

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the Clinton Presidential Library Staff.

Folder Title:

Immigration Issues-Elian Gonzalez

Staff Office-Individual:

Counsel's Office-Chirwa, Dawn

Original OA/ID Number:

CF 1660

Row:	Section:	Shelf:	Position:	Stack:
19	2	9	2	v

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA
FAMILY DIVISION

IN RE: THE MATTER OF

CASE NO. 00-00479-FC-28

LAZARO GONZALEZ, as Custodian of
ELIAN GONZALEZ, a Minor,
Petitioner,
and

JUAN MIGUEL GONZALEZ-QUINTANA,
Respondent.

Final Order

THIS CASE comes to the Court upon various emergency motions brought by Petitioner seeking expedited discovery and an imminent hearing upon his Petition for temporary custody of the minor child, Elian Gonzalez.

For the reasons stated below, and with concern for those on both sides who feel so passionately about this case, the Court finds that this matter is federally pre-empted and that this court further lacks subject matter jurisdiction, and therefore dismisses this action and terminates the order of January 10, 2000 entered by a predecessor judge.

Index to Order

Case History	Page 2
General Principles of Jurisdiction	Page 7
Lack of Jurisdiction Due to Federal Preemption	Page 8
Lack of Jurisdiction Due to Petitioner's Lack of Standing To Sue under Chapter 751, Florida Statutes	Page 12
The Effect of This Ruling	Page 18
Orders	Page 21

Case History

Core facts are not in dispute: this extraordinary case began on an evening on a Cuban beach, when fourteen people, including this child and his mother, fled the island in a small boat. Their destination was the shore of Florida and the United States of America. In rough seas, eleven people perished, including the child's mother. The child survived, alone in the ocean, by clinging to a floating tire. He was found at sea by fishermen who immediately contacted the United States Coast Guard, which transported the child to a local hospital. On November 27, 1999, Elian Gonzalez reached America. As an unaccompanied minor alien, Elian Gonzalez was taken into custody by the United States Immigration and Naturalization Service ("INS") and paroled into the loving arms of his great uncle, Petitioner in this matter. Who would have dreamed that the celebration of this child's survival would have been lost so soon in an international tug of war over him?

The child's father, investigation revealed, remained in Cuba. After two interviews in Cuba, the INS determined that Juan Miguel Gonzalez-Quintana was an active, involved and loving father, who freely and voluntarily requested that his son be returned to his home in Cuba.

In the meantime, in Florida, the Petitioner sought to file political asylum petitions on behalf of the child and by the child directly. After the INS determined that the father had the right to control the child's asylum application and wished it withdrawn, INS rejected the asylum applications filed, and announced in early January that the child would be returned to the father in Cuba.

CASE NO. 00-00479-FC-28

INS and the United States Attorney General, who is charged with the executive responsibility for immigration, determined that only the father could speak for the child, that there would be no hearing on the asylum petitions filed by Petitioner, and that the child would be returned to the father by January 14, 2000, four months ago.

Petitioner did not agree with INS and the Attorney General that the child should be returned to his father in Cuba. Petitioner objected to the INS procedure and asserted that INS had violated the child's independent due process rights to an political asylum hearing. He wanted the child to stay in the United States, where he would live in a free country. Recognizing that his control over the child extended only to the extent of the grant of the INS parole, Petitioner filed this action in state court on January 7, seeking temporary custody and a protective order prohibiting action by the INS.

The Petitioner, Lazaro Gonzalez, sought the following:

"Petitioner requests temporary custody of the Minor Child for purposes of providing legal consent to all necessary and reasonable medical care for ELIAN GONZALEZ, including psychological care, and to provide for ELIAN's due process rights to seek political asylum in the United States, and for such other things which are necessary for the care of ELIAN, until such time as there is a final disposition of the aforesaid application for political asylum on behalf of the Minor Child." *Petition at p. 6, paragraph h.*

"Petitioner seeks an evidentiary hearing, an Order awarding temporary custody of ELIAN for a period of time sufficient to adjudicate the application for asylum with INS." *Petition at p. 6, paragraph 14.*

The Petition was predicated upon implied consent from Elian's deceased mother, *see memorandum of law p. 7*, and the argument that the father could not object or consent because he could not freely express his wishes while in Cuba and under the control of Castro.

CASE NO. 00-00479-FC-28

*See, memorandum of law at l., page 7.*¹

The Petition further alleges that if JUAN MIGUEL GONZALEZ-QUINTANA objects to Petitioner's custody of the child, that Petitioner asserts he is unfit to provide for the care and control of Elian and that he has abused, abandoned, or neglected Elian based on the argument that: "While it is true that his father...is not responsible for the environment existing in Cuba or the violations of humanitarian rights commonplace in Cuba, by insisting that the boy be placed in the aforesaid environment, the father is engaging in conduct which constitutes abuse or neglect, as referred to in Fla. Stat. § 751.05(3) and as defined in Fla. Stat. Chapter 39." *Memorandum of law p. 11.*

A predecessor judge considered the petition's allegations and the motion for protective order on an emergency ex-parte basis, without a response from the INS or the father. On January 10, 2000, she entered a Temporary Protective Order granting Lazaro Gonzalez temporary custody pending service of process upon the father and a full hearing. The Judge reserved on subject matter jurisdiction. *Order of January 10, 2000, p.4, n.3.* The order also stated that it prohibited the removal of the child from the jurisdiction of the court. *Order of January 10, 2000, p.6 , paragraph 3.*

The ruling of January 10, 2000 was based upon the ex-parte motion, in an effort to act as quickly as possible given the urgent nature of Petitioner's allegations. Jurisdiction was

¹"...[T]his Court should not and cannot consider any objection of JUAN MIGUEL GONZALEZ-QUINTANA, the child's father, unless he is removed from his coercive environment and appear [sic] in this Court so that he may speak openly concerning the best interests of the Minor Child." *Memorandum of law at p. 9.*

CASE NO. 00-00479-FC-28

primarily justified under the theory of *parens patriae*, the theory that the state has the inherent power to protect children within its borders. The essential nature of the Temporary Protective Order was to give Petitioner the opportunity to pursue legal remedies in federal court with regard to his assertions that INS had violated due process and the child's constitutional rights by failing to give him a political asylum hearing. Petitioner did so. The order also permitted Petitioner to secure necessary health, psychological and material care for the child.

Additional research and developments in the case have caused the examination of relevant case law which was not available to the court in January. After receiving the temporary custody order, Petitioner proceeded to federal district court to seek an injunction prohibiting the INS from removing the child from Lazaro Gonzalez and requiring INS to grant the child a political asylum hearing. The federal district court concluded that Lazaro Gonzalez had standing to bring the action in federal court as the child's next friend, *Order of Judge K. Michael Moore in Gonzalez v. Reno*, 2000 WL 289604 (S.D. Fla. March 21, 2000) and did not reach the validity of the state custody order. *Id. at fn. 25*.

Petitioner attempted to serve the summons and petition upon Juan Miguel Gonzalez-Quintana, Elian's father, in Cuba. However, no additional substantive relief was requested in state court until after the Petitioner lost the federal district court case. Last Saturday night, four months after the state court action was commenced, the Petitioner filed a request to take the deposition of the father within three days, and asked for a trial within 10 days. In sum, only after that loss, and during the currently pending appeal to the federal court of appeals for the Eleventh Circuit, and only since the father has arrived in the United States to seek

CASE NO. 00-00479-FC-28

implementation of the federal decision, has Petitioner returned to state court to aggressively seek a hearing in an effort to continue to keep the child in Miami. INS and the Attorney General have decided to move forward on reuniting father and son.

In response to Plaintiff's motions, the court requested Petitioner brief the issues of subject matter jurisdiction, federal preemption, standard of law and their motion for default. As the first two jurisdictional issues are dispositive, the court does not reach standard of law or default.

Some may question the court's decision to rule without oral argument from the attorneys. The court decided to rule on this case without additional hearings for the following reasons: first, Petitioner's lawyers submitted an excellent brief which did an exceptionally thorough job of laying out the legal authority under which Petitioner asks this court to proceed. These are exclusively legal issues. Hearings are generally granted so that the court may take evidence. In this matter, evidence cannot be taken until the court can determine whether it has jurisdiction. It is important to understand that the question before the court at this point is not whether it should hear this case, but rather whether it could hear this case. This is not a discretionary call. Let no one conclude that this case was decided on legal technicalities — jurisdiction is ground zero in court. Without it, judges have no power to intervene.

Finally, this case has inflamed the passions of our community to the point that references to potential riots have been made by our leaders. There is no purpose in prolonging the anxiety of this family and other people who feel so strongly about this case when the law is so clear and when the inevitable result would be ever more crushingly disappointing.

CASE NO. 00-00479-FC-28

Holding a hearing would only have raised false hopes that somehow this court could legally act and keep Elian Gonzalez here.

General Principles of Jurisdiction

"Jurisdiction is the oxygen of an action. If present, the action is alive and the court may act." Keena v. Keena, 245 So.2d 665 (Fla. 1st DCA 1971). Equally if subject matter is not present, the court may not act.

Jurisdiction over the subject matter in a case refers to a court's power to hear and determine a controversy. Calhoun v. New Hampshire Ins. Co., 354 So.2d 882 (Fla. 1978). Generally, it is tested by the good faith allegations of the pleading, in this case the petition seeking temporary custody. See, Calhoun v. New Hampshire Ins. Co., 354 So.2d 882 (Fla. 1978), cited in Jefferson v. State, 724 So.2d 105 (Fla. 3rd DCA 1998).

"Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence." [citations omitted] Jesse v. State, 711 So.2d 1179 (Fla. 2nd DCA 1998).

"Subject matter jurisdiction, always essential to the validity of a court's action, can be challenged at any time, and a lack of subject matter jurisdiction should be recognized by a court even if unchallenged; when party or a court's own examination of a case suggests a lack of jurisdiction, the court is duty bound to consider such issue." Walt v. Walt, 574 So.2d 205 (Fla. 1st DCA 1991). This court required the Petitioner to present his position on subject matter jurisdiction because of the independent obligation imposed upon the court to recognize its own limitations; as stated in the briefing order: "Courts are bound to take notice of the

CASE NO. 00-00479-FC-28

limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order.” Greene v. Greene, 432 So.2d (Fla. 3rd DCA 1983).

The issue of preemption is a question of subject matter jurisdiction. Florida Auto. Dealers Industry Ben. Trust v. Small, 592 So.2d 1179 (Fla. 1st DCA 1992). The issue of standing to sue concerns a question of jurisdiction to hear and decide the case pled by a particular party. Rogers & Ford Constr. Corp. v. Carlandia Corp. 626 So.2d 1350 (Fla. 1993).

Lack of Jurisdiction due to Federal Preemption

Elian Gonzalez’s physical presence in this country is at the discretion of the federal government. The state court cannot, by deciding with whom his custody should lie, subvert the decision to return him to his father and his home in Cuba. This court is prohibited from acting by the Supremacy Clause of the United States Constitution from acting in this case. Const. Art. I, §8.

Federal Preemption is a principle based on the Supremacy Clause of the United States Constitution: Const. Art. I §8. There are different kinds of preemption, two of which are implicated in this case: field preemption and conflict preemption. “Field preemption” arises when Congress has so thoroughly regulated a field or federal interest is so dominating, that an intent for federal law to occupy the field exclusively may be inferred. Pacific Gas & Electric Co. v. Energy Resources Conservation and Dev. Comm’n, 461 U.S. 190, 202, 103 SCT. 1713, 1721, 75 L.Ed 2nd 752 (1983). “Conflict preemption” arises where state and federal laws or orders are in direct conflict, particularly here where the state order is intended to

CASE NO. 00-00479-FC-28

"prevent or hinder the [federal agency, here the INS] from operating the way Congress intended it to operate." Id. at 202. Both field and conflict preemption apply in immigration matters. Hines v. Davidowitz, 312 U.S. 52, 61 (1941).

"Power to regulate immigration is unquestionable exclusively a federal power." Decanas v. Bica, 424 U.S.351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976).; Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, (1941); Nyquist v. Mauclet, 432 U.S. 1, 97 S.Ct. 2120, 53 L.Ed.2d 63, (1977). The proposition that courts do not have the authority to second-guess the executive branch's decisions regarding permission of immigrants to enter the country is one of long standing, addressed as far back as 1892 in the case of Eiku v. U.S., 142 U.S. 651, 12 S.Ct 336 , 35 L.Ed. 1146 (1892).

"The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." [immigration] Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Nowhere is the "delicacy" of the policy judgment implicated more closely than in connection with Cuba. ²

The Petition presented to this court's predecessor judge sought the opportunity to go to federal court and seek review of the decision of the INS and the Attorney General that the

² Cuba lays 90 miles from our shores. It which has been the subject of an economic embargo for 30 years. We have transmitted both Radio and TV Marti to it people. Our community remains linked to the island with intimate family ties. Federal immigration policy shifts seismically affected this community in the 1980's with the Mariel Boatlift. The question of interdiction of *balseros* at sea remains a difficult issue, and current immigration detente with Cuba was reached only after apparently difficult negotiations. Foreign policy toward Cuba continues to shape local issues.

CASE NO. 00-00479-FC-28

father speaks for the child and to pursue a claim of denial of due process, by INS, to the child. She granted Petitioner that opportunity through the Temporary Protective Order. The federal district judge determined that Petitioner could pursue the claim as a "next friend" on behalf of the child under federal procedural rules.³ Petitioner can proceed with his appeal to the Eleventh Circuit based upon the district court's ruling as to his standing to sue on behalf of the child. The status of the state court action no longer affects the federal action or appeal.

The Petitioner went to federal district court, and the district court judge rendered a fifty-page carefully and thoroughly reasoned ruling which addressed the issues. Judge Moore determined that the Attorney General conducted the necessary investigation and did not abuse her discretion in coming to the conclusion that the child had a loving and adequate home waiting for him with his father, who desperately wanted his first-born son back in his arms.

The remedy sought in this court is custody of the child. While the court recognizes the many, many authorities that establish that domestic relations, family law, is an area reserved to the state courts, Petitioner fails to recognize the fundamental nature of his case -- it is an immigration case, not a family case. See, Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981): "Recent authority ... seems to favor a broader inquiry into the nature of the claim rather than resolution of the issue by technical appellation" *Id.* at 564.

This case is designed to keep Elian Gonzalez in Miami over the federal government's and his father's objection, and under the name of a custody claim. Petitioner's increased

³The state court order was not the basis of Petitioner's standing to sue in federal court under Federal District Court Judge Moore's analysis..

CASE NO. 00-00479-FC-28

level of activity in the state court action correlates with announcements by INS of reunification of the child with his father. The United States through the Attorney General has articulately and bluntly insisted that reunification **will** occur. The basis for the custody claim is that the child should not live in Cuba, with his father, and is better off here. The Court's ability to reach that decision is derailed by the federal government decision that he must return to Cuba, his homeland, and be with his father. This court cannot second guess the INS. In the end, a determination by this court as to who should have custody of Elian Gonzalez would not prevent his deportation to Cuba and his father, because deportation is exclusively the province of the federal government. "Custody is not a statutory factor in determining deportability." Johns v. Department of Justice, 653 F.2d. 884 (5th Cir. 1981).

The cases cited by Petitioner in his brief do not provide guidance under the unique facts of this case. Gao v. Jenifer, 185 F.3rd 548 (6th Cir. 1999) deals with a juvenile alien whose status was addressed by the INS prior to an amendment to the federal immigration law which provided that: "...no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction." 8 U.S.C §1101(a)(27)(j) (1999) [dealing with illegal and unaccompanied minors placed in foster care and whether the juvenile court has jurisdiction to declare them dependent.] The Johns case, *supra*, specifically addressed the lack of control the state court has over deportation issues. Bergstrom v. Bergstrom, 623 F.2d 517 (8th Cir. 1980) involved a U.S. citizen father's attempt to utilize the federal district court to modify a prior custody ruling between him and the U.S. citizen mother

CASE NO. 00-00479-FC-28

regarding the U.S. citizen child.

The court finds the reasoning of In Re C.M.K., 552 N.W. 2d 768 (Minn.Ct. App. 1996) of most assistance. In C.M.K., the child was a juvenile Chinese national who was smuggled into the United States. INS found him, and after he was placed with a foster family, moved to deport him. The family filed in state court for dependency. The Minnesota Court of Appeals affirmed the trial court's finding that it was without jurisdiction due to federal immigration preemption, particularly noting that issues of asylum are not subject to state court jurisdiction. Most importantly in that case, the family alleged that the child would be subject to "imprisonment, fines, harassment, and physical assault if he is returned to China." *Id.* at 771. The Court of Appeals found that the family was basing its claim on "... alleged circumstances in another country and therefore, circumstances directly related to the immigration process." *Id.* at 771. "A finding that C.M.K. is in need of protection or services based on circumstances in China would directly conflict with the immigration proceedings and, thus, is preempted by federal law." *Id.* at 771.

Petitioner is not without a remedy to seek delay of the INS action, which has been available to him since March 21,2000. Federal Rule of Appellate Procedure 8 provides that a party may proceed in federal court to seek a stay of the ruling of the district court which affirmed the authority of the Attorney General and the INS in this matter.

**Lack of Jurisdiction based upon Petitioner's Lack of Standing
to sue under Chapter 751**

The Petitioner sought relief under Florida Statute 751 titled "Temporary_Custody of

CASE NO. 00-00479-FC-28

Minor Children by Extended Family.” If the petitioner does not have standing to sue under Fla. Stat. 751, then this court cannot exercise jurisdiction under Fla. Stat. §61.1308 because there is no viable custody claim. The Act’s mission is stated:

The purposes of ss. 751.01-751.05 are to:

(1) Recognize that many minor children in this state live with and are well cared for by members of their extended families. ...Because of the care being provided the children by their extended families, they are not dependent [wards of the state] children.

(2) Provide for the welfare of minor children who are living with an extended family...At present, such family members are unable to give complete care to the child in tier custody because they lack a legal document that explains and defines their relationship to the child, and they are unable effectively to consent to the care of the child by third parties

(3) Provide temporary custody of a minor child to a family member or putative father having physical custody of the minor child to enable the custodian to:

(a) Consent to all necessary and reasonable medical and dental care for the child, including non-emergency surgery and psychiatric care;

(b) Secure copies of the child’s records, held by third parties, that are necessary to the care of the child, including , but not limited to:

1. Medical, dental, and psychiatric records;
2. Birth certificates and other records; and
3. Educational records;

(c) Enroll the child in school ...

(d) Do all other things necessary for the care of the child.

Fla. Stat. §751.01

In the definition section of the statute, Fla. Stat. §751.011, The Florida legislature defined the words “Extended family” and “putative father” and stated:

As used in ss. 751.01-751.05, the term:

CASE NO. 00-00479-FC-28

(1) "Extended family" is any family composed of the minor child and a relative of the child who is the child's brother, sister, grandparent, aunt, uncle or cousin."

The terms "relative" and "family member" are not defined anywhere in Chapter 751. The term "extended family" is not used in the rest of the statute, even though the definition says "as used in ss. 751.01-751.05".

Fla. Stat. §751.02, "Determination of temporary custody proceedings; jurisdiction" provides: "Any relative of a minor child...with whom the child is presently living, may bring proceedings in the circuit court to determine the temporary custody of the child."

Lazaro Gonzalez's petition seeking temporary custody under Chapter 751 reflects that the Petitioner is "Paternal Great Uncle." *Petition, p.g, paragraph 13 (g)*. Despite the limited list of extended family members who may sue under chapter 751, Petitioner asserts that he is a "relative", and therefore has standing to bring this claim to the child. If the statute's effect is limited by the definition of "extended family", then Petitioner is too remotely related to the child to bring this action under chapter 751 and this court has no jurisdiction.

To determine whether the legislature meant to empower any relative to take a child or whether the legislature sought to limit the remedy to the list of "extended family" members that they took the trouble to define is a question of statutory construction.

The legislative intent in passing the law is the polestar by which the court must be guided. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). The rules of statutory construction exist so that a court may determine the legislature's intent and effect the purpose of the law. Barnett Bank of South Florida v. State Dept. of Rev., 571 So.2d 527, 528 (Fla. 3rd DCA

CASE NO. 00-00479-FC-28

1990). The starting point is the clear language of the statute itself; if the language is clear and unambiguous, the court stops there. Barnett Bank, id. at 528. Petitioner argues that the word "relative" used in §751.02 is clear and unambiguous. However, courts must look beyond plain language if applying the literal construction would render other provisions meaningless. Unruh v. State, 669 So.2d 242, 245 (Fla. 1996).

To determine intent, the court must look to other factors in addition to the language used, including the subject matter and the stated purpose of the law. Badaraco v. Suncoast Towers V Assoc., 676 So.2d 502, 503 (Fla. 3rd DCA 1996). The title of the act is important. Carliile v. Game and Fresh Water Comm'n, 354 So.2d 362, (Fla. 1977). The title is deemed to be a "...direct statement by the legislature of its intent." State v. Webb, 398 So.2d 820 (Fla. 1981). The title of this act is "Temporary Custody of Minor Children by **Extended Family**". [emphasis added]

Also of importance is identification of the "evil to be corrected" by the law. Webb, supra. The legislative history reflected in the bill analyses of the Florida House of Representatives and the Florida Senate reflect as follows: the bill summary from the House states: "This bill creates an action for temporary custody of minor children who are currently living with members of their extended family..." Florida House of Representatives, Committee on Judiciary, Final Bill Analysis & Economic Impact Satement CS/HB 1185, 5/3/93. The House's substantive analysis states:

"PRESENT SITUATION: At the present time it has been reported by Florida Legal Services, Inc. that there are minor children living with family members... without an order granting custody. This presents a problem to these family members when a third party

CASE NO. 00-00479-FC-28

requires consent to care for or provide services to these children. Currently, the available solution for these families is to initiate a guardianship proceeding in probate court or to initiate a dependency proceeding under Chapter 39, Florida Statutes." *Id.* at p. 2, "*Substantive Analysis.*" The Senate's summary of the "Present Situation" echoes the House staff analysis. Florida Senate, *Senate Staff analysis and Economic Impact Statement*, 2/25/93.

The "Comments" section provides: "This bill would provide a relatively simple procedure for extended families and putative fathers to obtain custody of minor children....At the present time there is statutory authority for an adjudication of the custody of a child in a dissolution proceeding, through a paternity action, adoption, and juvenile dependency. In addition, a guardianship action encompasses custody, but the procedure is cumbersome and results in a family law issue being adjudicated in probate court rather than in a family law court. The dependency proceeding requires the showing of abandonment or unfitness of the natural parent. In addition, it results in the continual involvement of the Department of Health and Rehabilitative Services which is costly and not warranted in the types of situations which this bill addresses." Florida House bill analysis, *supra.*, p. 5, 5/3/93.

The Senate's legislative staff analysis acknowledged the definition issue: "The bill defines 'putative father' and 'extended family' for purposes of **its provisions**. [emphasis added]. However, the term 'extended family' is used only in the statement of the act's purpose...not..in the substantive provisions of the bill. Therefore, the bill would probably be clarified if the term 'relative' were defined in lieu of, or in addition to the term 'extended family'." Florida Senate staff analysis *supra.*, p. 4, 2/25/93.

The legislature ignored its staff's advice on clarifying the bill, and passed Chapter 751 with the definition of "extended family". However, during the rush of passage, uncles were omitted from the list. The legislature revisited the statute in 1997 to add "an uncle of a minor child" to the definition of extended family. See, Florida House of Representatives Committee on Judiciary, *Final Bill Analysis & Economic Impact Statement CS/HB 1087*, 5/20/96. The Bill analysis again refers to Chapter 751 as providing means to place minor children with extended family members, and notes: "This chapter allows those extended family members to seek temporary custody of the child, without which they could not consent to care of the child by third parties. In the 1993 session, the word "uncle" was inadvertently left out of CS/HB 1185.

CASE NO. 00-00479-FC-28

As a result, the definition of extended family does not include the word "uncle". At least two men were denied legal temporary custody because of the current definition of extended family." *Id.* at p. 3. In reviewing the entire legislative history and every staff analysis available, not once does a legislative intent to grant the opportunity to seek custody to any relative outside the extended family definition ever appear.

An additional fundamental rule of construction requires the application of the doctrine of *in pari materia*, which means looking at all the provisions of the chapter together. DeArmas v. Ross, 680 So.2d 1131 Fla. 3rd DCA 1996). Phrases cannot be read in isolation. Instead the phrases at issue must be read in the context of the entire section. Acosta v. Richter, 671 So.2d 149, 154 (Fla. 1994). Whenever possible, a court must adopt a construction of a statute that harmonizes and gives effect to all the provisions within an act, giving effect to the whole statute. Unruh, *supra.*, at 245. Allowing any "relative" to sue for temporary custody under §751.05 would wipe out the definition of extended family in §751.011. Why create a limited list of family members if any relative, no matter how distantly related, can sue? To adopt Petitioner's construction would violate the laws governing the court's obligation in construing the laws passed by the legislature.

"Categorical distinctions between relatives and nonrelatives, and between relatives of varying degree of affinity, have always played a predominant role in determining child custody and in innumerable other aspects of domestic relations." Reno v. Flores, 507 U.S. 292, 113 S.Ct 1439, 123 L.Ed.2d 1 (1993), fn. 6.

Under case law decided prior to the passage of Chapter 751 in 1993, and of which the legislature is presumed to be aware, the "great-uncle " issue was raised. In Kennedy v.

CASE NO. 00-00479-FC-28

Kennedy, 559 So.2d 713 (Fla. App. 1990) a great uncle and aunt were denied custody of their great niece/nephew where there was an attempt to show that the mother was unfit. Certainly the legislature could have included relatives within the second degree of consanguinity, meaning great-aunts, great-uncles, and second or third cousins, if they had wished to exercise the choice to do so.

The single application of this statute in a similar case, Glockson v. Manna, 711 So.2d 1332 (Fla. 2nd DCA 1998) states: "Section 751.05(3) specifies that an award of temporary custody to **an extended family member** over the objection of a natural parent may be granted only upon a finding, by clear and convincing evidence, that the parent is unfit, in which case the trial court must make a finding that the parent has abused, abandoned, or neglected the child as defined by chapter 39, Florida Statutes (1997)." [emphasis added by the court]. The Glockson court applied the definition section to the cause of action. *Id.*

In considering all the rules that apply when a court construes a statute, the court must conclude that as a paternal great-uncle, despite how loving, caring and well-motivated he may be, the law of the state of Florida does not permit the Petitioner to sue under this statute for temporary custody of this child.

The Effect Of This Ruling

A black robe is not a license for a judge to intervene in many of society's tragedies. The most difficult aspect of being a judge is watching horrible situations unfold and knowing that despite the awesome power of the judiciary, you are powerless to intervene. This case is one of those situations. This case has brought out strong feelings, passions, nowhere

CASE NO. 00-00479-FC-28

more visibly than in the streets of the city where this courthouse sits. Along with the people of the world, this court has watched the struggle between a family fighting for love and freedom and a father fighting for love and family. Which is more important? In the end, it depends on every person's individual experience.

Lazaro Gonzalez, and his wife Angela, and his daughter Marisleysis, have sacrificed their home, their health, and their peace of mind for this child. They nursed him through his recovery from his ordeal at sea and the loss of his mother. They are afraid for him, and are striving to do what they think is best for this child. This case has torn apart a once-close family. Although this court is constrained by the law to reach this result, but it must recognize the devotion and selflessness of this family.

This court also recognizes that the decision of this family court will be very difficult for those members of the community who had hoped desperately that the child could stay here. As family judges sitting in downtown Miami, we see case after case where families are separated because of the oppression and tyranny in Cuba. We handle divorce cases where fathers and mothers are divorcing spouses and children left in Cuba, whom they may never see. We see the pain in their faces when as we ask them about their children. In miles, this courthouse is roughly as close to Havana as it is to Orlando. This court knows that many in this community are sons and daughters, mothers and fathers, brothers and sisters of those who suffer the political oppression and tyranny of Cuba from the inside of a Cuban prison. They are angry and they are frustrated and they know exactly what the price of freedom is, and they are very afraid for this child. The experience of this community must be respected.

CASE NO. 00-00479-FC-28

Equally worthy of respect are those who have reached the opposite conclusion about where Elian Gonzalez should be. Those who believe that the child should be with his father understand the unbearable pain of the loss of a child. There is nothing to compare with the sorrow of an empty home where a child is missing. There are toys that will not be played with, a bed undisturbed. There is an awful silence that comes with the loss of a child that cannot be filled with any degree of noise other than the sound of that particular child. Every parent who has for a moment imagined their world without their child in it, the total fear and overwhelming emptiness, can empathize with Juan Miguel Gonzalez-Quintana. Some feel the father is selfish by insisting his son be returned to him -- but what parent really believes that anyone else could raise his child with the same degree of love and devotion as he? While we may not agree with Juan Miguel Gonzalez-Quintana's decision to live in Cuba, the freedoms which we stand for here in America require that we respect that decision, which the Attorney General has concluded is genuine and not coerced. Seeing the love and devotion to their Cuban homeland in our exile community, perhaps one can understand why Juan Gonzalez does not want to leave a country which many believe is Paradise lost.

The difference between the United States and Cuba is far wider than the 90 miles of the Florida Straits. Here, we live under a system of laws, not a system of men. The law is established by the representatives of our citizens in our legislature. This court is sworn to uphold the laws and the Constitution of the State of Florida, and is not free to substitute her individual opinions. If the law were what any one powerful person decreed it to be, then the differences between Cuba and America which make this case so difficult would vanish. None

CASE NO. 00-00479-FC-28

of us would be free. Our nation, and this state, guarantees the precious right to parent your children, in privacy, without the unfettered intrusion of others. That freedom necessitates this result. Courts must "reconcile ourselves to the idea that there are myriads of problems and troubles which judges are powerless to solve..." quoting United States Supreme Court Justice Warren Burger, in In Re Dubreuil, 603 So.2d 538 (Fla. 4th DCA 1992).

Judges watch television, too. I have watched Elian Gonzalez day after day. This is a beautiful child. He has survived the heart-wrenching loss of a mother and is enmeshed in the terror of a custody fight, and no matter how well-intentioned everyone in this case is, his days are filled with uncertainty. It is axiomatic in family court that six years old is too young to make life-altering decisions. What a lonely place for a six-year old. This is so hard for him. This is so hard for us all.

At this point, this child has become a joke on Letterman and Leno, a skit on Saturday Night Live, and an hourly update on daytime tv. We are losing sight of him as a child and starting to treat him as a thing. We need to stop. We need to turn off the cameras and let him return to the life of a child. The challenge with regard to this court's decision will be the choice of whether Elian Gonzalez will bring out the best in us all, or bring out the worst in us all. He deserves our best.

Orders

For the reasons stated above, this court terminates the effect of the order of January 10, 2000, and determines it does not have subject matter jurisdiction in this case, based

CASE NO. 00-00479-FC-28

on federal preemption and standing. This matter is dismissed. No motion for rehearing will be entertained.

Done and ordered in chambers at Miami, Miami-Dade County, Florida, this 13th day of April, 2000 at 12:02 p.m.

Circuit Court Judge Jennifer D. Bailey

Cc:
Service List & U.S. Attorney