O.A. 10-7-92 047

FILED
SID J. WHITE
JUL 15 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

8/10

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: 79,256
FIFTH DCA CASE NO.: 91-57

DEE ANN MIZE,

Petitioner,

vs.

DANNY WADE MIZE,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON MERITS

BRENDA LEE LONDON, ESQUIRE
Florida Bar No. 794112
Maitland Center
1051 Winderley Place, 4th Floor
Maitland, Florida 32751
(407) 660-8984

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner/Mother, Dee Ann Mize will refer to the Appendix to Petitioner's Initial Brief on Merits as (A.__).

STATEMENT OF CASE AND FACTS

Petitioner/Mother, Dee Ann Mize, (hereinafter "the Mother") and Respondent/Father, Danny Mize, (hereinafter "Respondent") were divorced on April 9, 1985. During the marriage, the respondent and the Mother had a child. The Final Judgment awarded custody of the minor child to the Mother. The minor child, Lauren Mize (hereinafter "Lauren"), is currently eleven (11) years old. In January, 1990, the Mother filed a Petition for Modification of the Final Judgment of Dissolution of Marriage (hereinafter "Petition for Modification"). (A.1).

Pursuant to the Petition for Modification, the Mother sought permission to move to California with Lauren, and consequently, she also sought to modify the respondent's visitation schedule with Lauren. Additionally, the Petition for Modification sought to increase the respondent's child support obligation, in accordance with Chapter 61, Florida Statutes. In retaliation, the respondent filed an amended response which sought primary residential custody of Lauren, allegedly based on the sexual orientation of the Mother. (A.2).

A Special Master was appointed to review the evidence and after extensive litigation, on October 15, 1990 filed a Report and Recommendation of Special Master (hereinafter "Special Master's Report"). (A.3) Pursuant to the Special Master's Report, the Special Master found that the mother met the heavy burden required to modify a final judgment: she had established by competent and substantial evidence both that there had been a substantial change in circumstance and the relocation was in the best interest of the child.

Specifically, the Special Master determined that there had been a substantial change in circumstances, in that Lauren's needs had increased since the entry of the Final Judgment in 1985, and that the respondent had not provided consistent financial support for the minor child. Additionally, the Special Master found the Mother had established that Lauren's needs would

best be served by allowing them to relocate to California, where she could improve her economic situation, home environment and educational possibilities for both her and Lauren. The Special Master determined:

> In the instant case, relocation appears to be in the best interest of the minor child. The Former Wife seeks to move to an area where the minor child will have financial, emotional and psychological stability, as well as the support of the paternal grandfather. Moreover, here in Florida, the minor child appears to be subjected to turmoil and pressure regarding her preference of one parent over the other. Furthermore, the Former Wife appears to be financially and emotionally able to facilitate regular and frequent visitation between the Former Husband and the minor child.
>
> . . . .
>
> In view of the fact that the mother has provided, and continues to provide, a loving, stable home environment for the minor child, it is in the best interest of the minor child that she remain in the custodial care of her mother. (A.3). (Emphasis added).

Moreover, the Special Master determined that the respondent did not meet his burden of proof to warrant a change in the primary custody of Lauren. The Special Master expressly found:

> The Former Husband has not satisfied the burden required by law for a modification of custody as he has not presented competent and substantial evidence that substantial and/or material changes in circumstances have occurred subsequent to the dissolution that were unknown at the time of the dissolution, nor has he shown by competent and substantial evidence that a change of custody would promote the best interest of the minor child. [Emphasis added].
>
> Furthermore, the Former Husband has failed to show competent and substantial evidence of an articulated concrete and specific connection between the Former Wife's sexual orientation and a negative and damaging impact on the minor child which could warrant the Former Wife's custody of the minor child to be changed, denied or restricted. Absent substantial, definite and relevant evidence to support such a nexus, the sexual orientation of the Former Wife cannot be the determinative factor in this cause. (A.3).

Accordingly, the Special Master determined that the Mother had unequivocally met her burden to modify the Final Judgment for Dissolution; moreover, the respondent miserably failed to meet his burden, and the trial court agreed.

On December 14, 1990, the trial court entered a Final Order on Petition For Modification of Final Judgment of Dissolution of Marriage. (A.4) In its Final Order, the trial court adopted the findings of fact and conclusions of law reported by the Special Master in their entirety. Accordingly, the trial court ordered that the Mother would retain primary residential custody of Lauren, and that she and Lauren would be permitted to relocate to California. Additionally, the trial court modified the visitation schedule to accommodate the respondent, and to provide for greater lengths of time for each visitation. Furthermore, the trial court ordered that the child support payments be increased pursuant to the Child Support Guidelines contained in Chapter 61, Florida Statutes, and that the respondent satisfy his child support arrearages by making monthly payments until the arrearages were satisfied in full.

On January 3, 1991, the respondent filed a Notice of Appeal of the trial court's Final Order on Petition for Modification of Final Judgment of Dissolution of Marriage. On March 28, 1991, Respondent filed his Initial Brief. (A.5). The Initial Brief argued that the trial court erred in entering the Final Order on Petition for Modification of Final Judgment of Dissolution of Marriage. In support of Respondent's argument, Respondent cited very little authority for his position, but simply relied upon the theme that the Mother leads an inappropriate lifestyle. On April 25, 1991, the Mother filed her Answer Brief arguing that she had met her burden of proof by presenting competent and substantial evidence and consequently, that the trial court did not abuse its discretion in entering the Final Order on Petition for Modification. (A.6). Respondent filed his Reply Brief on May 3, 1991, which merely echoed his one note theme, and which once again failed to provide any basis in fact or law to support his argument. (A.7). On

May 25, 1991, the National Center for Lesbian Rights filed an Amicus Brief. (A.8). The Amicus Brief dealt specifically with relevant issues concerning a homosexual parent raising a minor child.

On October 31, 1991, the Fifth District Court of Appeal entered a *per curiam* reversal of the trial court's Final Order on Petition for Modification of Final Judgment of Dissolution of Marriage. (A.9). The decision rendered by the Fifth District Court of Appeal states in its entirety:

> The appealed order which permitted the primary residential custodial parent to remove the child permanently from the State of Florida, where the non-custodial parent resides and has the right to visit with the child, is contrary to *Mast v. Reed*, 578 So. 2d 304 (Fla. 5th DCA 1991); *Cole v. Cole*, 530 So. 2d 467 (Fla. 5th DCA 1988); *Jones v. Vrba*, 513 So. 2d 1080 (Fla. 5th DCA 1987); *Giachetti v. Giachetti*, 416 So. 2d 27 (Fla. 5th DCA 1982); and for that reason must be reversed. (A.9).

As a result, not only did the Fifth District Court of Appeal reverse the trial court's final judgment which allowed the Mother to relocate to California with Lauren; by implication, the Fifth District Court of Appeal awarded custody to the respondent! Accordingly, on November 14, 1991, the Mother filed a Motion for Rehearing to which the respondent filed a reply on November 22, 1991. (A.10, 11) On December 17, 1992, the Fifth District Court of Appeal denied the Motion for Rehearing. (A.12). As a result, the trial court entered an Order on Petition to Enforce Final Judgment which required the Mother to place Lauren on an airplane and send her back to Florida to reside with the respondent, notwithstanding the fact that the Fifth District Court of Appeal had completely failed to address the issue of change in residential custody. (A.13).

Thereafter, on January 15, 1992, the Mother timely filed a Notice to Invoke Discretionary Jurisdiction. Petitioner's Jurisdictional Brief was filed on January 24, 1992. The

Jurisdictional Brief discussed the conflict between the Fifth District Court of Appeal and the other Florida District Courts of Appeal concerning the relocation of custodial parents with their children. On February 13, 1992, Respondent filed his Answer Brief which once again limited his argument to his views on the perceived evils of homosexuality, but totally failed to address the conflict issue. On June 19, 1992, the Supreme Court of Florida accepted jurisdiction to hear this case. Accordingly, Petitioner the Mother, respectfully submits her Brief on the Merits.

ISSUES ON APPEAL

I. WHETHER THE FIFTH DISTRICT COURT OF APPEAL MISAPPLIES THE STANDARD OF REVIEW IN CONSIDERING INTERSTATE MOVES OF FLORIDA PARENTS WHO HAVE PRIMARY RESIDENTIAL CUSTODY OF THEIR CHILDREN?

A. Most Florida District Courts of Appeal have applied an analysis which genuinely considers whether there has been a substantial change in circumstance and the best interest of the minor child.

B. The Fifth District Court of Appeal applies an analysis which pays "lip-service" to consideration of whether there has been a substantial change in circumstance and the best interest of the minor child, and merely concentrates on the best interest of the non-custodial parent.

II. WHETHER THE FIFTH DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S ORDER, WHICH GRANTED THE MOTHER'S PETITION FOR MODIFICATION, AND DENIED THE FATHER'S PETITION FOR CHANGE OF CUSTODY?

A. The Mother established both that there was a substantial change in circumstance, and it was in the best interest of the minor child, Lauren, to relocate with her to California.

B. The father failed to establish either that there was a substantial change in circumstance, or it was in the best interest of the minor child, Lauren, to warrant a change in custody.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal clearly misapplies the standard two-prong test in considering interstate moves for Florida parents who have primary residential custody of their children. The other district courts of Florida genuinely consider whether there has been a substantial change in circumstance, and the best interest of the child, when faced with a petition for modification to relocate. In applying this two-prong test, the courts should uniformly consider whether the move would be likely to improve the general quality of life for both the minor child and the primary residential parent. Additionally, the courts should consider whether the motive for seeking to relocate is to defeat visitation; whether the custodial parent will comply with adequate substitute visitation; and ultimately, whether the move is in the best interest of the child. The Fifth District court of Appeal simply pays "lip-service" to this analysis and has adopted an indefensible attitude that the custodial parent's personal wishes are somehow less worthy or valuable than the non-custodial parent's, thereby effectively sentencing the custodial parent to domestic purgatory in the state of Florida. The Fifth District Court of Appeal focuses its analysis on the non-custodial parent's "ready access" to the minor child.

In the instant, the Mother established by competent and substantial evidence that there was a substantial change in circumstance and it was in the best interest of the minor child to relocate to California. Furthermore, the trial court determined that the Father failed to carry his burden to warrant a change in custody. Nevertheless, the Fifth District Court of Appeal reflexively entered a *per curiam* reversal, which did not even attempt to justify its resulting implicit reversal of the Father's petition for change of custody.

Accordingly, this Court should set out specific guidelines for the District Courts of Appeal which genuinely analyze the important and often emotional issue of a custodial parent's

relocation with a minor child. The analysis applied by the Third District Court of Appeal does genuinely considers substantial changes in circumstance as well as the best interest of the child and should be adopted by this Court. Additionally, based on an appropriate analysis of the facts of the instant case, the Court must reverse the Fifth District Court of Appeal's decision.

ARGUMENT

I. THE FIFTH DISTRICT COURT OF APPEAL MISAPPLIES THE STANDARD OF REVIEW IN CONSIDERING INTERSTATE MOVES FOR FLORIDA PARENTS WHO HAVE PRIMARY RESIDENTIAL CUSTODY OF THEIR CHILDREN.

A. Most Florida District Courts of Appeal have applied an analysis which genuinely considers whether there has been a substantial change in circumstance and the best interest of the minor child.

With the striking exception of the Fifth District Court of Appeal, which will be detailed below, the appellate courts have been generally consistent in their review of petitions to relocate minor children from the State of Florida. These courts give serious consideration to, and genuinely apply, a two-prong test of whether the petitioner has proved that there has been a substantial change in circumstance, and whether the relocation is in the best interest of the minor child. The Third District Court of Appeal leads these courts in both the number and clarity of opinions on this issue.

The Third District Court of Appeal first addressed the issue of permitting a custodial parent to relocate to another state in *Matilla v. Matilla*, 474 So.2d 306 (Fla. 3d DCA 1985). In *Matilla*, the father claimed that the trial court erred in permitting the mother and child to return to her home in Michigan. The appellate court found that the trial court had not abused its discretion. In its opinion, the Third District Court of Appeal determined that a court should consider: the advantages of the move and the likelihood of improving the custodial parent's and child's quality of life; the motives behind the relocation; and whether the non-custodial parent is likely to comply with substitute visitation orders. Id. at 307. Significantly, the court noted that:

> The court should not insist that the advantages of the move be sacrificed ... solely to maintain weekly visitation by the father ... Id.

In *Zugda v. Gomez*, 553 So.2d 1295 (Fla. 3d DCA 1989), the Third District Court of Appeal revisited the issue of a custodial parent seeking to relocate with a minor child. In *Zugda*, the custodial parent removed her child from Florida, where the father resided, and the father filed a Motion to Modify Residential Custody. The trial court granted his motion and ordered that the mother move back to Florida or lose custody of the child. The mother appealed the order.

The appellate court stated that for the father to prevail on the petition for modification, he bore the standard dual burden of showing that there had been a substantial change of circumstances as a result of the move, and that the best interest of the child would be served by a change in custody. Id. Furthermore, the court stated that the "law in Florida is clear that in the absence of compelling circumstances the custodial parent's move to a foreign state is not a substantial change of circumstances which would support a change of custody." (Emphasis added). The *Zugda* court held that the mother's desire to relocate was insufficient to justify a change of custody. Id. at 1297.

The next issue addressed by the court was whether the move was in the child's best interest. The court concluded that, although the child would enjoy fewer visitation periods with the non-custodial father, they would be of longer duration, and he would not suffer as a result. Id. at 1297. Consequently, the Third District Court of Appeal ruled that the best interest of the child was to remain with the custodial mother.

The clearest illustration of the Third District Court of Appeal's analysis in considering a petition for modification to relocate is found in *Hill v. Hill*, 548 So.2d 705 (Fla. 3d DCA 1989). In *Hill*, the trial court denied the custodial mother's petition to relocate to Alabama.

The Third District Court of Appeal outlined the elements to be used to resolve these relocation dilemmas. Specifically, the Third District Court of Appeal considered the following:

> 1. Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children.
>
> 2. Whether the motive for seeking the move is for the express purpose of defeating visitation.
>
> 3. Whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements.
>
> 4. Whether the substitute visitation will be adequate to foster continuing meaningful relationship between the child or children and the noncustodial parent.
>
> 5. Whether the cost of transportation is financially affordable by one or both of the parents.
>
> 6. Whether the move is in the best interest of the child. (This sixth requirement we believe is a generalized summary of the previous five.)Id. at 706.

The appellate court held that the trial court's decision prohibiting the mother's move was error. The concurring opinion in *Hill* declares that those cases which "exalt the father's convenience" in seeing the children at the place he desires are based on an "indefensible attitude that the mother's personal wishes are somehow less worthy and valuable than the desires of a male parent . . ." Id. at 708 (Emphasis Added).

Most recently, the Third District Court of Appeal affirmed the trial court's order allowing the custodial parent to move with the minor child to **Israel**. *Tamari v. Turko-Tamari*, 17 FLW D1150 (Fla. 3d DCA 1992). In *Tamari*, the mother testified that she was amenable to a visitation schedule which would allow her former husband an amount of time with his son equal to that which he presently enjoyed. In granting the petition, the trial court applied the *Hill* criteria, finding:

1. The move would likely improve the general quality of life for both the child and the mother.

2. That the former wife's motive to relocate is sincere, and is not for the intent of defeating visitation.

3. That the former wife will be likely to comply with substitute visitation arrangements.

4. That the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and his father.

5. The cost of transportation is financially affordable by the former wife.

Consequently, the Third District Court of Appeal affirmed the trial court's authorization for the mother to relocate to Israel with the minor child. Specifically, the Third District Court of Appeal held that the trial court applied the correct case law (citing *Hill, supra*), and secondly, that there was substantial competent evidence to support the court's factual findings.

The Fourth District Court of Appeal applied a similar analysis to the relocation issue in *Bachman v. Bachman*, 539 So. 2d 1182 (Fla. 4th DCA 1989). See also, *DeCamp v. Hein*, 541 So.2d 708 (Fla. 4th DCA 1989), and *Britt v. Shovein*, 559 So.2d 749 (Fla. 4th DCA 1990). In *Bachman*, supra, the trial court permitted the custodial parent to move with the minor child to New Jersey. The Fourth District Court of Appeal found no abuse of discretion, even though the father's "ready access" to the minor children would be "curtailed", because he would still be able to have contact by telephone.

Most recently, however, the Fourth District Court of Appeal affirmed a denial of a mother's petition to relocate with her children to another state. *Ferguson v. Baisly*, 593 So.2d 319 (Fla. 4th DCA 1992). In a dissenting opinion, Judge Anstead stated that the trial court's order denying the mother's petition to relocate should be reversed. Furthermore, Judge Anstead

stated that the question should be certified as one of great public importance for resolution by the Florida Supreme Court, because of the need for uniformity and clearer guidelines than presently exist in the district court opinions. Specifically, Judge Anstead states:

> ...it would make as much or more sense to require the father to move entirely to the mother's chosen home so as to exercise his access to the children, as the reverse requirement that the mother remain where she does not wish to live in order to accommodate the father. Viewed in this light, I must think that those cases which exalt the father's convenience in seeing the children at the place he makes his living over a sincere desire of the mother to live where she wishes . . . are informed by a thoroughly indefensible attitude that the mother's personal wishes are somehow less worthy and valuable than the desires of the male parent and the preference accorded the place where he pursues the money-making function he still so often performs in our society...

The Second District Court of Appeal applied the same two-part standard in denying a custody change, specifically holding that an interstate move for employment reasons did not constitute a substantial change in circumstance. *Nissen v. Murphy*, 528 So.2d 502 (Fla. 2d DCA 1988). Although the non-custodial parent complained of "restricted" visitation, the appellate court approved the trial judge's decision to simply alter the length of that visitation. See also, *Lenders v. Durham*, 564 So.2d 1186 (Fla. 2d DCA 1990).

The First District Court of Appeal affirmed an order granting a mother's petition to temporarily move with her children to Japan. The Court in *McIntyre v. McIntyre*, 452 So.2d 11 (Fla. 1st DCA 1984), found that there had been a substantial change of circumstances and the move was in the child's best interest, notwithstanding the "serious impact upon the father visitation rights." Id. at 20.

Although the First, Second, Third, and Fourth District Courts of Appeal have addressed the issue of a custodial parent relocating out of state by genuinely analyzing whether there has been a substantial change of circumstances and applied a detailed examination as to whether it

is in the best interest of the child, the Fifth District Court of Appeal has chosen a very different analysis.

B. The Fifth District Court of Appeal applies an analysis which pays"lip-service" to consideration of whether there has been a substantial change in circumstance and the best interest of the minor child, and merely concentrates on the best interest of the non-custodial parent.

It is readily apparent that the Fifth District Court of Appeal applies a much different version of the familiar two-prong test; one which centers on the non-custodial parent's best interest. This deviation is one which has been noted with disfavor, not only by other appellate courts, but within the Fifth District itself. Most important, the Fifth District's aberrant application inflicts a great injustice on those about whom it should be the most concerned: the children.

The touchstone for the Fifth District Court of Appeal's line of cases is *Giachetti v. Giachetti*, 416 So.2d 27 (Fla. 5th 1982). In *Giachetti*, the Fifth District Court of Appeal pays lip service to the acknowledged standard to be applied in a petition for modification of a custody order, and maneuvers through a tortured line of reasoning to accomplish its goal in preventing removal of the children at issue from Florida. It would appear that the Fifth District Court of Appeal is more concerned with the convenience of the non-custodial parent than the best interest of the child.

In *Giachetti*, the mother was initially granted custody of her minor children. Upon learning of the mother's impending move out of state, the father filed a petition to modify the final judgment of dissolution and sought custody of the children. The trial court granted the petition. The Fifth District Court of Appeal decided that the trial court was correctly concerned that the proposed move would "impair, impede and destroy the non-custodial parent's right of free access to his children and would hamper the natural development of the childrens' love and

affection for their father", which the court held would violate the terms of the final judgment. Id. at 29. Based on this premise, the Fifth District Court of Appeal, with twisted logic deemed the father's request, not as a petition to modify, with that action's inherent burden of proof, but merely as a "request to enjoin the violation of the custodial parent of the terms of the Final Judgment." Id. The court generously offered that if the wife was so inclined, she could petition for a modification; of course, that meant she must then satisfy the burden. The Fifth District Court of Appeal thus laid the foundation for its continuing greater concern for the non-custodial parent's convenience over that of the custodial parent's right to choose the best place for his or her family to live.

This viewpoint was again expressed in *Jones v. Vrba*, 513 So.2d 1080 (Fla. 5th DCA 1987), which cited *Giachetti*, *supra*, in its reversal of a grant of permission for a mother to move out of Florida and denial of a concomitant petition of custody change by the father. The Fifth District Court of Appeal in *Jones* noted that:

> The move from Florida, severely restricts the contact between the father and son. . . The record shows that the mother failed to show any bona fide reason for the removal of the child from his father's ready access, save her desire to be with the serviceman she chose to marry and travel with as his career requires.

Id. at 1081.

The Fifth District Court of Appeal held the mother to the traditional burden in her petition to remove the child, belittling her argument that she can make a better home for her son with her husband, and portraying her as little more than a camp follower. On the other hand, although the Fifth District Court of Appeal winked at the requirement that this standard also be applied to the father's petition, the Court's only focus was the convenience of the father's ready access. Id. at 1782.

The Fifth District Court of Appeal closely followed the *Jones* decision in *Cole v. Cole*, 530 So.2d 467 (Fla. 5th DCA 1988). In *Cole*, the Fifth District Court of Appeal again reversed a trial court's denial of a father's petition for change of custody. As in *Jones, supra,* the mother in *Cole* sought to move with her child out of Florida, but she was denied by the Fifth District Court of Appeal with language nearly identical to that in *Jones, supra.* The *Cole* court noting its similarity to *Jones, supra*, held that the mother had not met the burden necessary to obtain the modification of the judgment. Once again, the discussion of the father's burden was primarily limited to a concern that "the move from Florida would severely restrict the previous extent of contact between the father and the child." Id. at 469.

The Fifth District Court of Appeal in an *en banc* decision issued on March 14, 1991, once again considered whether to allow a custodial parent to remove her child from Florida. *Mast v. Reed,* 578 So.2d 304 (Fla. 5th DCA 1991). In *Mast,* the court reversed a decision denying a mother's petition to relocate with her child. The appellate opinion reversed the trial court's order, which granted the father's counter petition for change of custody. The Fifth District Court of Appeal applied a detailed analysis of the evidence and found that the father had not sustained the allegations of his petition. Notably, a specific section of the opinion is devoted to possible "INTERFERENCE WITH FATHER-SON CONTACT." Id. at 306.

Of most significance in the *Mast* case, however, is the opinion filed by Judge Sharp, in which she concurred and dissented with the plurality. Judge Sharp observed that her opinion began as the proposed majority opinion for the three-judge panel. Her goal she stated, was to bring the Fifth District Court of Appeal "into harmony with (the views on interstate moves of custodial parents) now expounded by our sister courts." Id. at 307. Judge Sharp recognized that the party seeking to modify a custody judgment carries the heavy burden to prove that there

has been a substantial change in circumstances and that the best interest of the child are served. Id. at 310. But, she asked: "Exactly what does this mean and who has the burden?" In addressing this question, Judge Sharp notes that:

> a custodial parent's genuine need to leave Florida with a minor child because of a new marriage appears about as 'material and substantial' a change in that party's life circumstances as is imaginable, short of being declared dead or paralyzed after being run over by a Mack truck. Id. at 310.

As discussed above, this type of drastic change did not meet the acknowledged standard as applied by the Fifth District Court of Appeal. Accordingly, Judge Sharp found that the court's controlling line of cases lead to the conclusion that the mother's petition must fail. Judge Sharp concluded that "*Cole* and *Giachetti* are fundamentally erroneous." Id.

> Focusing entirely on a non-custodial parent's biweekly visitation rights entirely ignores the devastating impact on the custodial parent if he or she could not leave this state. (citations omitted) A child's day-to-day welfare depends much more on the custodial parent's circumstances than that of the visiting parent. To prohibit a move by the custodial parent may well deprive the child of greatly improved living conditions. . . . [I]t is both parochial and punitive to continue to confine Florida's custodial parents to this state as matter of law, or face loss of residential custody of their children. Id.

Finally, Judge Sharp applied the criteria which the sister courts utilize when a parent seeks to relocate with a child, believing that these factors should be employed by her own court.

II. THE FIFTH DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S ORDER, WHICH GRANTED THE MOTHER'S PETITION FOR MODIFICATION, AND DENIED THE FATHER'S PETITION FOR CHANGE OF CUSTODY.

An appeal is to be reviewed with the recognition that the decisions of a trial court are cloaked with the presumption of correctness and that the burden is upon the appellant to demonstrate error. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979). As well-demonstrated below, the respondent did not carry this burden.

A. The Mother established both that there was a substantial change in circumstance, and it was in the best interest of the minor child, Lauren, to relocate with her to California.

First, the trial court, through the Special Master, determined that the Mother had proved by "substantial and competent evidence" that there had been a substantial change in circumstance. (A.3). Specifically, after having heard extensive testimony, the Special Master made the following findings of fact. The Special Master found:

(1) Lauren's needs had increased in the five years subsequent to the dissolution.

(2) The Mother had paid for counseling that Lauren had required.

(3) The Mother had paid for Lauren's medical and dental expenses despite the final judgment requirement that the father be primarily responsible for medical insurance.

(4) The Father had failed to provide regular and/or substantial support for Lauren; moreover, arrearages had accrued. The psychiatrist testified that the father's position respecting his child support obligation was merely something he should "pay when he can", which clearly was not a high priority for him. Further, the former husband was capable of employment and of providing the necessary child support.

Second, the Special Master determined that the Mother had proved by "substantial and competent evidence" that it was in the best interest of the child to relocate with the Mother to California. Specifically, the Special Master found:

(1) The move would improve the quality of the economic circumstances of the Mother, as well as Lauren's home and school environment.

(2) The Mother did not seek to limit the visitation of Lauren with the Father and encouraged visitation consistent with the best interest of the child.

(3) The Mother could afford to assist in the minor child's transportation to ensure a continuing relationship with the Father.

Additionally, the Special Master noted:

> In the instant case, relocation appears to be in the best interest of the minor child. The Former Wife seeks to move to an area where the minor child will have financial, emotional, and psychological stability, as well as the support of the paternal grandfather. Moreover, here in Florida, the minor child appears to be subjected to turmoil and pressure regarding her preference of one parent over the other. Furthermore, the Former Wife appears to be financially and emotionally able to facilitate regular and frequent visitation between the Former Husband and the minor child.

Clearly, the Mother met the requirements necessary to grant her Petition for Modification. The trial court had more than ample basis to enter its order which granted the Mother's Petition. The Fifth District Court of Appeal utterly failed to cite any basis for its implicit ruling that the trial court had abused its broad discretion *Adams v. Adams*, 477 So.2d 16 (Fla. 1st DCA 1985). Rather, it reflexively entered a *per curiam* reversal based on the aberrant *Giachetti* case and its progeny.

B. The father failed to establish either that there was a substantial change in circumstance, or it was in the best interest of the minor child, Lauren, to warrant a change in custody.

As will be demonstrated below, not only did the respondent fail to meet the requirements necessary to obtain a modification, the Fifth District Court of Appeal did not so much as attempt to justify its resulting implicit reversal of this portion of the trial court's final judgment.

It is clear that the trial court had ample basis to deny the respondent's petition to modify the custody award as evinced by the Special Master's Report. The Special Master specifically found:

> The Former Husband has not satisfied the burden required by law for a modification of custody as he has not presented competent and substantial evidence that substantial and/or material changes in circumstances have occurred subsequent to the dissolution that were unknown at the time of the dissolution, nor has he shown by competent and substantial evidence that a change in custody would promote the best interest of the minor child.

The respondent's sole basis for arguing that a change in custody was warranted centered on the Mother's sexual orientation. However, not only did the evidence indicate that the respondent was aware of this situation prior to the divorce, but after careful consideration, determined that it was not a basis for change in custody. Specifically, the Special Master found:

> (1) The Former Wife has utilized appropriate parenting skills and has sought counseling for her child when needed.
>
> (2) The objective tests performed by qualified psychologists indicate that the minor child is emotionally sound.
>
> (3) There is no evidence (other than hearsay statements of the minor child), that the minor child has ever been exposed to any of the Former Wife's sexual acts.
>
> (4) The testimony of both experts indicates that it is the minor child's perception that the Former Wife is more dependable, and that she is the parent to whom the child goes to for primary support.
>
> (5) It is not the Former Wife's intention to expose the minor child to any environment which is primarily homosexual.
>
> (6) It is in the best interest of the minor child to avoid placing her in a position (in) which she may hear disparaging remarks or (be) exposed to disparaging attitudes towards her mother's sexual preference.

Moreover, the Special Master determined that the Father:

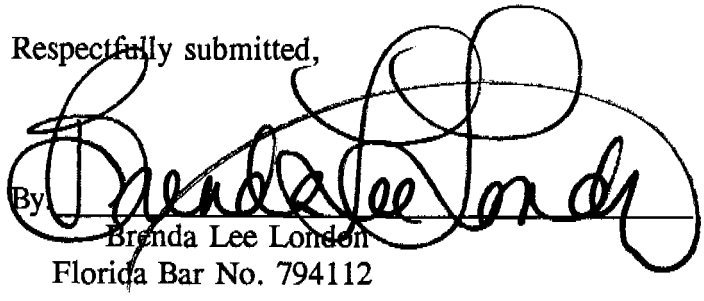
> had failed to show competent and substantial evidence of an articulated concrete and specific connection between the former wife's sexual orientation and a negative and damaging impact on the minor child which could warrant the former wife's custody of the minor child to be changed, denied, or restricted.

Consequently, the respondent utterly failed to meet either of the two requirements necessary to warrant a change in custody. Furthermore, the Fifth District Court of Appeal was apparently unable to proffer the semblance of a basis to reverse the trial court's order denying the father's petition to change custody, which is completely indefensible.

CONCLUSION

The Florida Supreme court should adopt the analysis found in *Hill, supra,* when considering interstate moves of Florida parents who have primary custody of their children. Additionally, this Court should reverse the Fifth District Court of Appeal's decision which denied the Mother's petition for modification to relocate to California, and implicitly granted the Father's petition for change of custody.

Respectfully submitted,



By: _____
Brenda Lee London
Florida Bar No. 794112

Maitland Center, 4th Floor
1051 Winderley Place
Maitland, Florida 32751
(407) 660-8984
Attorneys for Petitioner

OA 10-7-92

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: 79,256
FIFTH DCA CASE NO.: 91-57

DEE ANN MIZE,

Petitioner,

vs.

DANNY WADE MIZE,

Respondent.
_____/

APPENDIX TO PETITIONER'S INITIAL BRIEF ON MERITS

BRENDA LEE LONDON, ESQUIRE
Florida Bar No. 794112
Maitland Center
1051 Winderley Place, 4th Floor
Maitland, Florida 32751
(407) 660-8984

Attorney for Petitioner

INDEX TO APPENDIX