

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

In re Guardianship of J.D.S.,

Jennifer Wixtrom,

Appellant

CASE NO: 5D03-1921

Nos. Below: 48-2003-CP-001188-O

48-2003-MH-000414-O

EMERGENCY MOTION IN LIGHT OF ABSENCE OF ADVERSARIAL
POSITIONS ON APPEAL, RENEWING REQUEST OF ACLU, ACLU OF
FLORIDA, FLORIDA NOW AND CENTER FOR REPRODUCTIVE RIGHTS
TO PARTICIPATE AS *AMICI CURIAE* IN OPPOSITION TO APPELLANT
AND IN SUPPORT OF CIRCUIT COURT DECISION DENYING PETITION
FOR APPOINTMENT OF GUARDIAN FOR FETUS

Randall C. Marshall
Florida Bar No. 018176
American Civil Liberties Union of Florida
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
(305) 576-2337

Julie Sternberg*
Diana Kasdan*
Jaya Ramji*
ACLU Reproductive Freedom Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633

Bebe J. Anderson*
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Susan A. England
Florida Bar Number 0186081
Cooperating Counsel for
Florida NOW, Inc.,
Susan A. England P.A.
2805 Lakeview Drive
Fern Park, FL 32730
(407) 339-4600

Counsel for *Amici Curiae*

* Motions for Admission Pro Hac Vice previously filed

The American Civil Liberties Union (“ACLU”), ACLU of Florida, Florida National Organization for Women, Inc. (“Florida NOW”), and Center for Reproductive Rights (“the Center”), collectively “*Amici*,” bring this emergency motion before the Court in light of the current absence of adversarial positions on matters of great public importance presented by this appeal. *Amici* recently learned that appeal of this matter is proceeding before this Court without the presence of adversarial parties. In light of these new circumstances, *Amici* hereby renew their request that this Court grant them permission both to present oral argument at the scheduled hearing and to file the accompanying *Amici* brief, in opposition to the appeal from the Circuit Court decision denying Appellant’s petition for appointment as guardian of the fetus.¹ Specifically, *Amici* respectfully request permission to present argument to this Court on the issue of the statutory and constitutional impermissibility of appointing a guardian for the fetus in this matter.²

In support of this motion, *Amici* state the following:

1. This appeal presents a matter of substantial public concern – an unprecedented request for appointment of a guardian for a fetus where the pregnant

¹ The accompanying brief argues in support of the circuit court’s decision based on both the situation before that court and the changed situation presented by J.D.S.’s decision to carry her pregnancy to term.

² As part of this request, *Amici*’s New York-based counsel hereby renew their requests to be admitted *pro hac vice* in this matter.

woman is carrying to term and no exigent medical situation exists – yet adversarial parties are not before the Court. At present, the only party before the Court is Appellant Jennifer Wixtrom.

2. Although styled in the Court caption as an “appellee,” the State Department of Children and Families has correctly stated to the Court that it is not an “appellee,” its motion for intervention was denied by the circuit court, and it sought to file an *amicus* brief in support of Appellant’s position. (See The Department of Children and Families’ Response to Court’s June 19, 2003 Order and Motion to Correct Style; The Department of Children and Families’ Response to Court’s June 13, 2003 Order; Motion by the State of Florida and the Department of Children and Families to Appear as *Amici Curiae*, for Acceptance of *Amicus* Brief, and Participation in Oral Argument).

3. In fact, the State Department of Children and Families has, in its filings with this Court, supported Appellant’s position. The arguments presented by the State are on the same side of the issues as those presented by Appellant. The State, whether termed an “appellee” or not, is clearly aligned with Appellant on the issues before this Court.

4. For a case to proceed in Florida courts, there must be “compliance with fundamental ‘case and controversy’ principles, *i.e.*, the requirement of a bona fide adversarial dispute.” *Save Sand Key, Inc. v. U.S. Steel Corp.*, 281 So. 2d 572,

575 (Fla. 2d DCA 1973); *accord*, *Montgomery v. Dep't of Health & Rehabilitative Servs.*, 468 So. 2d 1014, 1016-17 (Fla. 1st DCA 1985) (noting that judicial tribunal must decide only “actual controversies”); *Griffin v. State*, 396 So. 2d 152, 157 (Fla. 1981) (noting that standing doctrine requires “a focused and sufficiently adversarial case”) (Sundberg, C.J., concurring specially and dissenting in part).

5. Here, the requisite adversarial dispute is missing. Only one party -- Appellant -- is before the Court and arguments in support of the position of only Appellant have been presented. Although the circuit court issued a written decision that is well reasoned and correct, the important issues before the Court have not been focused by the presentation on appeal of arguments on both sides of the controversy. Moreover, the facts of the case have changed since the circuit court issued its decision: J.D.S., through her appointed guardian, has exercised her right of reproductive choice by deciding to carry her pregnancy to term. If this appeal goes forward without the presentation of opposition to Appellant's position under the current circumstances, the Court should, on its own motion, dismiss the appeal.

6. If this Court proceeds to consider this appeal on the merits, Appellant's own arguments against mootness -- that this appeal presents a matter of great public importance and presents a situation that is likely to occur in the future -- point to the imperative need for a voice in opposition to Appellant. (*See*

Appellant's Response to July 8, 2003 Order.) Appellant is asking this Court to issue a ruling that will affect the rights of other pregnant women not before the Court. That request puts in sharp relief the necessity of either dismissing this appeal or granting *Amici's* request to participate in oral argument and to file an *Amici* brief in opposition to Appellant.

7. The proper resolution of this appeal is a matter of substantial concern to *Amici*, all of which are organizations dedicated to promoting women's reproductive rights. Further, participation by *Amici*, both through written submission and oral argument, is desirable because *Amici* have extensive practice and expertise in asserting the rights of pregnant women, including in the specific area of constitutional law at issue in the proceedings now before this Court. Therefore, it is respectfully submitted that the proposed *Amici's* analysis of the important constitutional questions raised by this appeal may assist this Court in resolving the issues presented.

8. The ACLU is a nationwide nonpartisan organization of over 400,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions. The ACLU of Florida is its state affiliate and has approximately 18,000 members in the State of Florida also dedicated to the principles of liberty and equality embodied in the United States Constitution and the Florida Constitution. The ACLU and its affiliates, including

the ACLU of Florida, have long been committed to protecting the constitutional right to reproductive choice and have participated in challenges to the appointment of a guardian for a fetus. Among its many efforts to protect constitutional rights, the ACLU of Florida participated as *amicus curiae* in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), in which the Florida Supreme Court held that the appointment of a guardian ad litem for a fetus is “clearly improper.” *Id.* at 1190.

9. Florida NOW is a subdivision of the national organization, NOW, a non-profit, tax-exempt civic organization under Sec. 501(c)(4) of the Internal Revenue Code. NOW is dedicated to advancing women's equality and self-determination by, *inter alia*, protecting women's reproductive rights through both litigation and advocacy.

10. The Center for Reproductive Rights (“the Center”) is a national public interest law firm dedicated to preserving and expanding reproductive rights in the United States and throughout the world. The Center has long been active in working to protect the constitutional right of reproductive choice in Florida, including serving as lead counsel in challenges to Florida statutes banning abortion methods, limiting Medicaid coverage of medically necessary abortions, imposing a parental notification requirement on minors, and promoting an anti-choice message on license plates.

WHEREFORE, the ACLU, ACLU of Florida, Florida NOW, and the Center respectfully request that this Court issue an order granting *Amici* permission to participate as *Amici Curiae* in support of the circuit court decision and in opposition to Appellant, by presenting oral argument at the scheduled hearing and by filing their accompanying *Amici* brief.

Date: August ____, 2003.

Respectfully Submitted,

Randall C. Marshall
Florida Bar No. 018176
American Civil Liberties Union of Florida
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
(305) 576-2337
fax: (305) 576-1106