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SID J. WHITE
JAN 27 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DEE ANN TERRY MIZE,

Petitioner,

vs.

DANNY WADE MIZE,

Respondent.
_____/

5th DCA CASE NO.: 91-57

79,256

PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

BRENDA LEE LONDON, ESQUIRE
Florida Bar No. 794112
M. SUSAN SACCO, ESQUIRE
Florida Bar No. 341721
Maitland Center, 4th Floor
1051 Winderley Place
Maitland, Florida 32751
(407) 660-8984

Attorneys for Petitioner

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STATEMENT OF THE CASE AND FACTS

On October 31, 1991, the Fifth District Court of Appeal ("5th DCA") filed its Opinion in this case. (Ap.1). Pursuant to the Opinion, the court per curiam reversed the Final Order on Petition for Modification of Final Judgment of Dissolution of Marriage, (hereinafter, "Order"). The trial court entered the Order on December 14, 1990. (Ap.2). In the Order, the trial court adopted the findings of fact and conclusions of law of the Special Master, (Ap.3), and determined that the Petitioner, DEE ANN TERRY MIZE, (hereinafter, "DEE MIZE"), would retain primary residential custody of her child, and be permitted to relocate with the child to California. In light of this relocation, the Order modified the visitation schedule of the Respondent, DANNY WADE MIZE.

On November 14, 1991, DEE MIZE, timely filed a Motion for Rehearing, Motion for Rehearing En Banc, and Motion to Certify Questions and Certify Conflict to Supreme Court. On December 17, 1991, the 5th DCA entered an Order Denying Motion for Rehearing, Motion for Rehearing En Banc, and Motion to Certify Questions and Certify Conflict to Supreme Court. (Ap.4). Accordingly, on January 15, 1992, DEE MIZE, timely filed a Notice to Invoke Discretionary Jurisdiction. (Ap.5).

SUMMARY OF THE ARGUMENT

The Supreme Court should exercise its discretionary jurisdiction to review this case, because the 5th DCA's Opinion in question is in direct conflict with the remaining DCAs regarding the issue of the interstate relocation of a child by the custodial parent. All DCAs recognize the two-prong standard which courts should apply in deciding whether a custodial parent can remove a child from the state. The 5th DCA is alone, however, in its application of this standard. Succinctly, all DCAs acknowledge that to permit relocation there must be a substantial change in circumstances and that the move be in the best interests of the child. In direct conflict with the remaining DCAs, the 5th DCA gives primary importance to the convenience in visitation of the non-custodial parent when making this analysis.

Accordingly, the Supreme Court should exercise its discretionary power to resolve this direct conflict and harmonize the application of the standards which are to be applied by the DCAs.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another District Court of Appeal on the same point of law. *Article V, Section 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).*

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DIRECTLY CONFLICTS WITH DECISIONS OF THE REMAINING DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

Jurisdiction in the Supreme Court is conferred, because the Fifth District Court of Appeal ("5th DCA") decision expressly and directly conflicts with decisions of the remaining District Courts of Appeal ("DCAs"). The decision is in direct conflict with these appellate courts with respect to its application of the law regarding the criteria and analysis to be used in determining whether a custodial parent should be permitted to relocate with a minor child outside the state of Florida. Generally, the DCAs uniformly address two concerns in determining this issue. First, the courts determine whether there has been a substantial change in circumstances; and second, the courts look at what is in the best interest of the child. The 5th DCA, however, has adopted its own test which primarily addresses the best interests of the non-custodial parent, usually the father.

The appellate opinion at issue is a **per curiam reversal** and does not explicitly identify a direct conflict with other district court opinions; however, such an acknowledgment is not necessary. *Ford Motor Co. v. Kikis,* 401 So.2d 1341 (Fla. 1981). The cases cited as support for the opinion: *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); and *Giachetti v. Giachetti,* 416 So.2d 27 (Fla. 5th DCA 1982) are in direct conflict with cases cited in other district courts.

The Third District Court of Appeal, ("3d DCA") 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 judge erred in permitting the mother and child to return to her home in Michigan. The appellate court found no abuse of discretion in the trial court's ruling. Id. In its opinion, the 3d DCA determined that it should consider: the advantages of the move and the liklihood 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.

Additionally, 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 3d DCA revisited the issue of a custodial parent seeking to relocate with the minor child. 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 the mother to 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 interests 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 interests. 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 will not suffer. Id. at 1297. Consequently, the 3d DCA ruled that the best interest of the child was to remain with the custodial mother.

The clearest illustration of the direct conlfict between the 5th DCA and the remaining district courts 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 appellate court outlined the elements to be used to resolve relocation dilemmas. *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*, states 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 the male parent..."** (Emphasis added). Id. at 708.

The Fourth District Court of Appeal, ("4th DCA") applied a similar analysis to this 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 children to New Jersey. The appellate court 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.

The First and Second District Court of Appeal, ("1st DCA and 2d DCA") have issued decisions consistent with those of the 3d and 4th DCAs. The 2d DCA applied the same two-prong standard in denying a custody change, specifically holding that an interstate move for employment reasons did not constitute a substantial change in circumstances. *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 1st DCA 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 in circumstances and the move was in the child's best interests, notwithstanding "the serious impact upon the father's visitation rights." *Id.* at 20. Clearly, the 1st and 2d DCAs, unlike the 5th DCA did not grant primary importance to the non-custodial parents in this matter.

Although the 1st, 2d, 3d, and 4th DCAs have uniformly addressed the issue of a custodial parent relocating out of state by **genuinely** analyzing whether there has been a substantial change in circumstances and whether it is in the best interests of the child, the 5th DCA has chosen a very different

analysis which centers on the non-custodial parent's best interests.

The touchstone for the 5th DCA line of cases is *Giachetti v. Giachetti, supra.* In *Giachetti*, the 5th DCA pays lip service to the acknowledged standard to be applied in a petition for modification of a custody order, then maneuvers through a tortured line of reasoning to accomplish its goal of preventing removal of the children at issue from Florida. Succinctly, that court is more concerned with the convenience of the non-custodial parent than the best interests of the child.

In *Giachetti*, the mother was granted custody of her children. Upon learning of the mother's impending move out of state, the father filed a petition to modify the final judgment of dissolution to change custody of the children to himself. The appellate court decided 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 children's 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 5th DCA, with twisted logic deemed the father's request, not as a petition to modify, with that action's inherent burden of proof, but rather 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 were so inclined, she could petition for modification; of course she must then satisfy the burden. The 5th DCA thus laid the foundation for its continuous concern for the non-custodial parent's convenience over that of the custodial parent's right to choose the best place for her family to live.

This viewpoint is expressed again in *Jones v. Vrba, supra,* which cites *Giachetti, supra,* in its reversal of a grant of permission of a mother to move out of Florida and denial of a concomitant petition of custody change by the father. The 5th DCA in *Jones* noted that:

> The move ...severely restricts the contact between 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.** (Emphasis added). *Id.* at 1081.

The 5th DCA held the mother to the traditional standard in her petition to remove the child,

belittling her argument that she could make a better home for her son with her new husband, portraying her as little better than a camp follower. On the other hand, although the 5th DCA winked at the requirement that this standard be applied to the father's petition, the court once again merely focused on the convenience of the "father's ready access." *Id.* at 1082.

The 5th DCA closely followed the *Jones* decision with that of *Cole v. Cole, supra.* The appellate court again reversed a trial court's denial of a father's petition for change of custody. As in *Jones*, the mother in *Cole*, sought to move with her child out of Florida, but she failed, the 5th DCA noted, with language nearly identical to that in *Jones*. The *Cole* court noting its similarity to *Jones*, held that the mother had not met the burden necessary to obtain a modification of the judgment. Once again, the discussion of the father's burden was primarily limited to a concern that "the move from Florida will severely restrict the previous extensive contact between the father and the child." *Id.* at 469.

Although the direct conflict necessary to obtain this Court's jurisdiction cannot be found within, rather than among or between the DCAs. However, it is significant that the issue *sub judice* has been recognized and addressed by Judges at the 5th DCA itself.

The 5th DCA in an *en banc* decision issued on March 14, 1991, once again considered whether to allow the custodial parent to remove her child from Florida. In *Mast v. Reed, supra*, the court reviewed a decision denying a mother's petition to relocate with her child. The court also granted the father's counterpetition for change of custody. The 5th DCA reversed the finding that the father had not sustained the allegations of his petition.

Of most significance to the instant matter, 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 was to bring the 5th DCA "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 a heavy burden which proves a substantial change in circumstances and that the best interests of the child are served.

Id. at 310. But, she asks: 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.

As discussed above, this type of vast change did not meet the acknowledged standard as applied by the 5th DCA. Accordingly, Judge Sharp found that that court's controlling line of cases led to the conclusion that Mrs. Mast's petition should fail. Judge Sharp concluded that "***Cole* and *Giachetti* are fundamentally erroneous."** *Id.* (Emphasis added)

> Focusing narrowly on the noncustodial parent's biweekly visitation rights entirely ignores the devastating impact on the custodial parent if he or she cannot 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 a matter of law, or face loss of residential custody of their children. *Id.*

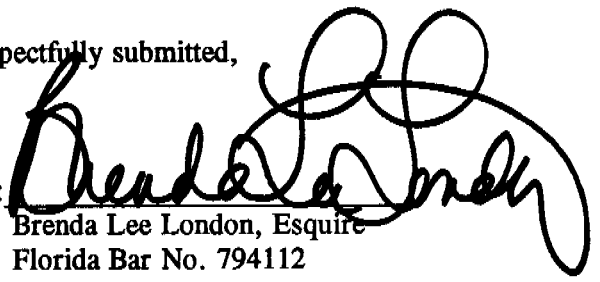
Finally, Judge Sharp applied the criteria to the *Mast* facts which the 5th DCA's sister courts apply when a parent seeks to remove a child, believing that these factors should be similarly employed by her own court.

Accordingly, it is clear that the 5th DCA is out of step with the remaining DCAs as recognized both within the 5th DCA itself, as well as by other DCAs. The 5th DCA should employ the same analysis with respect to the standard applied when determining whether a custodial parent can remove a minor child from the state of Florida.

CONCLUSION

The Supreme Court has discretionary jurisdiction to resolve the conflict created by the 5th DCA with respect to the proper application of the standard to be applied when a custodial parent seeks an interstate relocation of a minor child.

Respectfully submitted,

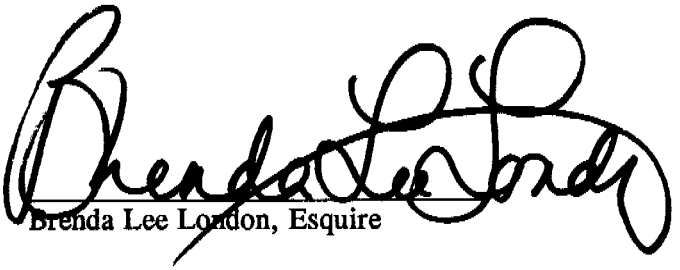
BY: 

Brenda Lee London, Esquire
Florida Bar No. 794112
and
M. Susan Sacco, Esquire
Florida Bar No. 341721
1051 Winderley Place, 4th Floor
Maitland, Florida 32751
407/660-8984

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to **Jack Nants, Esquire**, 13 South Magnolia Avenue, Post Office Box 1191, Orlando, Florida 32802, and **Kelvin L. Averbuch, Esquire**, 3008 East Robinson Street, Orlando, Florida 32803, this 24th day of January, 1992.



Brenda Lee London, Esquire