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Constitutional Law: The Consideration of Pre-Birth Conduct in the Determination of Abandonment

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CASE COMMENT

CONSTITUTIONAL LAW: THE CONSIDERATION OF PRE-BIRTH CONDUCT IN THE DETERMINATION OF ABANDONMENT

In re Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995)

*Tracy A. Duany**

Petitioner, an unwed father,[1] contested a motion to waive his consent to respondents' adoption of his natural child.[2] Respondents argued that petitioner abandoned the child by emotionally abusing the mother and failing to provide her with adequate financial and emotional support during her pregnancy.[3] Petitioner contended that while he paid for half of the couple's joint living expenses,[4] he was unable to afford prenatal care.[5] Still, petitioner attended a doctor visit with the mother, bought a

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* This case comment is dedicated to my parents, Tony and Trudy Duany, for their continuing love and support. Special thanks to the members and staff of the *Florida Law Review* for their countless hours of work and dedication.

1. *In re* Adoption of Baby E.A.W., 658 So. 2d 961, 963 (Fla. 1995) [hereinafter *Baby E.A.W.*].

2. *See id.* Respondents, the prospective adoptive parents, *id.* at 968 app., filed a motion during the adoption proceedings to waive petitioner's, the birth father, consent to the adoption. *Id.* at 971. Petitioner filed a challenge to the motion soon after the child's birth. *Id.* at 978.

3. *See id.* at 964. The birth mother testified that petitioner once grabbed and shook her, then spit on her for using his razor. *Id.* She also testified that petitioner called her names, verbally abused her, and had a drinking problem. *Id.* Further, when she was considering adoption, petitioner told her to " 'do whatever you have to do.' " *Id.* Moreover, after she was pregnant, petitioner resumed a sexual relationship while still living with the birth mother. *Id.* at 965. Not surprisingly, the birth mother's doctor testified that she was having trouble at home during this time. *Id.* at 964.

4. *Id.* The birth mother's testimony contradicts the petitioner's contention that he provided full support. *Id.* The couple lived together for only the first six months of the pregnancy. *In re* Adoption of Baby E.A.W., 647 So. 2d 918, 923-24 (4th DCA 1994) (en banc), *aff'd*, 658 So. 2d 961 (Fla. 1995) [hereinafter *E.A.W.*]. During the first few months, the birth mother was employed and paying her own expenses. *Baby E.A.W.*, 658 So. 2d at 964. Even after an accident left her unable to work, she continued to pay her own way. *Id.* at 969 app. "She bought food with food stamps and gave a government aid check to [petitioner] for her expenses." *Id.* at 964. This covered her half of the rent and other expenses. *See id.* at 969 app. After the birth mother moved out, petitioner did not provide her with financial support. *Id.* at 964.

5. *E.A.W.*, 647 So. 2d at 942. Even assuming the petitioner maintained the highest level of earnings supported by evidence, $400 per week, the couple's combined income level qualified them for Medicaid. *Id.* at 941-42 app. Consequently, during the period of joint residency, the

crib for the child, and promptly opposed the adoption before the child was born.[6] Finding the evidence of abandonment insufficient, the trial court denied respondents' motion.[7] Upon rehearing, appellant introduced new evidence disclosing that petitioner had a criminal past.[8] The trial court reversed its decision, finding clear and convincing evidence of abandonment.[9]

On appeal, the Fourth District Court of Appeal reversed the trial court's finding,[10] and declared that evidence regarding emotional support should not be used when determining abandonment.[11] After rehearing en banc, the district court reversed the decision,[12] and certified a question to the Florida Supreme Court to determine whether a father's lack of emotional support of the mother during pregnancy could be considered as evidence of abandonment.[13] Approving the

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birth mother never asked petitioner to help her find health care. *Id.* at 941 app.

6. *Baby E.A.W.*, 658 So. 2d at 964-65. The birth mother testified that petitioner was an " 'ice cube' " at the doctor visit. *Id.* at 964. In contrast, petitioner contended that "[h]e was overjoyed about becoming a father." *Id.* Further, when contacted by the attorney intermediary, petitioner immediately sought legal representation. *Id.* at 964-65. The instant court noted that the petitioner bought the crib with his mother's money. *Id.* at 964. Yet, it opined that had the attorney-intermediary not contacted him, petitioner's passive stance probably would have continued. *Id.* at 965.

7. *E.A.W.*, 647 So. 2d at 919.

8. *Id.* at 944-45 app. The trial court granted the rehearing because the prospective adoptive child had not been represented in the initial trial. *Id.* at 944 app. However, the trial court granted the motion reluctantly, still believing that its original finding of no abandonment was appropriate. *Id.* The new evidence presented at rehearing revealed that, in 1977, petitioner was convicted for burglary and sexual battery. *Id.* at 945 app. Petitioner also was arrested for sexual battery in 1985, but was acquitted. *Id.* Yet, normally evidence of this character may have been relevant only to the best interests of the child. *See id.* at 945 n.9 app.

9. *Baby E.A.W.*, 658 So. 2d at 963. The trial court found the evidence clear and convincing that the father did not demonstrate that he did not abandon the child. *Id.* at 971 app.

10. *Id.* at 965. A three-judge panel decided two to one that petitioner did not abandon the child. *Id.* at 963.

11. *See E.A.W.*, 647 So. 2d at 949 app.

12. *Baby E.A.W.*, 658 So. 2d at 963. The court found abandonment by a decision of six to five. *Id.*

13. *Id.* The question the Fourth District Court of Appeal certified to the Florida Supreme Court inquired:

> In making a determination of abandonment as defined by section 63.032(14), Florida Statutes (Supp. 1992), may a trial court properly consider lack of emotional support and/or emotional abuse of the father toward the mother during pregnancy as a factor in evaluating the "conduct of the father towards the child during the pregnancy."

Id. The Florida Supreme Court noted that the certified question misquoted § 63.032(14). *Id.* It then adjusted the question to correctly reflect that the statute allows a court to consider the

district court's finding of abandonment, the Florida Supreme Court answered in the affirmative and HELD, that a trial court may consider a father's lack of emotional support and emotional abuse of the mother when determining whether he had prenatally abandoned his child.[14]

The Florida Supreme Court is not alone in struggling with questions regarding the termination of parental rights. In recent years, the United States Supreme Court has addressed the constitutional rights involved in the parent-child relationship.[15] In *Santosky v. Kramer*,[16] the Court addressed the constitutionality of a statute which allowed the State to terminate the rights of parents in their natural child upon a finding that the child had been permanently neglected.[17] The statute required only a " 'fair preponderance of the evidence' " to support such a finding.[18] The State argued that the statute furthered the State's interests in preserving and promoting the welfare of children and reducing the cost and burden of proceedings to terminate parental rights.[19]

On review, the Court held that due process required the State to support its allegations by at least clear and convincing evidence before it severed the rights of parents in their natural children.[20] The Court reasoned that the private interests of the natural parents in their children were commanding, and the countervailing state interests were slight in comparison.[21] Furthermore, the Court recognized that raising the standard of proof may result in an overall reduction of inappropriate terminations because the higher standard will emphasize the gravity of parental rights termination proceedings to the factfinder.[22] By making it more difficult to strip parental rights in one's natural children, the

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father's conduct toward the mother, not the child. *Id.* (citing FLA. STAT. § 63.032(14) (Supp. 1992)). The Court claimed jurisdiction pursuant to FLA. CONST. art. V, § 3(b)(4). *Id.*

14. *Baby E.A.W.*, 658 So. 2d at 965.

15. *See, e.g.*, Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 70 (1995). Before the Supreme Court decisions, common law dictated that a man had absolutely no legal relationship with children he sired out of wedlock. *Id.* at 67. However, he had complete custodial authority over children born of his wife. *Id.*

16. 455 U.S. 745 (1982).

17. *Id.* at 747 (citing N.Y. SOC. SERV. LAW §§ 384-b.4.(d), 384-b.7.(a) (McKinney Supp. 1981-1982)).

18. *Id.* (quoting Family Court Act, N.Y. Jud. Ct. Acts § 622 (McKinney 1975 & Supp. 1981-1982)).

19. *See id.* at 766.

20. *Id.* at 747-48.

21. *See id.* at 760. "A standard of proof more strict than preponderance of the evidence is consistent with both [parent's and state's] interests." *Id.* at 766. Further, the State's interest only arises on a clear showing that the natural family cannot or will not provide for the child. *Id.* at 767.

22. *Id.* at 764-65 (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)).

Court recognized that natural parents have a fundamental liberty interest in the care, custody, and management of their children.[23]

The Supreme Court clarified who possessed this fundamental liberty interest in *Lehr v. Robertson*.[24] Appellant was the putative father of a child born out of wedlock.[25] Two years after the child's birth, the mother and her new husband entered an order of adoption.[26] The court approved the adoption order without notifying appellant.[27] Unaware of the adoption order and before it was final, appellant filed a paternity petition in the same court.[28] The issue before the Court was whether the State could deny a putative father notice and an opportunity to be heard in an adoption proceeding when the State was aware of his interest in the child.[29]

Affirming the lower court, the Supreme Court held that appellant had not been denied due process.[30] Instead, the Court found that he could have guaranteed receipt of notice by entering his name in the State's putative father registry.[31] The Court declared that the father's mere biological link to the child did not merit constitutional protection, but rather offered the natural father an opportunity interest in developing a relationship with his offspring.[32] In order to acquire protection under the Due Process Clause, the Court announced that the father must come forward to participate in the rearing of his child.[33] Because the father waited two years to get involved with his child, the Court concluded that he had not acquired constitutional protection.[34] Thus, the *Lehr* decision narrowed the class of constitutionally protected parents to

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23. *Id.* at 758-59 (quoting Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981)); *see also* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (recognizing that unwed fathers have a protected liberty interest in raising their children).

24. 463 U.S. 248 (1983).

25. *Id.* at 250.

26. *Id.*

27. *Id.* The order also provided for an unchallenged adoption of appellee's older daughter. *Id.* at n.2.

28. *Id.* at 252. Five weeks prior to the adoption order, appellant filed a " 'visitation and paternity petition' " in Westchester County Family Court. *Id.*

29. *See id.* at 250.

30. *Id.* at 265.

31. *Id.* at 264.

32. *Id.* at 261-62. The Court also said that by grasping the opportunity, a natural father may enjoy the parent-child relationship and make significant contributions to the child's development. *Id.* at 262. Moreover, the Court declared if the natural father does not exercise the opportunity, the Federal Constitution does not force the State to consider what the father believes are the best interests of the child. *Id.*

33. *Id.* at 261.

34. *Id.* at 262.

include only those parents who have established a substantial relationship with their children.[35]

The Supreme Court of Florida took *Lehr* one step further in *In re Adoption of Doe*.[36] In *Doe*, an unwed father, although financially able, failed to provide the mother of his child with meaningful financial or emotional support during her pregnancy.[37] With the father's knowledge, the mother sought to place the child with adoptive parents.[38] The father did not oppose the adoption until after the child had been placed in an adoptive home.[39] On review, the court addressed whether the father's pre-birth conduct towards the mother was relevant to a finding of abandonment.[40] The court held that by failing to provide pre-birth assistance to the mother when he was financially able, the father abandoned his child.[41]

According to Florida law, a court may waive a parent's consent to adoption when it finds the parent abandoned the child.[42] The court stated that a finding of abandonment meant that a parent had not provided the child with emotional and financial support.[43] Further, the court found that evidence regarding the parent's pre-birth conduct was relevant because such evidence tended "to prove or disprove [the] material facts bearing on abandonment."[44] The court also recognized that evidence of the best interests of the child was not relevant unless the child was legally available for adoption.[45] Relying on *Lehr*, the

35. *See id.* at 261-62.

36. *In re* Adoption of Doe, 543 So. 2d 741 (Fla.), *cert. denied*, 493 U.S. 964 (1989).

37. *Id.* at 742-43. The district court found that Doe earned $10,000 in commissions in one month. *In re* Adoption of Doe, 524 So. 2d 1037, 1038 (Fla. 1st DCA 1988).

38. *Doe*, 543 So. 2d at 743.

39. *Id.* After the mother signed the adoption papers, the father proposed to her, moved to Florida, signed an acknowledgement of paternity and married her two months later. *Id.*

40. *Id.* at 745.

41. *Id.* at 749.

42. *Id.* at 745. The Court referred to FLA. STAT. § 63.072 which enumerates the persons whose consent to an adoption may be waived by a court. *Id.* Section 63.072(1) provides that such persons include: "A parent who has deserted a child without affording means of identification or who has abandoned a child." FLA. STAT. § 63.072(1) (1995).

43. *Doe*, 543 So. 2d at 744. The court interpreted the meaning of abandonment under Florida Statutes chapter 63. *Id.* At that time, chapter 63 did not contain a subsection defining abandonment. *Baby E.A.W.*, 658 So. 2d at 966. The court then recognized that the trial court incorrectly relied on the chapter 39 definition in its determination that abandonment as a matter of law could only occur after birth. *See Doe*, 543 So. 2d at 745. However, the court found that even the reliance chapter 39 provided on testing communication with the child was not conclusive. *Id.* Instead, the court found testing whether pre-birth conduct evaluation was relevant to the child support issue to be the better approach. *Id.*

44. *Doe*, 543 So. 2d at 746.

45. *Id.* at 744 (citing *In re* Adoption of John Doe, 524 So. 2d 1037 (Fla. 5th DCA 1978)).

court reasoned that the pre-birth conduct of the father constituted a failure to assume his parental responsibilities as required by Florida law.[46] As an additional basis for its decision, the court acknowledged "the public policy interests of society in encouraging unwed fathers to assume parental responsibilities."[47] Thus, the court determined that the father had abandoned his child, and held that his consent to the adoption was therefore unnecessary.[48]

After *Doe*, the Florida Legislature amended its adoption statute to include a definition of abandonment.[49] The statute did not apply to parents who were unable to provide support.[50] In addition, the statute required that the abandonment be willful.[51] Further, section 63.032(14) provided that "the court may consider the conduct of a father towards the child's mother during her pregnancy" when determining whether the father abandoned the child.[52] Thus, Florida law has declared that the pre-birth conduct of a father, as well as his conduct after the child is born, is relevant when considering whether his parental rights should be terminated.

In the instant case, the court concluded that section 63.032(14) allowed a court to consider a father's lack of emotional support, in addition to displays of abuse toward the mother during pregnancy, when determining whether the father abandoned his child.[53] Looking at the language of the statute, the instant court focused on the Legislature's use of the term "conduct."[54] Because the term "conduct" generally connotes behavior, the instant court concluded that the Legislature did not intend to limit such conduct to financial support.[55] Having found the statutory language clear and unambiguous, the instant court did not resort to rules

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46. *Id.* at 748-49. In interpreting *Lehr*, the court found the biological-relationship rights inchoate. *Id.* at 748. Accordingly, they were not constitutionally significant until assumed by the parent. *Id.*

47. *Id.* at 749. *But see* Michael H. v. Gerald D., 491 U.S. 110, 129-30 (1989) (discussing that a natural father's liberty right in his child is overcome by the traditional family unit of husband and wife).

48. *Doe*, 543 So. 2d at 749.

49. *Baby E.A.W.*, 658 So. 2d at 966.

50. FLA. STAT. § 63.032(14) (1993). The statute provides in relevant part: " '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." *Id.*

51. *Id.*

52. *Id.*

53. *Baby E.A.W.*, 658 So. 2d at 966.

54. *Id.*

55. *Id.*

of statutory interpretation.[56] Pursuant to section 63.032(14), the instant court concluded that a father's lack of emotional support of the mother during pregnancy could be considered when determining whether the father had abandoned his child.[57]

As a further basis for its holding, the instant court relied on the *Doe* decision.[58] The instant court acknowledged that *Doe* was primarily concerned with financial support, but also recognized the *Doe* court's statement that a finding of abandonment meant a parent had not provided the child with adequate emotional and financial sustenance.[59] Because the Legislature amended the abandonment definition after *Doe*,[60] the instant court found the *Doe* court's recognition of an emotional sustenance element provided additional justification for considering a father's emotional support of the mother during pregnancy when determining whether parental rights should be terminated.[61]

In light of *Doe* and the intent of the Legislature, the instant court concluded that petitioner's conduct towards the mother during pregnancy tended to prove abandonment of the child.[62] In making this decision, the instant court approved the trial court's disregard of best-interests evidence as an inappropriate consideration.[63] Further, the instant court found the evidence of lack of emotional and financial support to be sufficient to satisfy the clear and convincing evidence standard because it was of "sufficient weight to convince a trier of fact without hesitancy."[64] Thus, the instant court concluded that petitioner had waived his right to consent to his natural child's adoption.[65]

This interpretation of section 63.032(14) ignores the Supreme Court's holding in *Lehr* that unwed fathers have a constitutionally protected opportunity interest in developing a relationship with their children.[66] Because this opportunity interest protects petitioner's fundamental liberty interest, the State must, at a minimum, allow him to exercise this interest absent clear and convincing proof that he abandoned his child.[67] While a father's pre-birth conduct is relevant in making an

56. *Id.*
57. *Id.*
58. *Id.* at 965.
59. *Id.*
60. FLA. STAT. § 63.032(14) added by 1994 Fla. Laws ch. 92-96, § 3.
61. *Baby E.A.W.*, 658 So. 2d at 966.
62. *Id.* at 967.
63. *Id.* at 966. The court agreed that consideration of best-interests evidence lacks relevancy unless the child was available for adoption for reasons other than abandonment. *Id.*
64. *Id.* at 967 (quoting *In re* Davey, 645 So. 2d 398, 404 (Fla. 1994)).
65. *See id.*; *Doe*, 543 So. 2d at 747.
66. *See supra* text accompanying notes 29-33.
67. *Baby E.A.W.*, 658 So. 2d at 976 (Kogan, J., concurring in part, dissenting in part).

abandonment determination under the Florida statute, it is only relevant to the extent it demonstrates a willful abandonment of the child.[68] Lack of emotional support of the mother before the child is born does not tend to prove a willful abandonment of a child and would therefore be irrelevant.[69] Thus, the use of pre-birth emotional support evidence in the instant court's application of section 63.032(14) raises a due process concern as to whether the father's opportunity interest in forming a relationship with his child remained adequately protected.[70]

This due process concern resurfaces through an analysis of the instant court's reliance on the *Doe* decision. The facts in *Doe* are clearly distinguishable from the facts in the instant case.[71] In *Doe*, the natural father was financially able to provide the mother with prenatal care.[72] In the instant case, petitioner had no such financial abilities.[73] Reading the statute in conjunction with *Doe*, section 63.032(14) prevents a father who is incapable of paying for health care from being accused of abandonment.[74] Moreover, the fact that petitioner paid half of the couple's joint living expenses would refute a finding of a lack of financial support.[75]

Justice Kogan interpreted the opportunity interest to require a period of time after birth when a biological father has access to his child. *Id.* (Kogan, J., concurring in part, dissenting in part).

68. *Id.* at 977 (Kogan, J., concurring in part, dissenting in part). Justice Kogan reasoned that "hatred of the mother [did] not necessarily imply hatred of the [fetus]." *Id.* (Kogan, J., concurring in part, dissenting in part).

69. *Id.* (Kogan, J., concurring in part, dissenting in part). Justice Kogan feared that the majority's interpretation of the adoption statute extended state law into the "realm of the unconstitutional." *Id.* (Kogan, J., concurring in part, dissenting in part). Moreover, Justice Kogan was unconvinced that a father's pre-birth conduct could ever demonstrate abandonment of the child. *Id.* (Kogan, J., concurring in part, dissenting in part). Judge Kogan opined that the only way to make such a demonstration was through clear and convincing evidence that the natural father expressly abandoned the child, or that he "recklessly or intentionally engaged in conduct that posed a significant risk of detriment to the fetus." *Id.* (Kogan, J., concurring in part, dissenting in part).

70. *Id.* (Kogan, J., concurring in part, dissenting in part); *E.A.W.*, 647 So. 2d at 933 (Klein, J., dissenting). Judge Klein emphasized that a father's conduct must be willful in order to be considered as evidence that he abandoned his child. *Id.* (Klein, J., dissenting).

71. *See E.A.W.*, 647 So. 2d at 948 app.

72. *Doe*, 524 So. 2d at 1038.

73. *E.A.W.*, 647 So. 2d at 942 app.

74. *Doe*, 543 So. 2d at 749 (holding "failure of respondent natural father to provide pre-birth assistance to the pregnant mother, *when he was able*, and assistance was needed") (emphasis added). FLA. STAT. § 63.032(14) (1995) provides in pertinent part: " 'Abandoned' means . . . the parent or legal custodian of a child, *while being able*, makes no provision for the child's support. . . ." *Id.* (emphasis added).

75. *See E.A.W.*, 647 So. 2d at 941 app. Justice Kogan opined that the majority's finding reflected an assumption "that an unwed father who lacks [financial] means has fewer rights than one with money." *Baby E.A.W.*, 658 So. 2d at 978 (Kogan, J., concurring in part, dissenting in

The instant case is also distinguishable from *Doe* because of the circumstances surrounding the objection to the adoption.[76] The father in *Doe* did not object to the adoption until after the child was already placed in an adoptive home.[77] In contrast, petitioner objected to the adoption before the child was even born.[78] While the father's conduct in *Doe* was held to be insufficient to satisfy the requirements set out by *Lehr*,[79] petitioner's conduct in the instant case suggests an effort to assume parental responsibilities.[80] Not only did petitioner come forward by objecting to the adoption, he also paid part of the couple's joint living expenses, attended a doctor visit with the mother, and purchased a crib for his child.[81] According to the *Lehr* rationale, such evidence tends to prove that petitioner was assuming parental responsibilities and was therefore exercising his opportunity interest.[82]

The facts of the instant case further suggest that the courts may have considered the best interests of the child when deciding this action.[83] As acknowledged by *Doe* and the instant court, the best interests of a child should not be considered unless the child is available for adoption.[84] Further, a child is not available for adoption unless the court has determined that the child has been abandoned.[85] With this is mind, the trial court's reversal of its initial finding of no abandonment is questionable.[86] Upon rehearing, the trial court focused on new evidence which disclosed that petitioner had a criminal history.[87] Yet, this evidence is not relevant to whether petitioner willfully abandoned his child.[88] Still, after the rehearing focused on this best-interests evidence,[89] the trial court found there was clear and convincing evidence to reverse its initial decision and conclude that petitioner had abandoned

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part). Justice Kogan emphatically stated that poverty could not equate to abandonment under any standard. *Id.* (Kogan, J., concurring in part, dissenting in part).

76. *See E.A.W.*, 647 So. 2d at 948 (discussing the factual differences of the two cases).

77. *Doe*, 543 So. 2d at 743.

78. *Baby E.A.W.*, 658 So. 2d at 965.

79. *Doe*, 543 So. 2d at 748-49; *supra* notes 24-35 and accompanying text.

80. *See Baby E.A.W.*, 658 So. 2d at 977 (Kogan, J., concurring in part, dissenting in part).

81. *Id.*

82. *See id.* at 980-81 (Anstead, J., dissenting) (arguing the court moved away from the *Lehr* rationale by shifting the burden of proof to the natural father, forcing him to prove support rather than requiring those seeking to cut off his rights to prove he did not support the child).

83. *E.A.W.*, 647 So. 2d at 945 n.9.

84. *Doe*, 543 So. 2d at 744; *Baby E.A.W.*, 658 So. 2d at 966.

85. *Baby E.A.W.*, 658 So. 2d at 966.

86. *See E.A.W.*, 647 So. 2d at 944-45 app.

87. *Id.* at 945 app.; *see supra* note 8.

88. *E.A.W.*, 647 So. 2d at 945 n.9 app.

89. *Id.*

his child.[90] Because petitioner's criminal past was the focus of the rehearing, it is reasonable to conclude that such evidence was at least subconsciously considered by the trial judge.[91] While the instant court declared that evidence regarding petitioner's criminal past was not relied upon,[92] the reversal of the earlier decision raises questions as to whether the trial court, as well as the instant court, was impermissibly influenced by this evidence.[93]

This analysis of the instant facts raises the additional question of whether the respondents ever presented clear and convincing evidence that petitioner abandoned his child.[94] The very nature of the proceedings on appeal sheds doubt upon the instant court's finding that the evidence was of sufficient weight to satisfy the clear and convincing evidence standard.[95] Given the series of reversals, it would "strain[ ] reason to conclude that the . . . [evidence] was so clear and convincing as 'to convince the trier of fact without hesitancy.' "[96] *Santosky* recognized that parents have a fundamental liberty interest in the " 'care, custody, and management of [their] children.' "[97] A failure to adhere to the clear and convincing evidence standard would undermine the due process goal announced in *Santosky* of protecting the liberty interests of natural parents.[98] If, as the instant facts tend to suggest, the evidence did not satisfy the clear and convincing evidence standard, the instant

90. *Id.* at 945 app.

91. *Id.* at 945 n.9 app.

92. *Baby E.A.W.*, 658 So. 2d at 966.

93. *See E.A.W.*, 647 So. 2d at 945 n.9 app.

94. *See Baby E.A.W.*, 658 So. 2d at 982 (Anstead, J., dissenting). Besides failing to satisfy the clear and convincing evidence standard, Justice Anstead thought the majority erred by "applying the concept of abandonment to prebirth situations." *Id.* at 980 (Anstead, J., dissenting). Justice Anstead noted that the concept was traditionally limited to "relationships between parents and their . . . existing children." *Id.* (Anstead, J., dissenting); *see also E.A.W.*, 647 So. 2d at 939 (Farmer, J., dissenting) (stating that the evidence presented at trial did not "amount to proof of anything approaching abandonment"). Judge Farmer noted that evidence cannot satisfy the clear and convincing evidence standard "when it is consistent with both sides . . . of the case." *Id.* (Farmer, J., dissenting).

95. *Baby E.A.W.*, 658 So. 2d at 982 (Anstead, J., dissenting); *see also E.A.W.*, 647 So. 2d at 940 (Farmer, J., dissenting) (noting that the continuation of proceedings on appeal logically lead to the conclusion that there was not clear and convincing evidence of abandonment). Judge Farmer maintained that there could not possibly be clear and convincing evidence of abandonment "unless every judge who reviewed [the case] agreed." *Id.* (Farmer, J., dissenting).

96. *Baby E.A.W.*, 658 So. 2d at 982 (Anstead, J., dissenting).

97. *Santosky*, 455 U.S. at 758-59 (quoting Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981)).

98. *See id.* at 759.

court's decision, as well as any decision relying on it, could be construed as a violation of due process.[99]

While encouraging unwed fathers to take responsibility for their unborn children is an admirable policy, the instant court's means of achieving that end are not constitutionally defensible. A man's lack of interest in the mother of his child, while unfortunate, is not dispositive of an intention to sever his parental relationship with his unborn child. If a man wanted to shirk his parental responsibilities, the easiest way to do so would be to consent to the adoption of his child. Because of the magnitude of the consequences of the instant court's decision, it is imperative that Florida law be brought back into the realm of constitutionality. Until this issue is addressed, current state laws will continue to do children, natural parents, and adoptive parents a grave disservice.

99. *See id.*; *Baby E.A.W.*, 658 So. 2d at 980-83 (Anstead, J., dissenting) (discussing the impact of merely providing "lip service to the clear and convincing standard of proof").