights. See id.

Subsection (1)(a) suffers from the same infirmity and therefore also fails to survive the compelling state interest test. Subsection (1)(a) mandates that the trial court "shall" order grandparent visitation upon the grandparent's petition, "when in the best interest of the minor child," without first requiring proof of demonstrable harm to the child. [FN3]

FN3. As we made clear in Beagle v. Beagle, 678 So.2d 1271, 1277 (Fla.1996): [O]ur holding in this case is not intended to change the law in other areas of family law where the best interest of the child is utilized to make a judicial determination. In issuing this decision, we have no intent to disrupt or modify the current requirements for best interest balancing in those other areas of family law proceedings.

Neither the legislature nor the courts may properly intervene in parental decisionmaking absent significant harm to the child threatened by or resulting from those decisions. See id. at 1275.

. . .

The grandparents concede that there is a right of privacy connected with parenting decisions, but argue that the death of the parent triggers the basis for government intervention. They assert that Florida has a compelling interest in preserving the familial bond between grandparents and grandchildren, especially where one or both parents are deceased.

Finding that the death of one of the child's biological parents gives rise to a compelling state interest would inappropriately expand the types of harm to children that have traditionally warranted government intervention in parental decision-making. . . .

As this Court explained in Beagle, "[o]ur cases have made it abundantly clear that the State can satisfy the compelling state interest standard when it acts to prevent demonstrable harm to a child." 678 So.2d at 1276 (emphasis supplied). The potential harm to a child flowing from the death of a parent does not constitute the kind of harm this Court has previously found to authorize government intervention.

The grandparents further urge us to distinguish our holding in Beagle as involving "an intact family," whereas, here, the original family is no longer "intact" due to the death of the child's biological mother. Although in Beagle we refer to the fact that the Beagles were an "intact" family, we based our decision in Beagle on the constitutionally protected privacy rights parents have in the rearing of their children. The result we reach in this case flows logically from our decision in Beagle.

Under Beagle, the State could not force grandparent visitation against the
wishes" of Philip Von Eiff before the death of the biological mother, "in the absence of demonstrated harm to the child." 678 So.2d at 1272. We find nothing in the unfortunate circumstance of one biological parent's death that would affect the surviving parent's right of privacy in a parenting decision concerning the child's contact with her maternal grandparents. Philip Von Eiff, whom the trial court found to be a "loving, nurturing and fit" parent, continues to enjoy a right of privacy in his parenting decisions, despite the death of the child's biological mother. . . .

In addition, Philip Von Eiff has remarried and his new wife, Cheryl Von Eiff, adopted the child, thereby together forming a new "intact" family. While our result does not depend upon this factual scenario, the fact that a new intact family was formed illustrates the difficulty in allowing government intervention into family decision-making based on whether the family is "intact."

Besides the constitutional infirmity, there is an inherent problem with utilizing a best interest analysis as the basis for government interference in the private lives of a family, rather than requiring a showing of demonstrable harm to the child. It permits the State to substitute its own views regarding how a child should be raised for those of the parent. It involves the judiciary in second-guessing parental decisions. It allows a court to impose "its own notion of the children's best interests over the shared opinion of these parents, stripping them of their right to control in parenting decisions." Beagle, 678 So.2d at 1276.

We recognize that the death of a biological parent may be a traumatic event for a child and that a family may deal with that tragic event in many different ways. Some parents may decide that counseling is beneficial for the child; others may disagree. Some parents may decide that the child should spend more time with the deceased biological parent's grandparents, siblings or close friends. Others may restrict those relationships. Interaction with the grandparents may help ease the pain of loss for both grandparent and child and, thus, be beneficial to the child. . . .

However laudable the purpose of this statute, as Justice Overton explained in Beagle:

[!] It is not our judicial role to comment on the general wisdom of maintaining intergenerational relationships. We must refrain from expressing our personal thoughts as either grandparents or future grandparents.

678 So.2d at 1277.

We recognize that it must hurt deeply for the grandparents to have lost a daughter and then be denied time alone with their granddaughter. We are not insensitive to their plight. However, familial privacy is grounded on the right of parents to rear their children without unwarranted governmental interference.

The Von Eiffs possess a constitutional right of privacy in their decision to limit the grandparents' visitation with their child. The Von Eiffs are loving, nurturing and fit parents, whose parenting decisions do not constitute a substantial threat of demonstrable harm to the child's health or welfare. Thus, the decision they have made
regarding the grandparents' visitation with the child is protected by our State's constitution.

CONCLUSION

There may be many beneficial relationships for a child, but it is not for the government to decide with whom the child builds these relationships. This concept implicates the very core of our constitutional freedoms and embodies the essence of Florida's constitutional right of privacy.

In summary, government interference in a parent's decision to exclude or limit grandparental visitation cannot be countenanced without a showing of a compelling state interest. No compelling state interest underlies subsection 752.01(1)(a), however well-meaning its purpose. Accordingly, we declare subsection 752.01(1)(a) facially unconstitutional. We remand for further proceedings consistent with this opinion.

It is so ordered.
STATE OF FLORIDA DEPARTMENT OF REVENUE on behalf of Linda Michelle PAYNE, Appellant, v. Orlando ORTEGA, Appellee.

682 So.2d 589
(2d DCA 1996)

WHATLEY, Judge.

The Department of Revenue (DOR), on behalf of the mother in this paternity action, section 409.2561(3), Florida Statutes (1995), appeals the final order setting custody, support, and visitation. DOR contends that the trial court erred in directing that the mother shall relinquish all her rights to receive child support from AFDC and her minor child's father. We agree with DOR that these directives of the final order are improper and reverse.

The minor child was born on December 2, 1992. On July 21, 1994, Orlando Ortega filed a complaint to establish the paternity of the child against Linda Michelle Payne, the child's mother. Ultimately, upon stipulation by Ortega, the trial court entered summary judgment adjudicating Ortega to be the father of the minor child. The court then entered a temporary order on visitation and support which directed that DOR be notified. After receiving notice, DOR filed a motion to intervene, which was granted. The parties, their attorneys, and counsel for DOR were present at the final hearing on custody, support, and visitation.

After the hearing, the trial court entered a final order stating that Ortega had agreed to waive his right to visitation and Payne had agreed to waive all claims for child support. The order further states that DOR had been allowed to intervene and objected to Payne's waiver of child support, arguing that a parent cannot waive a child's right thereto. DOR had informed the court that Payne is currently receiving AFDC and that fact indicates that the child is in need of support. The court then found that "waiving support is in the best interest of the child as [Payne] and [Ortega] do not wish to have further contact." It ordered that Payne "shall relinquish all rights to receive child support from Mr. Ortega, from AFDC, or from any other government source or individual. However, Ms. Payne does not relinquish her right to Medicaid benefits." The court further found in the order that the parties agreed that it is in the best interests of the minor child for Payne to have sole parental responsibility because the ex-boyfriend of Ortega's girlfriend had become potentially violent and had made threats against Ortega in the presence of the child. Ortega was ordered to reimburse DOR the $5,864 that Payne had received in AFDC benefits and each party was ordered responsible for their own attorney's fees and costs.
We agree with DOR that the trial court did not have authority to prohibit the mother from applying for and receiving AFDC benefits. . . . Ordering Payne to relinquish her right to receive child support from AFDC runs directly counter to the federal requirements for state participation in that program. . . .

DOR also appeals that part of the final order directing that the mother shall relinquish all her rights to receive support from the minor child's father. The case law is clear that parents may not waive their children's right to support because that right belongs to the children.

The parties stipulated to the mother's waiver of child support in exchange for the father's waiver of his right to visitation. The trial court appears to have agreed to this stipulation. This was improper.

The Florida legislature has made it clear that visitation rights and the obligation to provide child support are unrelated and that the inability to exercise visitation rights does not relieve the noncustodial parent from the obligation to pay child support. § 61.13(4)(b), Fla. Stat. (1991); § 88.271, Fla. Stat. (1991).

Additionally, the best interests of the minor child are clearly not served by ordering the mother to relinquish her rights to receive benefits from the father or any governmental agency or by relieving the father of his obligation to provide child support. . . . See also Peregood v. Cosmides, 663 So.2d 665, 669 (Fla. 5th DCA 1995) ("We can locate no Florida cases in which the parents contracted away all legal rights to their child to relieve themselves of child support obligations or visits by the other parent.... Such an agreement runs into the teeth of Florida's strong public policy to provide support for children by their parents, and not to countenance circumvention of a parent's duty to support his or her children.").
This is a paternity action brought in the circuit court of Orange County by Finley, the mother of a child born February 20, 1993. The complaint sought determination that Scott was the biological father of the child and also sought support for the child pursuant to section 61.30, Florida Statutes (1993).

By order dated January 25, 1994, the trial court adjudicated Scott to be the child's biological father and ordered temporary child support in the amount of $5000 per month. The trial court's order states that the amount of temporary child support is less than the amount dictated by the child support guidelines imposed by section 61.30(6), Florida Statutes (1993), which would have required child support exceeding $10,000 per month because Scott's gross monthly income was approximately $266,926. . . .

In September 1994, Scott filed a petition in the probate division of the Ninth Judicial Circuit in Orange County for the appointment of a guardian of the property of his minor child. Margaret Quarantello, an experienced private guardian of property, was proposed as the guardian of the property. At a hearing held before a judge of the probate division, evidence was presented as to the payment by Scott and use by Finley of the temporary monthly child support payments. The judge found at the end of the hearing that the ordered amount had not been expended for the benefit of the child and that Scott had paid a total of $12,000 above what was needed for the child. The judge declined to honor the preference of the mother in the appointment of the guardian because of "the already-apparent application of a large percentage of the minor's funds to [Finley's] own use and needs." The judge appointed Quarantello to be the guardian of the property of the minor child.

. . . In a paternity judgment dated December 30, 1994, the trial court entered a final adjudication that Scott was the biological father. The trial court awarded primary residential custody and responsibility to Finley, subject to shared parental responsibility. The trial court found that Finley had made misrepresentations to the court concerning financial information and had refused to properly account for the $50,000 of temporary child support that Scott had paid to her.

The trial court found that Finley's request of approximately $10,000 per month in direct child support had no economic relevance to the bona fide actual needs of the child. The trial court found that this Court recently stressed in Miller v. Schou, 616 So.2d 436 (Fla.1993), that "[t]he child is only entitled to share in the good fortune of his parent
consistent with an appropriate lifestyle." . . . The trial court stated that it declined to impose the guideline amount suggested by Finley in the amount of $10,011 but rather awarded the sum of $5000 per month because it found that this amount of support was "consistent with the actual and bona fide needs of the minor child and the overall financial circumstances of each parent and will therefore foster and promote an appropriate lifestyle for her." Final Judgment of Paternity at 14, Finley v. Scott, No. DR93-10246 (Fla. 9th Circ.Ct., Dec. 30, 1994).

The trial court ordered Scott to pay $2000 per month directly to Finley and $3000 per month to Quarantello, as guardian of the property of the minor child. . . .

Finley appealed the final judgment, arguing that the trial court should have awarded the full guideline amount, $10,011, and that the trial court had no authority to require any of the support payment to be paid into a guardianship trust. Scott cross-appealed, arguing that the $3000 per month ordered to be paid to the guardian of the property was an abuse of discretion in that the $3000 was in excess of the child's actual needs.

The Fifth District en banc held that the trial court erred in awarding child support in the amount of $5000 per month when it found that only $2000 was required to meet the day-to-day living requirements of the child. The majority concluded that the trial court erred in ordering an additional "good fortune award" of $3000 to be paid to the guardian. . . . The Fifth District majority acknowledged an apparent conflict with Boyt and stated its disagreement with the Second District's interpretation of Schou as allowing good-fortune awards. . . .

As the trial court's final judgment recognized, the correct analysis of the amount of child support appropriate in this case begins with section 61.30(1)(a), Florida Statutes (1993) [and] . . . section 61.30(6), Florida Statutes (1993).

We find that the schedule for determining the amount of child support, presumed to be the amount a trial judge awards under section 61.30(6), is clearly rebuttable. The trial court is given the specific authority to order payment of child support which varies more than five percent from the schedule upon a written finding or specific finding on the record explaining why ordering payment of such guideline amount would be unjust or inappropriate. § 61.30(1)(a), Fla. Stat. (1993). . . .

Our reading of the trial court's final judgment is that the trial court adhered to the statute. We . . . believe that the trial court properly exercised its discretion in finding:

In this case, this Court specifically declines to impose the guideline amount suggested by Petitioner in the sum of $10,011 but will rather award the sum of $5,000 per month as child support because this Court finds that the same is consistent with the actual and bona fide needs of the minor child and the overall financial circumstances of each parent and will therefore foster and promote an appropriate lifestyle for her.

Final Judgment of Paternity at 13-14. Consideration of both the bona fide needs of the child and the financial circumstances of each parent complies with section 61.30, Florida Statutes (1993), and with our decision in Schou. We reject the district court's
majority view that consideration of parental financial resources conflicts with the statutory guidelines and with our decision in Schou.

... We recognize that decisions as to whether and how much to vary child support awards from amounts dictated by the statutory guideline formula are fact-intensive decisions that depend upon the record in each case. Our analysis concurs with Judge Sharp's well-reasoned dissent, which indicates why the problem in this case begins with the fact-intensive nature of deciding the appropriate amount of child support. Judge Sharp stated:

While I concur with Judge Goshorn’s opinion in this case, I appreciate the paradox of requiring a parent to overpay "needs and expenses" for a child, as Judge Harris points out in his majority opinion. The difficulty is in part semantical, and in part practical. The crux of the difficulty is settling on whose standard of living determines the "needs" of this child.

In this case, the mother is raising the child on a much lower standard of living than would be established by the father, if the child were living at his current lifestyle [as a professional athlete] of $266,926.00 gross income per month. He could well afford, for example, a full time nanny, housekeepers, international travel, residence in a mansion with high attendant expenses, and transportation in expensive automobiles--a portion of which could be allocated to this child. These expenses could easily equate to the $5,000.00 per month found appropriate by the trial court.

However, the mother is not able, in this case, to live at that standard of living. She must provide for herself and her other two children. They cannot benefit from the child support paid for this child, although the mother tried to do so, and has been properly reprimanded by the trial court for that effort. At her standard of living, the trial court found that only $2,000.00 was actually being spent on this child. However, if the father's child support obligations are limited to this level, the child will not share in her father's much higher standard of living and lifestyle. Clearly the "needs" of this child should not be solely based on what the mother can afford to spend on her, consistent with the mother's much lower standard of living. That also would be inequitable. Finley, 687 So.2d at 345 (W.Sharp., J., dissenting).

To assist trial courts in making this fact-intensive decision in future cases, we expressly point out that a trial court is to begin its determination of child support by accepting the statutorily mandated guideline as the correct amount. The court is then to evaluate from the record the statutory criteria of the needs of the child, including age, station in life, and standard of living, the financial status and ability of each parent, and any other relevant factors. If the trial court then concludes that the guideline amount would be unjust or inappropriate and also determines that the child support amount should vary plus or minus five percent from the guideline amount, the trial court must explain in writing or announce a specific finding on the record as to the statutory factors supporting the varied amount. Absent an abuse of discretion as to the amount of the variance, the trial court's determination will not be disturbed on appeal if the calculation begins with the guideline amount and the variation is based upon the statutory factors.
We next consider whether the trial judge was authorized to require a part of the money to be paid to the legal guardian of the child's property. We conclude that the trial judge acted within his authority in this case in ordering that the portion of the money not needed for the child's immediate custodial maintenance be paid to the legally appointed guardian of the child's property.

. . . Once the probate court determined a need for a guardianship of the property, then the trial court in the support proceeding could use the guardian to protect the portion of the child support payment that the trial court determined pursuant to section 61.30 was not needed for the child's day-to-day custodial expenses. Through the guardianship, the probate court could exercise judicial supervision of this portion of the funds.

. . . Our conclusion is that only when the necessity for a legal guardianship of the property has been proven and a legal guardian appointed by the probate court in accordance with chapter 744, Florida Statutes (1997), can the trial court use a guardian to protect the minor's assets. The trial court is not to order any portion of the child support paid into a trust unless a legal guardian has been appointed, and we disapprove Boyt to the extent that it authorizes continuing supervision of the child support award by the court that determined the child support amount or the payment into a guardianship trust to be supervised other than through the probate court.

In this case, the probate court has made a specific finding requiring a court-appointed guardian of the property of the child because the child's custodial parent did not use temporary support payments totally for the benefit of the child. Now the probate court will supervise, through the guardian, the use of the money not required for the child's immediate custodial needs. We find this to be the correct procedure for this case.

Accordingly, we quash the decision of the district court and remand with directions to affirm the trial court's final judgment of paternity.

It is so ordered.

ANSTEAD, Justice, specially concurring.

I write separately only to emphasize the controlling principles first clearly articulated by Justice Grimes, in Miller v. Schou, 616 So.2d 436 (Fla. 1993):

As a practical matter, it is impossible to believe that any court would award the same amount of child support where the paying parent is a multimillionaire as it would where the paying parent makes a modest living. While technically the child's basic survival needs would be the same in each case, the determination of "need" in awarding child support takes into account more than just the basic necessities of survival. See Smith, 474 So.2d at 1213 ("The child's residence with his mother does not mean that the father must do no more than provide a survival level of support."). The child of a
multimillionaire would be entitled to share in that standard of living--for example to attend private school or to participate in expensive extracurricular activities--and would accordingly be entitled to a greater award of child support to provide for these items, even though provision for such items would not be ordered in a different case. Of course, we do not mean to imply that the child of a multimillionaire should be awarded enough support to be driven to school each day in a chauffeured limousine. The point of financial disclosure is not to ensure that the child of a wealthy parent will own a Rolls Royce, but rather to ensure that the trial court will have enough information to allow it to make an informed decision as to the extent of the parent's good fortune and the corresponding extent of the child's right to share in that good fortune. The child is only entitled to share in the good fortune of his parent consistent with an appropriate lifestyle. We believe that Florida's trial courts are fully capable of making the determination of an appropriate amount of support in these cases and will not, as Schou argues, create a class of children who are unduly pampered in the name of sharing in the noncustodial parent's good fortune.

Id. at 438-39 (footnote omitted).
Stephanie Chavez Saporta appeals a final dissolution judgment asserting error in the trial court's failure to impute income to her husband, Daniel Saporta, for child-support purposes. We reverse the judgment except for the dissolution of the marriage and remand for further proceedings.

We next address the wife's assertion that the trial court abused its discretion in not imputing income to the husband for child support guidelines calculation purposes. We agree. The evidence supports the wife's claim.

The record demonstrates that the husband's reported income is dwarfed by the household's lifestyle. The husband's testimony that his business has been doing poorly for years is belied by the family's lifestyle, and the former husband provided no credible reason for maintaining a business that operates at such alleged severe losses. Here, where the head of the family has established and maintained a standard of living on a certain financial level the court can impute income or financial status sufficient to maintain that standard.

The basis for imputing income may be inferred from the circumstances of the case. See Smith, 737 So.2d at 643. "A claim that a payor spouse has arranged his financial affairs or employment situation so as to short change the payee spouse is a valid matter to be explored in determining the payor's real ability to pay." Id., at 644. Failure to impute income for child-support purposes impermissibly penalizes the child, whose needs the child support was designed to meet. Accordingly, we reverse the judgment as to the child-support award. On remand, the court shall reconsider whether to impute income in fashioning the child-support award, in accordance with this decision.

Based on the foregoing, we reverse the final judgment and remand for further proceedings.
Maurice C. **PIMM**, Petitioner/Cross-Respondent,  
v.  
Carolyn M. **PIMM**, Respondent/Cross-Petitioner.  

**601 So 2d 534**  
**(S Ct FL 1992)**

**HARDING**, Justice.

[1] We review *Pimm v. Pimm*, 568 So.2d 1299 (Fla. 2d DCA 1990), in which the district court of appeal certified the following question as a matter of great public importance: IS THE POSTJUDGMENT RETIREMENT OF A SPOUSE WHO IS OBLIGATED TO MAKE SUPPORT OR ALIMONY PAYMENTS PURSUANT TO A JUDGMENT OF DISSOLUTION OF MARRIAGE A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED TOGETHER WITH OTHER RELEVANT FACTORS AND APPLICABLE LAW UPON A PETITION TO MODIFY SUCH ALIMONY OR SUPPORT PAYMENTS?  
*Id.* at 1301. We answer the question in the affirmative.

On July 21, 1975, a final judgment dissolved the twenty-nine-year marriage of petitioner Maurice C. Pimm (husband) and respondent Carolyn M. Pimm (wife). The final judgment incorporated a property settlement agreement of the parties providing that the husband would pay the wife weekly alimony installments. In 1988, shortly before the husband turned sixty-five years of age, he filed a petition for modification of the final judgment seeking to terminate the alimony obligation upon his retirement at the age of sixty-five. The wife counterpetitioned for an increase in alimony. The trial court denied both petitions. As to the husband's petition, the trial court determined that under *Ward v. Ward*, 502 So.2d 477 (Fla. 3d DCA 1987), a voluntary retirement, regardless of age, is not a factor that can be considered in determining if there is a change of circumstance sufficient to modify the obligation to pay alimony.

At the time of the dissolution of marriage, the husband was a civil engineer and president of his own surveying company. The husband subsequently became a salaried employee of the firm that purchased his company, and it was from this position that the husband contemplated retirement when he filed his petition for modification of the alimony payments.

The wife was a full-time mother and homemaker and was never employed outside the home, either during or after the marriage. However, the record reflects that through inheritance and the sale of jointly-owned property the wife had accumulated considerable liquid assets since the time of the dissolution.
The wife contends that the husband's voluntary act of retirement should not be considered a change of circumstance which would support a modification of alimony. The wife points out that in petitioning to modify alimony, the moving party must show three fundamental prerequisites. First, there must be a substantial change in circumstances. Second, the change was not contemplated at the time of final judgment of dissolution. Third, the change is sufficient, material, involuntary, and permanent in nature. As measured by this standard, the wife argues that the husband's voluntary retirement may be a substantial change, but it is not involuntary; that his retirement was or should have been contemplated at the time of final judgment; and that such a voluntary retirement is not sufficiently permanent in nature.

The husband asserts that if the reduced income of a payor spouse who retires at "normal" retirement age is not a factor that may be considered in proving a change in circumstances, then the payor spouse is put in the untenable position of being unable to retire at any age.

Consequently, the husband urges that voluntary retirement is a part of the "total circumstances" which the "court can and should take into consideration" when modification is requested. The husband reasons that if the trial court is permitted to consider the payor spouse's retirement as part of the total circumstances, then the court can inquire into the motivation and facts surrounding the retirement.

The district court held that unless there is such a "true" or "pure" property settlement agreement that forecloses modification or a showing that a spouse's future retirement was contemplated and considered in establishing the alimony payments, a supporting or payor spouse's retirement is a factor that may be considered along with all other relevant factors and applicable law in determining whether the payor spouse is entitled to a modification of alimony or support payments.

Pimm, 568 So.2d at 1301. In reaching that conclusion, the court rejected the bright line rule announced in Ward and Servies, which would not permit "any consideration of 'voluntary' retirement as a change of circumstance sufficient to support a modification of alimony or support payments."

In this case, the district court concluded that the agreement at issue was not a "pure" property settlement agreement because the wife "did not surrender any valuable property rights in exchange for her right to receive periodic alimony payments." Thus, modification was not precluded by the type of agreement at issue.

Although it would be a better practice to incorporate consideration of retirement and what will happen in the event of retirement in an agreement or final judgment, we find that silence in that regard should not preclude consideration of a reasonable retirement as part of the total circumstances in determining if sufficient changed circumstances exist to warrant a modification of alimony.

In determining whether a voluntary retirement is reasonable, the court must consider the
payor's age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire. The age of sixty-five years has become the traditional and presumptive age of retirement for American workers: many pension benefits maximize at the age of sixty-five; taxpayers receive an additional federal tax credit at the age of sixty-five in recognition of the reduced income which accompanies retirement; and the Employee Retirement Income Security Act of 1974 defines "normal retirement age" as including the "time a plan participant attains age 65." Based upon this widespread acceptance of sixty-five as the normal retirement age, we find that one would have a significant burden to show that a voluntary retirement before the age of sixty-five is reasonable. Even at the age of sixty-five or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty. Thus, the court should consider the needs of the receiving spouse and the impact a termination or reduction of alimony would have on him or her. In assessing those needs, the court should consider any assets which the receiving spouse has accumulated or received since the final judgment as well as any income generated by those assets.

Additionally, the court should consider whether the provision for alimony was contained in an agreement between the parties or solely in a judgment of the court. "Where the alimony sought to be modified was ... set by the court upon an agreement of the parties, the party who seeks a change carries a heavier than usual burden of proof."

Finally, we note that the obligation to pay support to a former spouse is different from the obligation to pay child support. Voluntary retirement cannot be considered a change of circumstance which would warrant a modification of child support.

Accordingly, we answer the certified question in the affirmative and approve the decision below. It is so ordered.
Daniel Lynn OVERBEY, Petitioner,
v.
Janet Carol Hutching OVERBEY, etc., Respondent.

698 So.2d 811 (Fl. Sup. Ct. 1997)

OVERTON, Justice.

We have for review Overbey v. Overbey, 674 So.2d 898 (Fla. 5th DCA 1996), in which the Fifth District Court of Appeal held that the voluntary decision by a non-custodial parent to attend law school, with a consequent significant loss of income, did not constitute a valid basis for a downward modification of child support. . . .

For the reasons expressed, we find that a downward modification of child support for education enhancement should be ordered only if the modification is found to be in the best interests of the child or children. Under the unrefuted facts in this record, we find that the requested modification is not in the best interests of the children. We therefore approve the result reached by the district court.

The facts of this case are as follows. Janet Overbey (the mother) and Daniel Overbey (the father) were divorced in 1990. Pursuant to the marital settlement agreement that was incorporated into the judgment of dissolution, the father was to pay child support for the parties' two minor children in the amount of $200 per week. As of 1994, the father's income as a police officer was approximately $45,000 per year and the mother's income as a practical nurse was approximately $24,000 per year. In 1995, the father was accepted to law school and applied for a reduction in child support to enable him to attend. The mother opposed the motion, contending that the father's voluntary decision to attend law school did not constitute a significant change of circumstances justifying a reduction in child support.

. . .

Several statutory provisions must be examined to adequately evaluate and resolve the issue presented by these cases. Section 61.14(1), Florida Statutes (1995), governs "[e]nforcement and modification of support, maintenance, or alimony agreements or orders." That section provides in pertinent part as follows:

When a party is required by court order to make any [support, maintenance, or alimony] payments, and the circumstances of or the financial ability of either party changes ... either party may apply ... for an order decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties or the child, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the ... order.

(Emphasis added.) Section 61.13, Florida Statutes (1995), which governs the power of courts to issue orders regarding child support, additionally provides:

(1)(a) In a proceeding for dissolution of marriage, the court may at any time order
either or both parents who owe a duty of support to a child to pay support in accordance with the guidelines in s. 61.30. The court initially entering an order requiring one or both parents to make child support payments shall have continuing jurisdiction after the entry of the initial order to modify the amount and terms and conditions of the child support payments when the modification is found necessary by the court in the best interests of the child, when the child reaches majority, or when there is a substantial change in the circumstances of the parties. The court initially entering a child support order shall also have continuing jurisdiction to require the obligee to report to the court on terms prescribed by the court regarding the disposition of the child support payments.

(Emphasis added.)

Generally, under these provisions, a fundamental prerequisite to bringing an action to modify child support payments is a showing of substantial change of circumstances. . . . However, under section 61.13(1)(a), a court that initially entered an order requiring a parent to pay child support has jurisdiction to modify the amount of that support under three circumstances: (1) when the modification is necessary for the best interests of the child; (2) when the modification is necessary because the child has reached majority; or (3) when there is a substantial change in the circumstances of the parties.

The burden of establishing that a reduction is necessary is on the party seeking modification. Moreover, when, as in the instant case, the child support was based on an agreement by the parties that was subsequently incorporated into an order, a heavier burden rests on the party seeking a reduction than would otherwise be required.

In Lacy, [413 So. 2d 472 (Fla. 2d DCA 1982)] the district court concluded that parties who, as in the instant case, entered into a support agreement could not seek modification under the "best interests" prong. The court first concluded that under section 61.13 a trial court does not "initially" enter an order requiring child support payments if the parties themselves execute a property settlement agreement that is subsequently incorporated into the order. The court then determined that modification of agreements is governed solely by section 61.14, which allows for a modification only if there has been a substantial change in circumstances. We disagree with this interpretation of the statutes. First, the court cited no support for the initial conclusion, and we find no basis in the statute for this holding. Second, both sections 61.13 and 61.14 on their face govern the modification of orders. Thus, we conclude that sections 61.13 and 61.14 must be read in pari materia. In sum, we find that the incorporation of a settlement agreement into a final judgment ordering support is irrelevant in determining whether a court initially ordered support for purposes of bringing an action under sections 61.13 and 61.14. Consequently, we disapprove Lacy to the extent it holds to the contrary. As previously indicated, however, the incorporation of a settlement agreement is relevant to the burden of proof necessary to establish that a reduction is warranted.

In this case, as well as in the cases cited for conflict, the district court decisions turned on whether the reduction in child support was "voluntary." This is because courts
interpreting the meaning of the term "substantial change of circumstances" have found that such a change in circumstances must be significant, material, involuntary, and permanent in nature to warrant a reduction in payments. 

As noted, Florida district courts evaluating cases where a reduction in income is due to a payor parent's decision to return to school are divided as to whether such a reduction (1) constitutes a voluntary reduction in income for purposes of imputing income or (2) constitutes an involuntary temporary reduction of income that is reasonably calculated to ensure the future economic well-being of the recipients. However, the issue of whether a decision to return to school is "voluntary" has created a significant amount of confusion because, clearly, under the circumstances of each of the cases discussed earlier in this opinion, the decision to leave employment to attend school was a voluntary one over which the payor parent had control. Under the circumstances at issue, we find that the question should not be whether the reduction is voluntary; instead, the focus should be on whether the temporary reduction will be in the best interests of the recipients. Section 61.13(1)(a) contemplates the distinction between the best interests and voluntary change of circumstances methods for evaluating a reduction in child support by providing that a court may enter an order modifying child support payments when the modification is found to be necessary in the best interests of the child or when there is a substantial change of circumstances.

Having concluded that, under the circumstances of this case, the father's reduction in income is voluntary and consequently insufficient to support a finding of substantial change in circumstances, we must evaluate whether the reduction is in the best interests of the children. This is not an easy issue. Today, we live in a changing economy that often requires new or enhanced skills to ensure that individuals may continue to earn wages at a commensurate or increased level. Courts cannot address this issue in a vacuum. Among other things, the need for retraining when a skill is no longer needed and the need for increased education to enhance income are two very important factors that may need to be considered.

At the time this action was brought, the minor children were ten and sixteen years of age. The income of the father as a police officer was approximately $45,000 per year. The trial judge reduced the child support payments from approximately $200 per week to $200 per month to allow the father to attend law school. In so holding, the trial judge found that "the minor children will ultimately benefit from the former husband's actions, even though the older child will reach the age of majority while her father is attending law school." We are unable to agree with this conclusion. As noted by the trial judge, the older child will reach majority before the father finishes school; the younger child only a few years thereafter. Thus, the legal duty of the father to support the children will completely terminate soon after he finishes school. Grapin v. Grapin, 450 So.2d 853 (Fla.1984) (absent finding of dependency, any duty to support child who has reached majority is moral rather than legal one). Additionally, there is no guarantee that the father will secure employment paying more than $45,000 per year immediately after he finishes school. Under these circumstances, we cannot conclude with any certainty that the father's reduction in income and respective reduction in child support would act to
ensure the present and future economic well-being of the children. In fact, the children would be subsidizing the father's law school education through lower child support payments despite having no assurances of any future benefit. Given the undisputed facts in this record, we must find that the trial judge abused her discretion in concluding that the children would eventually benefit from the proposed reduction in child support payments. From our view, while there may possibly be some voluntary long-term benefit, there clearly would be no legally enforceable benefit.

In reaching our decision, we must emphasize that we are in no way promulgating a bright-line rule to be applied in these cases. In light of today's fast-paced changing age of technology, trial judges will have to evaluate, on a case-by-case basis, whether a temporary reduction in child support payments due to a payor's pursuit of an enhanced education will eventually be legally beneficial to the recipients. To illustrate, while we find that the court in Arce erred in finding the reduction to be involuntary, we fully agree with the court's conclusion that, under the circumstances in that case, the temporary reduction in child support was appropriate.

... It is so ordered.

HARDING, Justice, concurring in part and dissenting in part.

While I agree with the majority's conclusion that section 61.13(1)(a) contemplates a distinction between the best interests of the child and a voluntary change in the parties' circumstances when a court evaluates a request for a reduction in child support, I respectfully dissent from the majority's determination that the trial judge in the instant case abused her discretion in concluding that the children would eventually benefit from the proposed reduction in child support payments.

... The majority opinion acknowledges that "trial judges will have to evaluate, on a case-by-case basis, whether a temporary reduction in child support payments due to a payor’s pursuit of an enhanced education will eventually be legally beneficial to the recipients." This is the type of discretionary ruling that should only be disturbed if it fails the test of reasonableness. The trial judge was in the best position to evaluate the testimony and evidence presented to her in the instant case. In my judgment, the trial judge covered all the bases and considered everything that she was supposed to consider in arriving at her conclusion. Even if I might have come to a different conclusion, I cannot say as a matter of law that the judge's ruling was unreasonable. Thus, I find no abuse of discretion and would approve the judge's determination in this case.
Henry F. POHLMANN, III, Appellant/Cross-Appellee,  
v.  
Carol L. POHLMANN, Appellee/Cross-Appellant.  

703 So.2d 1121 (Fl. 5th DCA 1997)  

PETerson, Judge.  

The former husband, Henry F. Pohlmann, III, appeals a final judgment denying modification of his child support obligations. He contends that the trial court erred by finding subsection 61.30(12), Florida Statutes (1995), constitutional, and by finding an absence of substantial change in circumstances that prevented a downward modification of child support. . . .  

In February 1995, the former husband petitioned for modification of child support alleging that there had been a substantial change in his financial circumstances warranting a downward modification of his child support obligation. The specific allegations included: (a) his income had decreased permanently, involuntarily and substantially, (b) the former wife's income had increased, (c) he had remarried and has three children from the subsequent marriage, (d) the former wife had remarried, and (e) it appeared the child support guidelines would provide for a decrease of $50 per month or 15% of the current amount. The trial court struck allegations (c) and (d), above. . . .  

The former husband testified he was self employed, but that his income had dropped considerably from the time of dissolution. He conceded on cross examination, however, that his available monthly income of $2,479 at the time of trial exceeded his available income at the time of dissolution. He admitted he was not meeting his child support obligations and was donating $260 per month to his church because he felt this obligation took priority over his duty to support his child. . . .  

Shortly before the modification hearing, the former husband's current wife sought and obtained a child support order for the three children produced by their marriage. The current wife testified that although she and the former husband were experiencing marital difficulties that were financial in nature, they nonetheless continue to cohabit and she continues to have access to their joint bank account into which he deposits his income.  

The trial court found that no substantial change in circumstances occurred that would warrant a downward modification in child support, that the former husband had willfully failed to maintain his child support obligation and owed $4,825 in child support arrearages, that he had willfully failed to reimburse $6,224.83 to the former wife for medical expenses, and that he and his current wife continue to live together in a marital relationship despite the entry of a final judgment for separate maintenance. The trial court also found that an income deduction order entered by another court to support the three children produced from the current marriage was subordinate and inferior to the
income deduction order entered in favor of the child of the parties.

We first address the former husband's argument that subsection 61.30(12) is unconstitutional. The subsection provides:

61.30 Child support guidelines.--

*  *  *  *  *

(12) A parent with a support obligation may have other children living with him or her who were born or adopted after the support obligation arose. The existence of such subsequent children should not as a general rule be considered by the court as a basis for disregarding the amount provided in the guidelines. The parent with a support obligation for subsequent children may raise the existence of such subsequent children as a justification for deviation from the guidelines. However, if the existence of such subsequent children is raised, the income of the other parent of the subsequent children shall be considered by the court in determining whether or not there is a basis for deviation from the guideline amount. The issue of subsequent children may only be raised in a proceeding for an upward modification of an existing award and may not be applied to justify a decrease in an existing award.

(Emphasis added). Section 61.30(12) prescribes a preference for a child under the protection of an existing child support order over any later born children of the payor parent. An obligor may raise the existence of subsequent children born after a support obligation arose as a circumstance affecting ability to pay only in a proceeding for an upward modification of an existing award. The former husband contends that the distinction in subsection 61.30(12), between earlier and later born children unconstitutionally denies equal protection of the law to both parents of subsequent born children and to the subsequent children.

In analyzing the former husband's argument, we apply the rational basis standard of review because neither a suspect classification nor a fundamental right is involved. . . Contrary to the former husband's contentions, we find that subsection 61.30(12) furthers a legitimate state interest and affirm the trial court's finding of constitutionality. The statute assures that noncustodial parents will continue to contribute to the support of their children from their first marriage notwithstanding their obligation to support children born during a subsequent marriage. Granting priority of child support to children of an earlier first marriage, the Feltman court determined that the South Dakota statute provided a fair and logical prioritization of claims against a noncustodial parent's income. Feltman at 592. "Without prioritization, the children from the first family might find their standard of living substantially decreased by the voluntary acts of a noncustodial parent. A noncustodial parent who elects to become responsible for supporting the children of a second marriage does so with the knowledge of a continuing responsibility to the children of the first marriage." Id. . . .

We also affirm the trial court's finding that the former husband failed to show a substantial change of circumstances which would justify a downward modification of his
support obligations. Court modification of a support agreement requires a party to show a permanent, involuntary, and substantial change in circumstances. Moreover, a noncustodial parent who agrees to the amount of child support, as the former husband did in the instant case, will face a heavier burden of proof to reduce such amount in a later modification proceeding. . . . The former husband further admitted that his available income at the time of trial exceeded his available income at the time of the dissolution, and that while he was not meeting his child support obligations, he was donating $260 per month to his church. In an attempt to manufacture a substantial change in circumstances, the former husband and his current wife produced the latter's petition for separate maintenance which tellingly was filed only two weeks before trial. The current wife testified that while she filed such petition in order to assure that her three children would be provided for, nothing in their marital relationship has changed. The trial court did not abuse its discretion in finding that the former husband failed to meet his burden of proving a permanent, involuntary, and substantial change in circumstances.

. . .

We affirm the judgment of the trial court. . .

HARRIS, Judge, dissenting.

The issue in this case, quite simply, is whether it is a "legitimate government interest" for the State, through its legislative process, to prefer certain children over others. Because I believe that it is not, I would hold § 61.30(12), Florida Statutes, unconstitutional under the provisions of Article I, § 2, of the Florida Constitution.

. . .

The Feltman court acknowledges that the application of the South Dakota statute (substantially the same as ours) may result in the children of second marriages receiving a lesser amount of economic support than children of first marriages. But, says Feltman, such an outcome was considered by the Child Support Commission. It is our obligation, under the constitution of this state, to determine whether the state has the right under any circumstance (even if recommended by a commission) to discriminate between children born to the same parent. There is no doubt that if parents are required to support their children by a second marriage to the same extent that they must support their children from an earlier marriage, the standard of living of all of the children will be affected. But so too will the standard of living of the first-born child in an intact marriage be affected by the birth of the second child and this adjusted standard of living will be further affected by the birth of the third child and this adjusted standard of living will again be affected by the birth of the fourth child and so on. The living standard of children will always be affected when the parent's finite income is required to be shared with additional siblings. But each child should be able to expect that the law (the state) will not intervene in order to treat him or her unfairly in the allocation of the parent's income which is available for support. If the court so
intervenes, the children of the second marriage will see the court as the neighborhood bully who steals their candy to give to their half-siblings. The fact of a divorce should not be justification for the state to prefer some of the siblings over others. It is not appropriate for the state to punish the children of a second marriage because their parent was involved in a previous divorce.

... Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice. "[V]isiting ... condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the ... child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the ... child is an ineffectual--as well as unjust--way of deterring the parent." (Citation omitted).

Throughout this discussion, we should keep in mind that we are not here dealing with state funds. The state is mandating a disproportionate allocation of the parent's income. It is demanding that parents, from their income, support some of their children better than they support the others. And the state is wrong. The state does have a legitimate interest in seeing that a noncustodial parent does not discriminate against the children of the first marriage by supporting them at a lesser level than subsequently born children in that parent's custody. And in supplying this protection, the court should consider not only any additional income earned by the parent since the divorce but also any support contribution that might be made by the new spouse. But the state should not attempt to meet this obligation, as it has by this statute, by throwing the subsequent children to the wolves. The state's current approach is Cinderellian--it makes noncustodial parents appear as wicked stepparents to their own children by requiring them to provide new ball gowns for their first born while supplying hand-me-downs to their later children.

... Even though it is a discomforting topic, perhaps we should consider the fairness issue. Suppose it were the mother who was required to pay support to the children of her first marriage. And assume that upon remarriage she elects to have additional children. By doing so, she has voluntarily become unemployed rendering further child support problematic. Assume further that she elects to become a stay-at-home mother to raise her new children. The court would not, could not, and should not intervene. And there is a good reason. The children of the first marriage simply have no more veto power over the noncustodial parent's future reproductive decisions than a child of an intact marriage has over his parents' decision to have additional children. And such children of the first marriage, at least in my view, have no vested right to a higher standard of living based on an allocation of a greater percentage of their parent's income than do the children of a second marriage.
Because the state has no business discriminating between children based solely on the fact of a divorce, there is no legitimate state purpose in requiring a parent to allocate his or her income more to one child than another. The state’s attempt to do so is state-mandated, court-enforced child abuse; it is not only cruel discrimination, it is unconstitutional.
Anthony GREGORY, Petitioner,
v.
Everett RICE, Sheriff of Pinellas County, Florida, Respondent.

727 So.2d 251
(Supreme Court of Florida 1999)

OVERTON, Senior Justice.

This case involves the wrongful incarceration of a father who failed to pay child support payments. The father, Anthony Gregory, was sentenced to ninety days in jail with a $200 purge provision even though the unrefuted record in this proceeding reflects that he had no money and no assets other than the clothes he was wearing; that he had only recently been released from jail for this same offense; and that he had obtained employment just two days before the hearing. He was released from jail in this case only after this Court directed the State to file a response to his petition for a writ of habeas corpus. On the same date the Department of Revenue filed its response, it requested the trial court to release Gregory "in the interests of justice." In its response, the Department of Revenue moved to dismiss this cause as moot based on Gregory's release.

The relevant facts of this case are as follows. Gregory was incarcerated from August to October, 1997, for failure to pay child support. On the day before he was released, he was served with a notice of hearing for failure to pay child support. In January 1998, Gregory appeared as directed before Angela Hoogeven, a child support enforcement hearing officer, on a motion for contempt filed by the Department of Revenue. At the hearing, it was determined that Gregory owed $7,218 in child support arrearages. Gregory testified that he had just started working again (he had worked for only two days) and was expecting a paycheck of $55; he also testified that he had no cash or other assets other than his clothing. After this testimony was presented, the hearing officer found that Gregory "ha[d] been or was employed for six months," even though there was nothing in the record to support this finding, and found Gregory to be in contempt for failure to pay support. In the recommended order, the hearing officer sentenced Gregory to jail for ninety days with a $200 purge amount.

. . . [I]t appears that Gregory was incarcerated without a proper determination that he had the present ability to purge. According to allegations in the petition, the routine process for handling cases of this type in Pinellas County is as follows: Four respondents are called before two hearing officers and are duly sworn; each is then addressed separately; after inquiry, those who are taken into custody are instructed to
have a seat and wait for their court orders; the hearing officer's assistant then takes the order down the hall and obtains a judge's signature on the order; the assistant then returns with the executed orders; and the hearing officers formally adjudicate and sentence the respondents.

In his petition, Gregory contends that the civil contempt proceeding that led to his incarceration was actually criminal in nature because (1) no proper finding was made that he had the ability to purge the contempt prior to his incarceration and (2) the trial court failed to properly review the recommendations of the hearing officer as required by Florida Family Law Rule 12.491. We recently adopted new Florida Family Law Rule 12.615 to specify the procedure that must be followed in civil contempt proceedings in family law cases. The law in this area has not changed recently; however, cases such as this one reflect that confusion still exists as to the process to be followed. As a result, we found it necessary to adopt a specific rule to provide detailed guidance in this area. In adopting the rule, we stated:

We have noted on numerous occasions that there are two distinct types of contempt proceedings: (1) criminal contempt proceedings, and (2) civil contempt proceedings.

Criminal contempt is used to punish intentional violations of court orders or to vindicate the authority of the court, and "potential criminal contemnors are entitled to the same constitutional due process protections afforded criminal defendants in more typical criminal proceedings." See also Hicks v. Feiock, 485 U.S. 624 (1988).

On the other hand, the primary purpose of a civil contempt proceeding is to compel future compliance with a court order. A civil contempt sanction is coercive in nature and is avoidable through obedience.

In addition to discussing the distinct types of contempt, in Bowen we also set forth the procedures to be followed in civil contempt proceedings involving support in family law matters. First, an initial order directing that support or alimony be paid is entered. Because such an order is based on a finding that the alleged contemnor has the ability to pay, the initial order creates a presumption in subsequent proceedings that there is an ability to pay. Second, in a subsequent proceeding, the movant has the obligation to show that a prior order of support has been entered and that the alleged contemnor has failed to pay all or part of that support. The burden then shifts to the alleged contemnor, who must establish that he or she no longer has the ability to pay the support. The court must then evaluate the evidence and determine whether the alleged contemnor has the present ability to pay the support and has willfully refused to do so. If the court finds in the affirmative, then the court must determine the appropriate sanctions to obtain compliance. [R]egardless of whether the sanction is incarceration, garnishment of wages, additional employment, the filing of reports, additional fines, the delivery of certain assets, the revocation of a driver's license, or other type of sanction, the court must provide the contemnor with the ability to purge the contempt; that is, if the contemnor satisfies the underlying support obligation, the
sanctions must be lifted.

While these principles appear to be fairly straightforward, cases reflect that courts often fail to apply the principles properly. In re Amendments to the Florida Family Law Rules of Procedure, 723 So.2d 208, 213, 23 Fla. L. Weekly S573, S576 (Fla.1998). As our decision in Amendments makes clear, the court must evaluate the evidence and determine whether the alleged contemnor (1) has the present ability to pay the support and (2) has willfully refused to do so. The problem at issue here, however, involves not only a proper determination as to whether the alleged contemnor has the present ability to pay but also the proper procedure to be followed when a hearing officer, rather than an article V judge, hears evidence and makes recommendations to the court regarding the disposition of child support enforcement proceedings.

... Although rule 12.491 provides that the trial court is to review a hearing officer's recommendation and promptly enter an order, this does not mean that the trial court is to merely "rubber-stamp" the hearing officer's recommendation without first independently reviewing the hearing officer's findings of fact. ... An adequate method of judicial review of the recommendations is still required given the limited judicial authority that may be vested in masters. ... Whether exceptions are filed to the report of the Master or not, it is the duty of the court to examine and carefully consider the evidence and determine whether under the law and the facts the court is justified in entering the decree recommended by the Master. We find that, provided a judge carefully considers (1) whether the evidence and facts, as fully set forth in a master's report, support the recommendations of the master and (2) whether the recommendations are justified under the law, then the review, absent exceptions, is adequate. ...

In the instant case, the order at issue apparently was a standard form order, which set forth limited and internally inconsistent facts in support of the finding that Gregory had the present ability to pay. Recommended orders must contain detailed findings of fact to support the hearing officer's recommendation. For instance, if the findings of fact state that the alleged contemnor is employed, the findings should recite where the contemnor is employed, together along with the dates of employment. Otherwise, the reviewing judge does not have sufficient information to properly review the order. Had that been done in this case, both the hearing officer and the reviewing judge would have seen that Gregory had been employed for only two days since his release from incarceration. Instead, the hearing officer made the determination that Gregory was making $800 a month plus overtime, based on Gregory's statement that, when he worked, he worked forty hours per week, plus overtime.

Additionally, in Amendments, we concluded that prior to imposing any sanction, particularly when the sanction is incarceration, the hearing officer must advise the alleged contemnor of the alleged contemnor's rights under the rule. Because many contemnors have no counsel and may be unaware of their rights under the rule, it is
imperative that officers advise them of those rights. Otherwise, contemnors may sit in jail for extended periods of time without realizing they had the right to contest the order or have it modified.

As we stated in our recent Family Law Rules opinion:
We acknowledge and are sympathetic to the importance of ensuring that individuals who are entitled to support receive that support. We must be equally diligent, however, in protecting the rights of those obligated to pay support. As the court noted in *Pompey*:
The consequences of a civil contempt in the area of child support enforcement are potentially greater than those of a criminal contempt. Yet there are few procedural safeguards. Many individuals are unrepresented and may be unaware of their rights—such as the right to periodic review of the contempt order and the right to request a hearing to demonstrate that they no longer possess the ability to pay. The consequences are even more dire for an indigent individual caught in a "Catch-22" situation: he cannot afford to hire an attorney, yet he has no right to an attorney because the court indulges in the assumption that no incarceration can take place unless the contemnor possesses the present ability to pay. Contempt jurisprudence must attempt to balance the need of a court to enforce its orders with the doctrine that a court's power to obtain compliance should be tempered by safeguards that ensure fundamental fairness.

We recognize that our decision today will impose the requirement of additional hearings on an already heavily burdened judicial system. However, inconvenience cannot be cited as a reason to deny an individual the due process to which the individual is entitled. Incarceration to obtain compliance with a court order may indeed be warranted when a contemnor has the ability to comply with the order and willfully refuses to do so, but incarceration for the simple failure to pay a debt is clearly prohibited. *We will not allow our rules to be modified to serve as the basis for creating a debtor's prison.*

*Amendments*, 723 So.2d 208, 23 Fla. L. Weekly at S577 (emphasis added).

It is so ordered.
Justice KENNEDY delivered the opinion of the Court.

This case presents, as it has from its inception in the United States District Court, a question of interpretation under the Hague Convention on the Civil Aspects of International Child Abduction (Convention) The Convention provides that a child abducted in violation of “rights of custody” must be returned to the child’s country of habitual residence, unless certain exceptions apply. The question is whether a parent has a “right[t] of custody” by reason of that parent’s ne exeat right: the authority to consent before the other parent may take the child to another country.

Timothy Abbott and Jacquelyn Vaye Abbott married in England in 1992; their son A.J. A. was born in 1995. The Abbotts moved to La Serena, Chile, in 2002. There was marital discord, and the parents separated in March 2003. The Chilean courts granted the mother daily care and control of the child, while awarding the father “direct and regular” visitation rights, including visitation every other weekend and for the whole month of February each year.

Chilean law conferred upon Mr. Abbott what is commonly known as a ne exeat right: a right to consent before Ms. Abbott could take A.J. A. out of Chile. In effect a ne exeat right imposes a duty on one parent that is a right in the other. After Mr. Abbott obtained a British passport for A.J. A., Ms. Abbott grew concerned that Mr. Abbott would take the boy to Britain. She sought and obtained a “ne exeat of the minor” order from the Chilean family court, prohibiting the boy from being taken out of Chile.

In August 2005, while proceedings before the Chilean court were pending, the mother removed the boy from Chile without permission from either the father or the court. A private investigator located the mother and the child in Texas. In February 2006, the mother filed for divorce in Texas state court. Part of the relief she sought was a modification of the father’s rights, including full power in her to determine the boy’s place of residence and an order limiting the father to supervised visitation in Texas. This litigation remains pending.

In May 2006, Mr. Abbott filed the instant action in the United States District Court for the Western District of Texas. He sought an order requiring his son’s return to Chile pursuant to the Convention and enforcement provisions of the ICARA. In July 2007, after holding a bench trial during which only Mr. Abbott testified, the District Court denied relief. The court held that the father’s ne exeat right did not constitute a right of custody under the Convention and, as a result, that the return remedy was not authorized.

The United States Court of Appeals for the Fifth Circuit affirmed on the same rationale. The court expressed substantial agreement with the Court of Appeals for the Second Circuit in Croll v. Croll, 229 F.3d 133 (2000). Relying on American dictionary definitions of “custody” and noting that ne exeat rights cannot be “actually exercised” within the meaning of the Convention, A dissenting opinion in Croll was filed by then-Judge Sotomayor. The dissent maintained that a ne exeat right is a right of custody because it “provides a parent with decisionmaking authority regarding a child’s international relocation.”.
The Courts of Appeals for the Fourth and Ninth Circuits adopted the conclusion of the majority. The Court of Appeals for the Eleventh Circuit has followed the reasoning of the dissent. Certiorari was granted to resolve the conflict.

II

The Convention was adopted in 1980 in response to the problem of international child abductions during domestic disputes. The Convention seeks “to secure the prompt return of children wrongfully removed to or retained in any Contracting State,” and “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”.

The provisions of the Convention of most relevance at the outset of this discussion are as follows:

“Article 3: The removal or the retention of the child is to be considered wrongful where-

“a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

“b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

.......

“Article 5: For the purposes of this Convention-

“a ‘rights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

“b ‘rights of access’ shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

.......

“Article 12: Where a child has been wrongfully removed or retained in terms of Article 3 ... the authority concerned shall order the return of the child forthwith.” Id., at 7, 9.

The Convention's central operating feature is the return remedy. When a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must “order the return of the child forthwith,” unless certain exceptions apply. A return remedy does not alter the pre-abduction allocation of custody rights but leaves custodial decisions to the courts of the country of habitual residence. The Convention also recognizes “rights of access,” but offers no return remedy for a breach of those rights. Arts. 5(b), 21, id., at 7, 11.

The United States has implemented the Convention through the ICARA. The statute authorizes a person who seeks a child's return to file a petition in state or federal court and instructs that the court “shall decide the case in accordance with the Convention.”.
As the parties agree, the Convention applies to this dispute. A.J. A. is under 16 years old; he was a habitual resident of Chile; and both Chile and the United States are contracting states. The question is whether A.J. A. was “wrongfully removed” from Chile, in other words, whether he was removed in violation of a right of custody. This Court's inquiry is shaped by the text of the Convention; the views of the United States Department of State; decisions addressing the meaning of “rights of custody” in courts of other contracting states; and the purposes of the Convention. After considering these sources, the Court determines that Mr. Abbott's *ne exeat* right is a right of custody under the Convention.

Chilean law granted Mr. Abbott a joint right to decide his child's country of residence, otherwise known as a *ne exeat* right. Minors Law 16,618, art. 49 (Chile). To support the conclusion that Mr. Abbott's right under Chilean law gives him a joint right to decide his son's country of residence, it is notable that a Chilean agency has explained that Minors Law 16,618 is a "right to authorize the minors' exit" from Chile and that this provision means that neither parent can “unilaterally” “establish the [child's] place of residence.”

Mr. Abbott's joint right to determine his son's country of residence is best classified as a joint right of custody, as the Convention defines that term. The Convention defines “rights of custody” to “include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.” Art. 5(a), ibid. Mr. Abbott's *ne exeat* right gives him both the joint "right to determine the child's place of residence" and joint “rights relating to the care of the person of the child.”

Mr. Abbott's joint right to decide A.J. A.'s country of residence allows him to “determine the child's place of residence.” The phrase “place of residence” encompasses the child's country of residence, especially in light of the Convention's explicit purpose to prevent wrongful removal across international borders. “[D]etermine” can mean “[t]o fix conclusively or authoritatively,” Webster's New International Dictionary 711 (2d ed.1954) (2d definition), but it can also mean “[t]o set bounds or limits to,” ibid. (1st definition), which is what Mr. Abbott's *ne exeat* right allows by ensuring that A.J. A. cannot live at any street addresses outside of Chile. It follows that the Convention's protection of a parent's custodial “right to determine the child's place of residence” includes a *ne exeat* right.

Mr. Abbott's joint right to determine A.J. A.'s country of residence also gives him “rights relating to the care of the person of the child.”. Few decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb. These factors, so essential to self-definition, are linked in an inextricable way to the child's country of residence. One need only consider the different childhoods an adolescent will experience if he or she grows up in the United States, Chile, Germany, or North Korea, to understand how choosing a child's country of residence is a right “relating to the care of the person of the child.” The Court of Appeals described Mr. Abbott's right to take part in making this decision as a mere
“veto,” but even by that truncated description, the father has an essential role in deciding the boy's country of residence. For example, Mr. Abbott could condition his consent to a change in country on A.J. A.'s moving to a city outside Chile where Mr. Abbott could obtain an astronomy position, thus allowing the father to have continued contact with the boy.

That a *ne exeat* right does not fit within traditional notions of physical custody is beside the point. The Convention defines “rights of custody,” and it is that definition that a court must consult. This uniform, text-based approach ensures international consistency in interpreting the Convention. It forecloses courts from relying on definitions of custody confined by local law usage, definitions that may undermine recognition of custodial arrangements in other countries or in different legal traditions, including the civil-law tradition. And, in any case, our own legal system has adopted conceptions of custody that accord with the Convention’s broad definition. Joint legal custody, in which one parent cares for the child while the other has joint decisionmaking authority concerning the child's welfare, has become increasingly common.

The Court of Appeals' conclusion that a breach of a *ne exeat* right does not give rise to a return remedy would render the Convention meaningless in many cases where it is most needed. The Convention provides a return remedy when a parent takes a child across international borders in violation of a right of custody. The Convention provides no return remedy when a parent removes a child in violation of a right of access but requires contracting states “to promote the peaceful enjoyment of access rights.” For example, a court may force the custodial parent to pay the travel costs of visitation, or make other provisions for the noncustodial parent to visit his or her child. But unlike rights of access, *ne exeat* rights can only be honored with a return remedy because these rights depend on the child's location being the country of habitual residence.

Any suggestion that a *ne exeat* right is a “right[ ] of access” is illogical and atextual. The Convention defines “rights of access” as “includ[ing] the right to take a child for a limited period of time to a place other than the child's habitual residence,” Art. 5(b), Treaty Doc., at 7, and ICARA defines that same term as “visitation rights,” § 11602(7). The joint right to decide a child’s country of residence is not even arguably a “right to take a child for a limited period of time” or a “visitation right[ ].” Reaching the commonsense conclusion that a *ne exeat* right does not fit these definitions of “rights of access” honors the Convention's distinction between rights of access and rights of custody.

Ms. Abbott argues that the *ne exeat* order in this case cannot create a right of custody because it merely protects a court's jurisdiction over the child. Even if this argument were correct, it would not be dispositive. Ms. Abbott contends the Chilean court's *ne exeat* order contains no parental consent provision and so awards the father no rights, custodial or otherwise. This Court need not decide the status of *ne exeat* orders lacking parental consent provisions, however; for here the father relies on his rights under Minors Law 16,618. That law requires the father's consent before the mother can remove the boy from Chile, subject only to the equitable power family courts retain. The consent provision in Minors Law 16,618 confers upon the father the joint right to determine his child's country of residence. This is a right of custody under the Convention.

**B**

This Court's conclusion that Mr. Abbott possesses a right of custody under the Convention is supported and informed by the State Department's view on the issue. The United States has endorsed the view that *ne exeat* rights are rights of custody. In its brief before this Court the
United States advises that “the Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, has long understood the Convention as including ne exeat rights among the protected ‘rights of custody.’” It is well settled that the Executive Branch's interpretation of a treaty “is entitled to great weight.” There is no reason to doubt that this well-established canon of deference is appropriate here. The Executive is well informed concerning the diplomatic consequences resulting from this Court's interpretation of “rights of custody,” including the likely reaction of other contracting states and the impact on the State Department's ability to reclaim children abducted from this country.

C

This Court's conclusion that ne exeat rights are rights of custody is further informed by the views of other contracting states. In interpreting any treaty, “[t]he ‘opinions of our sister signatories’ ... are ‘entitled to considerable weight.’” The principle applies with special force here, for Congress has directed that “uniform international interpretation of the Convention” is part of the Convention's framework.

A review of the international case law confirms broad acceptance of the rule that ne exeat rights are rights of custody. (citing and describing decisions from the United Kingdom, Israel, Austria, South Africa, Germany, Australia and Scotland, and recognizing contrary views of courts in Canada and mixed decisions in France).

Scholars agree that there is an emerging international consensus that ne exeat rights are rights of custody, even if that view was not generally formulated when the Convention was drafted in 1980. At that time, joint custodial arrangements were unknown in many of the contracting states, and the status of ne exeat rights was not yet well understood. Since 1980, however, joint custodial arrangements have become more common. And, within this framework, most contracting states and scholars now recognize that ne exeat rights are rights of custody. See, e.g., Hague Conference on Private International Law: Transfrontier Contact Concerning Children: *General Principles and Guide to Good Practice* § 9.3, p. 43 (2008) (“[P]reponderance of the case law supports the view” that *ne exeat* rights are “rights of custody” (footnote omitted));

D

Adopting the view that the Convention provides a return remedy for violations of *ne exeat* rights accords with its objects and purposes. The Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence. It is the Convention's premise that courts in contracting states will make this determination in a responsible manner.

Custody decisions are often difficult. Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child. This judicial neutrality is presumed from the mandate of the Convention, which affirms that the contracting states are “[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody.” International law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings.
To interpret the Convention to permit an abducting parent to avoid a return remedy, even when the other parent holds a ne exeat right, would run counter to the Convention's purpose of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes. Ms. Abbott removed A.J. A. from Chile while Mr. Abbott's request to enhance his relationship with his son was still pending before Chilean courts. After she landed in Texas, the mother asked the state court to diminish or eliminate the father's custodial and visitation rights. The Convention should not be interpreted to permit a parent to select which country will adjudicate these questions by bringing the child to a different country, in violation of a ne exeat right. Denying a return remedy for the violation of such rights would “legitimize the very action—removal of the child—that the home country, through its custody order [or other provision of law], sought to prevent” and would allow “parents to undermine the very purpose of the Convention.” Croll, 229 F.3d, at 147 (Sotomayor, J., dissenting). This Court should be most reluctant to adopt an interpretation that gives an abducting parent an advantage by coming here to avoid a return remedy that is granted, for instance, in the United Kingdom, Israel, Germany, and South Africa. See supra, at 12-13.

IV

While a parent possessing a ne exeat right has a right of custody and may seek a return remedy, a return order is not automatic. Return is not required if the abducting parent can establish that a Convention exception applies. One exception states return of the child is not required when “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” If, for example, Ms. Abbott could demonstrate that returning to Chile would put her own safety at grave risk, the court could consider whether this is sufficient to show that the child too would suffer “psychological harm” or be placed “in an intolerable situation. The Convention also allows courts to decline to order removal if the child objects, if the child has reached a sufficient “age and degree of maturity at which it is appropriate to take account of its views.” The proper interpretation and application of these and other exceptions are not before this Court. These matters may be addressed on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice THOMAS and Justice BREYER join, dissenting.

Petitioner Timothy Abbott, the father of A.J. A., has no authority to decide whether his son undergoes a particular medical procedure; whether his son attends a school field trip; whether and in what manner his son has a religious upbringing; or whether his son can play a videogame before he completes his homework. These are all rights and responsibilities of A.J. A.'s mother, respondent Jacquelyn Abbott. It is she who received sole custody, or “daily care and control,” of A.J. A. when the expatriate couple divorced while living in Chile in 2004.. Mr. Abbott possesses only visitation rights.

On Ms. Abbott's custodial rights, Chilean law placed a restriction: She was not to travel with her son outside of Chile without either Mr. Abbott's or the court's consent. Put differently, Mr. Abbott had the opportunity to veto Ms. Abbott's decision to remove A.J. A. from Chile unless a Chilean
court overrode that veto. The restriction on A.J. A.’s and Ms. Abbott's travel was an automatic, default provision of Chilean law operative upon the award of visitation rights under Article 48 of Chile’s Minors Law 16,618. It is this travel restriction—also known as a *ne exeat* clause—that the Court today declares is a “‘right[s] of custody’” within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.

Because the Court concludes that this travel restriction constitutes a right of custody, and because Ms. Abbott indisputably violated the restriction when she took A.J. A. from Chile without either Mr. Abbott's or the court's permission, Mr. Abbott is now entitled to the return of A.J. A. to Chile under the terms of the Convention. Thus, absent a finding of an exception to the Convention's powerful return remedy, and even if the return is contrary to the child's best interests, an American court *must* now order the return of A.J. A. to Mr. Abbott, who has no legal authority over A.J. A., based solely on his possessing a limited veto power over Ms. Abbott's ability to take A.J. A. from Chile. As I shall explain, use of the Convention’s return remedy under these circumstances is contrary to the Convention’s text and purpose.

I

When the drafters of the Convention gathered in 1980, they sought an international solution to an emerging problem: transborder child abductions perpetrated by noncustodial parents “to establish artificial jurisdictional links ... with a view to obtaining custody of a child.” The drafters' primary concern was to remedy abuses by noncustodial parents who attempt to circumvent adverse custody decrees (e.g., those granting sole custodial rights to the other parent) by seeking a more favorable judgment in a second nation’s family court system.

The drafters determined that when a *noncustodial* parent abducts a child across international borders, the best remedy is return of that child to his or her country of habitual residence—or, in other words, the best remedy is return of the child to his or her *custodial* parent. The drafters concluded that the same remedy should not follow, however, when a *custodial* parent takes a child from his or her country of habitual residence in breach of the other parent's visitation rights, or “rights of access” in the Convention's parlance. The distinction between rights of custody and rights of access, therefore, is critically important to the Convention's scheme and purpose. It defines the scope of the available Convention remedies.

Article 3 of the Convention provides that the removal or retention of a child is “wrongful,” and thus in violation of the Convention, only when the removal “is in breach of the rights of custody.” The fact that a removal may be “wrongful” in the sense that it violates domestic law or violates only “rights of access” does not make it “wrongful” within the meaning of the Convention.

Only when a removal is “wrongful” under Article 3 may the parent who possesses custody rights force the child’s return to the country of habitual residence under the Convention's remedial procedures, A parent without “rights of custody,” therefore, does not have the power granted by Article 3 to compel the child's return to his or her country of habitual residence..

II

Putting aside the effect of the travel restriction, it is undisputed that Ms. Abbott possesses “rights of custody” over A.J. A. while Mr. Abbott would possess “rights of access,” as those terms are used in the Convention. The only issue in this case, therefore, is whether Mr. Abbott also possesses “rights of custody” within the meaning of the Convention by virtue of the travel
restriction, or **ne exeat** clause, that Chilean law imposes on Ms. Abbott. In other words, the question is whether the “right” of one parent to veto the other parent's decision to remove a child from the country, subject to judicial override, belongs in the category of “rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.” In my judgment, it clearly does not, and I need look no further than to the Convention's text to explain why.

**Rights relating to the care of the child.** The Court concludes that the veto power Mr. Abbott has over Ms. Abbott's travel plans is equivalent to those rights “'relating to the care of the person of the child.'” This is so, the Court tells us, because Mr. Abbott has a limited power to keep A.J. A. within Chile's bounds and, therefore, indirectly to influence “the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb.”. It is not nearly as self-evident as the Court assumes that Mr. Abbott's veto power carries with it any ability to decide the language A.J. A. speaks or the cultural experiences he will have. A.J. A.'s mere presence in Chile does not determine any number of issues, including: whether A.J. A. learns Spanish while there; whether he attends an American school or a British school or a local school; whether he participates in sports; whether he is raised Catholic or Jewish or Buddhist or atheist; whether he eats a vegetarian diet; and on and on. The travel restriction does not confer upon Mr. Abbott affirmative power to make any number of decisions that are vital to A.J. A.'s physical, psychological, and cultural development. To say that a limited power to veto a child's travel plans confers, also, a right “relating to the care” of that child devalues the great wealth of decisions a custodial parent makes on a daily basis to attend to a child's needs and development.

The Court's interpretation depends entirely on a broad reading of the phrase “relating to” in the Convention's definition of “rights of custody.” It is, undeniably, broad language. But, as the Court reads the term, it is so broad as to be utterly unhelpful in interpreting what “rights of custody” means. Taken in the abstract-and to its most absurd-*any* decision on behalf of a child could be construed as a right “relating to” the care of a child.

Such a view of the text obliterates the careful distinction the drafters drew between the rights of custody and the rights of access. Undoubtedly, they were aware of the concept of joint custody. See Perez-Vera Report ¶ 71, at 457 (“[C]ustody rights may have been awarded ... to that person in his own right or jointly. It cannot be otherwise in an era when types of joint custody, regarded as best suited to the general principle of sexual non-discrimination, are gradually being introduced into internal law”). But just because rights of custody can be shared by two parents, it does not follow that the drafters intended this limited veto power to be a right of custody. I fail to understand how the Court's reading is faithful to the Convention's text and purpose, given that the text expressly contemplates two distinct classes of parental rights. Today's decision converts every noncustodial parent with access rights—at least in Chile—into a custodial parent for purposes of the Convention.

**The right to determine the child's place of residence.** The Court also concludes that Mr. Abbott's veto power satisfies the Convention's definition of custodial rights because it is, in the Court's view, a “right to determine the child's place of residence.” I disagree with the Court's assessment of the significance and meaning of this phrase, both on its face and within the context of the Convention's other provisions.

As an initial matter, the Court's reading of the Convention depends on isolating the phrase “and, in particular, the right to determine the child's place of residence” to refer to a freestanding right
separate and apart from the rights related to the care of the child. I do not agree with this view of the text, nor did the Convention's drafters:

The drafters thus intended the “right to determine the child’s place of residence” to be an “example” of what the Convention means by “care of the person of the child.” It is indicative of the “substance” of what it means to be a custodial parent. The definition is not, as the Court would have it, one stick in the bundle that may be parsed as a singular “‘right[t] of custody,'”; rather, it is a shorthand method to assess what types of rights a parent may have. The parent responsible for determining where and with whom a child resides, the drafters assumed, would likely also be the parent who has the responsibility to “care” for the child.

Yet even assuming, as the Court does, that the “right to determine the child's place of residence,” is divisible from the “care” of the child, \textit{ibid.}, I still fail to understand how a travel restriction on one parent's exercise of her custodial rights is equivalent to an affirmative “right to determine the child's place of residence.” Analyzing its text, in the context of the Convention's focus on distinguishing custodial parents from noncustodial ones, leads me to conclude that the “right to determine the child's place of residence” means the power to set or fix the location of the child's home. It does not refer to the more abstract power to keep a child within one nation's borders.

Accordingly, I would give “place of residence” the location-specific meaning its plain text connotes, irrespective of the fact that this Convention concerns international abduction. The right described by the Convention is the right to decide, conclusively, where a child’s home will be. And this makes a good deal of sense. The child lives with the parent who has custodial rights or, in the language of the Convention, “care of the person of the child.”. The child's home-his or her “place of residence”-is fixed by the custody arrangement. This comports too with the Convention's decision to privilege the rights of custodians over the rights of those parents with only visitation rights.

In my view, the “right” Mr. Abbott has by virtue of the travel restriction is therefore best understood as relating to his “rights of access,” as the Convention defines that term-and not as a standalone “‘right[t] of custody,'” as the Court defines it, \textit{ante}, at 1987. Chile's statutory travel restriction provision is plainly ancillary to the access rights the Chilean family court granted to him as the noncustodial parent. By its terms, the obligation on the custodial parent to seek the other parent's permission before removing the child from Chile only operates upon the award of visitation rights; it has nothing to do with custody rights. And it operates automatically to facilitate the noncustodial parent's ability to access the child and to exercise his visitation rights. In the best of all possible circumstances, Mr. Abbott's limited veto power assures him relatively easy access to A.J. A. so that he may continue a meaningful relationship with his son. But this power, standing alone, does not transform him into a custodian for purposes of the Convention's return remedy. Instead, it authorizes him, pursuant to Article 21, to seek assistance from this country in carrying out the Chilean family court's visitation order.

IV

Hence, in my view, the Convention's language is plain and that language precludes the result the Court reaches. To support its reading of the text, however, the Court turns to authority we utilize to aid us in interpreting ambiguous treaty text: the position of the Executive Branch and authorities from foreign jurisdictions that have confronted the question before the Court. Were I
to agree with the Court that it is necessary turn to these sources to resolve the question before us, I would not afford them the weight the Court does in this case.

Views of the Department of State. Without discussing precisely why, we have afforded “great weight” to “the meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement.”

Putting aside any concerns arising from the fact that the Department's views are newly memorialized and changing, I would not in this case abdicate our responsibility to interpret the Convention's language. This does not seem to be a matter in which deference to the Executive on matters of foreign policy would avoid international conflict. Finally, and significantly, the State Department, as the Central Authority for administering the Convention in the United States, has failed to disclose to the Court whether it has facilitated the return of children to America when the shoe is on the other foot. Thus, we have no informed basis to assess the Executive’s postratification conduct, or the conduct of other signatories, to aid us in understanding the accepted meaning of potentially ambiguous terms.

Instead, the Department offers us little more than its own reading of the treaty's text. Its view is informed by no unique vantage it has, whether as the entity responsible for enforcing the Convention in this country or as a participating drafter. I see no reason, therefore, to replace our understanding of the Convention’s text with that of the Executive Branch.

Views of foreign jurisdictions. The Court believes that the views of our sister signatories to the Convention deserve special attention when, in a case like this, “Congress has directed that 'uniform international interpretation' of the Convention is part of the Convention's framework.” This may well be correct, but we should not substitute the judgment of other courts for our own. And the handful of foreign decisions the Court cites, provide insufficient reason to depart from my understanding of the meaning of the Convention, an understanding shared by many U.S. Courts of Appeals.

I also fail to see the international consensus-let alone the “broad acceptance,” -that the Court finds among those varied decisions from foreign courts that have considered the effect of a similar travel restriction within the Convention's remedial scheme. The various decisions of the international courts are, at best, in equipoise. Indeed, the Court recognizes that courts in Canada and France have concluded that travel restrictions are not “rights of custody” within the meaning of the Convention.

And those decisions supportive of the Court's position do not offer nearly as much support as first meets the eye.

In sum, the decisions relied upon by the Court and Mr. Abbott from our sister signatories do not convince me that we should refrain from a straightforward textual analysis in this case in order to make way for a “uniform international interpretation” of the Convention. There is no present uniformity sufficiently substantial to justify departing from our independent judgment on the Convention's text and purpose and the drafters' intent.
At bottom, the Convention aims to protect the best interests of the child. Recognizing that not all removals in violation of the laws of the country of habitual residence are contrary to a child's best interests, the Convention provides a powerful but limited return remedy. The judgment of the Convention's drafters was that breaches of access rights, while significant (and thus expressly protected by Article 21), are secondary to protecting the child's interest in maintaining an existing custodial relationship.

Today, the Court has upended the considered judgment of the Convention's drafters in favor of protecting the rights of noncustodial parents. In my view, the bright-line rule the Court adopts today is particularly unwise in the context of a treaty intended to govern disputes affecting the welfare of children.

I, therefore, respectfully dissent.