No Request Case

017

STATE OF FLORIDA
SUPREME COURT

RICHARD ALLEN DOBSON,

Petitioner,

vs.

JULIA HAYDEN SAMSON,

Respondent.
_____/

CASE NO. 80,028

(5th DCA Case No. 91-1991)

DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

==========

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATE OF FLORIDA
SUPREME COURT

RICHARD ALLEN DOBSON,

Petitioner,

vs.

JULIA HAYDEN SAMSON,

Respondent.

CASE NO. 80,028

(5th DCA Case No. 91-1991)

STATEMENT OF THE CASE AND THE FACTS

A. Nature of the Case

This case involves a request by a primary residential father to relocate the residence of his six and one-half year old daughter to Cedar Rapids, Iowa, thereby radically altering the pattern of shared parental responsibility between the parties wherein the mother, for the past four years, has had contact with the minor child on an average of sixteen of every twenty-eight days.

B. Course of Proceedings and Disposition Below

The Respondent agrees with many of the points stated in Appellant's "Course of Proceedings and Disposition Below" and will not restate the course of the proceedings. However, certain additions are required.

The Supplemental Final Order regarding shared parental responsibility, primary residential care, visitation and child support originally issued by the Court at the end of the dissolution proceedings on October 27, 1987 incorporated by reference the Settlement Agreement regarding Shared Parental

Responsibility, Primary Residential Care, Visitation and Child Support (R.111-118). That portion of the Agreement specifically stating the shared parental responsibility arrangement is as follows:

> 1. Shared Parental Responsibility, Primary Residential Care, Visitation.
>
> The parties shall have shared parental responsibility for their minor child, Alexandra Lee Dobson, pursuant to Section 61.13, Florida Statutes, (1985). The Former Husband, Richard Allen Dobson, shall have primary residential care for the minor child and the Former Wife shall have liberal and open visitation for extended periods of time to foster a loving atmosphere and to allow the child free and open access to both parties. Both parents shall confer so that major decisions affecting the welfare of their child shall be determined jointly. The Former Wife shall be entitled to visitation at the following minimum times:
>
> (a) alternate weekends from Friday at 4:00 p.m. to Monday at 8:00 a.m.;
> (b) each Wednesday beginning at 12:00 noon until 8:00 a.m. Thursday;
> (c) the Former Wife shall also be permitted to have sixty (60) minutes of unsupervised telephone contact with the minor child each week;
> (d) Four weeks in the summer, at a time mutually agreed to by the parties, during which the Husband will be permitted to visit with the child; and
> (e) Alternate holidays (and holiday periods) on alternate years with exact holiday periods and times to be agreed upon by the parties.
> (f) Any other times as the parties can mutually agree on.
>
> The parties will cooperate so that visitation does not interfere with the child's school or extracurricular activities. (R115-116). (Emphasis added).

Appellant's references to the trial court's findings in the modification proceeding omits the following:

Specific Findings of the Trial Court:

> "G. The child's maternal grandmother, with whom she has regular contact, and paternal grandparent, with whom she has regular contact, all reside in the Orlando area."
>
> ...
>
> "J. As a result of this child's young age, six and one-half years, the Court agrees with the testimony of the mother's expert, Carl Nickerson, Phd., that frequency of contact is important to maintain the existing relationship between the child and the mother."
>
> ...
>
> "K. While there may be circumstances in the future justifying a relocation, this Court finds that under the facts and circumstances of this case the desire to relocate by the father is outweighed by the benefit to the child of maintaining frequent and continuing contact with the mother. As a result of there being no direct flights between Orlando and Cedar Rapids, Iowa and considering the financial position of parties, the Court does not believe that the current pattern of frequent and continuing contact between the minor child and the mother could be maintained in the event of the relocation." (R.276-277).

Respondent further objects to the characterization of the Fifth District Court of Appeal opinion which affirmed the decision of the trial court based in great part upon the following:

> "The trial judge found that under the facts and circumstances the desire and benefits to the father and his new family and the child were outweighed by the benefit to the child of maintaining frequent and close continuous contact with the mother and the mother's right to continue frequent visitation and effective shared parental responsibility. Dobson v. Samson, 598 So.2d 139 (Fla. App. 5th DCA 1992) (Emphasis added).

Further, the Fifth District Court of Appeal simply said that they agreed with the trial judge and affirmed on the authority of Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

C. Statement of the Facts

Appellant's Statement of the Facts gives great emphasis to the position of Mr. Dobson, but lacks great emphasis with respect to Julia Samson's circumstances and that of the minor child, Alex.

At the time of the divorce in April, 1987, Alex was two years and four months of age (R.107). At the time of the trial from which this appeal is taken, Alex had reached the age of six years and seven months (R.274). While the Former Husband received primary residential responsibility for the minor child, the same Agreement provided that "the Former Wife shall have liberal and open visitation for extended periods of time to foster a loving atmosphere and to allow the child free and open access to both parties" (R.116). Thereafter, for a period of four years, the mother consistently had contact with Alex for parts of sixteen out of each twenty-eight days (R.49), a relationship which clearly is the epitome of shared parenting as contemplated by Florida law since July 1, 1982, the effective date of Florida's Shared Parental Responsibility law, Fla.Stat. 61.13 (1982).

Julia has lived in her present home, a lakefront home with a pool, for four years and Alex knows this as her home also (R.70). Further, Alex has a half brother, Christopher, (Julia's

child by a former marriage) whom Alex has known all of her life (R.28). Alex has never been separated from her mother for more than one week, other than for one vacation (R.27).

Alex's maternal grandmother resides in Winter Park (R.78), and Alex's paternal grandmother and grandfather also reside in Central Florida (R.29).

A relocation would result in her removal from her mother, her step-father, her half brother, her maternal grandmother, her paternal grandfather and paternal grandmother, as well as the home that she has known all of her life. Additionally, the proposed contact schedule put forth by Appellant would result in Alex having minimal contact in the future with her half brother, Christopher, who by virtue of his contact arrangement with his father would be gone for substantial portions of the summer, Easter break, and Christmas when Alex would have the opportunity to be with her mother (R.78).

Richard Dobson is a computer systems engineer, employed by Tracor Applied Sciences at an income of $42,000.00 per year (R.22). He has received an offer of employment from Iowa Electric Power at a salary of $50,000.00 per year as a nuclear engineer (R.25). He has worked in the defense industry as a computer systems engineer and outside of the nuclear industry for the past five or six years (R.24). His present employer has a contract which extends to the summer of 1993 (R.24). He is still employed at Tracor, and in fact has not provided his employer with any knowledge of his intended move to Iowa (R.23). In the

past when a job was completed, he has always been able to find new employment (R.47).

The $8,000.00 increase in salary would be divided between Richard's entire family, consisting of himself, Alex, his new wife, Shelly, and step-daughter, Autumn (R.21). Of course, there would also be transportation expenses for Alex to be able to maintain any type of direct contact with her mother, family and grandparents in Florida. Round trip air transportation to Cedar Rapids is $348.00 and would require Alex to change planes (R.47).

The psychologist called as a witness by the Former Wife testified that the substitute contact arrangement proposed by the Former Husband would not be sufficient to maintain the relationship between the six year old child and her mother (R.13-20). The trial court specifically agreed with the testimony of Dr. Nickerson as reflected in Paragraph "J" of her findings of fact in the Final Order, and implicitly disagreed with the testimony of the psychologist called by the Former Husband (R.276).

ISSUES PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A RELOCATION OF THE PRIMARY RESIDENCE OF A MINOR CHILD TO CEDAR RAPIDS, IOWA, HAVING MADE A SPECIFIC FINDING THAT THE RELOCATION WOULD NOT BE IN THE BEST INTEREST OF THE CHILD?

II.

WHETHER THERE IS A HEAVIER BURDEN UPON A PARTY SEEKING TO MODIFY AN EXISTING PATTERN OF SHARED PARENTING THAN THE BURDEN IN MAKING THE INITIAL DETERMINATION OF A SHARED PARENTING ARRANGEMENT?

III.

WHETHER THERE IS A HEAVIER BURDEN UPON A PARTY SEEKING TO RELOCATE THE PRIMARY RESIDENCE OF A MINOR CHILD, THEREBY RADICALLY ALTERING A PATTERN OF EFFECTIVE SHARED PARENTING REACHED BY AGREEMENT BETWEEN THE PARENTS?

SUMMARY OF THE ARGUMENT

The Florida Supreme Court should continue to uphold the well settled law in the State of Florida that issues relating to the primary residence of a minor child, and visitation or contact rights, are governed by the "best interest of the child". An application of the six-factor test applied in some of the District Courts of Appeal cannot be viewed as a mechanical

application wherein a legitimate, good faith relocation request should ordinarily be approved, thereby creating a "best interest of the parent" test.

The trial court is in the best position to evaluate the facts and evidence on a case by case basis and the broad discretion of the trial court should not be reversed if there is both a legal and factual basis to support the determination of the trial judge. This necessarily requires a case by case analysis of the facts in each individual relocation case.

The party seeking to radically alter an existing time-sharing arrangement wherein the child is with the secondary parent for half the time should have a heavier burden of proof, similar to that of a parent seeking modification.

There should be a heavier burden or higher standard required to radically alter an existing shared parenting arrangement arrived at by agreement between the parties and, in fact, adhered to by the parties for over four years of the life of a six year old child.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A RELOCATION OF THE PRIMARY RESIDENCE OF A MINOR CHILD TO CEDAR RAPIDS, IOWA, HAVING MADE A SPECIFIC FINDING THAT THE RELOCATION WOULD NOT BE IN THE BEST INTEREST OF THE CHILD.

Appellant insists that this case solely concerns the proper rule of law to apply having nothing to do with the discretion of the trial court. This is simply incorrect. Appellant submitted a Memorandum of Law to the trial court (R.213-226) which argued Judge Sharp's dissent in Mast v. Reed, 578 So.2d 304 (Fla. 5th DCA 1991), DeCamp v. Hein 541 So.2d 708 (Fla. 4th DCA 1989), Sherman v. Sherman, 558 So.2d 150 (Fla. 3rd DCA 1990), Bachman v. Bachman, 539 So.2d 1182 (Fla. 4th DCA 1989), Linders v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990) and Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd DCA 1985). While it is certainly agreed that the Trial Memorandum submitted by counsel for the mother cited the cases of the Fifth District Court of Appeal, the fact remains that the trial court considered all of the case law from all of the districts in reaching the Final Judgment.

The trial court's Final Judgment makes no reference whatsoever to any limitation on her ruling based upon the

decisions of the Fifth District Court of Appeal. To the contrary, the court made specific findings regarding all factors, such as the relocating parent's likelihood of complying with the substitute visitation order, his motivation, the adequacy of substitute visitation and costs of transportation regarding the shared parenting arrangement. These are the same factors urged by Appellant to be adopted by this Court, yet these same factors were considered by the trial court resulting in specific findings of fact. The trial court found after considering all of these factors, that frequency of contact is important to maintain the existing relationship between this six year old daughter and her mother and accordingly, on the facts and circumstances of this case the relocation should be denied. (R.274-278).

While Appellant is critical of past decisions of the Fifth District Court of Appeal, the Fifth District in this case affirmed the trial court's discretionary authority citing Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

This Court has previously adopted the statement of the test for review of a judge's discretionary power as follows:

> "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable man could take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it can not be said that the trial court abused its discretion." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

Certainly Judge Russell's discretion is supported by the facts of this case. She specifically adopted the testimony

of Dr. Nickerson, that frequency of contact is important to maintain the existing relationship between this child and her mother (R.276). All of the child's extended family is in Central Florida. No relatives live in Cedar Rapids, Iowa. During the past four years the child has had contact with her mother sixteen out of every twenty-eight days. The child has never been away from her mother for even one week, except for one vacation. The child has a half brother with whom she lives while with her mother and future contact with him would be significantly impaired as a result of his contact arrangement with his father. If no two reasonable men could differ on this set of facts, then Judge Russell's determination is an abuse of discretion. That is simply not the case.

The Fifth District Court of Appeal has not specifically adopted the "six factor" test. However, it has determined that the test is the "best interest of the child" in considering a substantial and material change in circumstances that would alter the frequent contact arrangement. Jones v. Verba, 513 So.2d 1080 (Fla. 5th DCA 1987), Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA 1988). The "six factor" test of the other districts simply delineates the factors for making that determination. In Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989) cited by Appellant and in the Third and Fourth District cases which Appellant cites, the court stated that the sixth factor for the court to consider was a follows:

> "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)" P.706.

Accordingly, the standard of review in all of the District Courts of Appeal remains in fact the "best interest of the child". The Courts other than the Fifth District have simply listed specific factors which the trial court should address, and in fact, which Judge Russell did address in the case before this Court. Appellant urges this Court to adopt a more mechanical test whereby if the motives of the relocating parent are good, then the relocation should presumptively be permitted. This would establish a "best interest of the parent" test, instead of that of the child, which has long been the law in all Districts concerning matters of primary residential responsibility and contact.

Appellant refers to the Florida decisions by the non-Fifth District Court of Appeal without significant discussion of the facts of each case. The case of Bachman v. Bachman, 539 So.2d 1182 (Fla. 4th DCA 1989) was an appeal from an original dissolution of marriage, not a modification. Further, the primary residential parent was permitted to return to her home state of New Jersey where she would find "the emotional support of her family". As will be discussed below, even Bachman recognized that the relationship between the child and the secondary residential parent must be considered.

Likewise, DeCamp v. Hein, 541 So.2d 708 (Fla. 4th DCA 1989) involved an original dissolution action as opposed to a

modification, where the Wife and children were permitted to return to New Jersey to reside near the Wife's mother, four sisters, brother and innumerable aunts, uncles and fifteen cousins. Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd DCA 1985) also was an appeal from an original divorce. The parties had grown up and married in Michigan and the child was born there. The mother was permitted to return to Michigan with the child.

While in Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989) the appeal was taken from a modification action, the custodial parent had been born and raised in Alabama, the child had been born there, and the parties had married there. All of the custodial parent's relatives and friends resided in Alabama with the exception of a few who lived nearby in Georgia. The Former Husband's family resided in Tennessee. In Landa v. Landa, 539 So.2d 543 (Fla. 3rd DCA 1989) the Former Wife had lost her job in Miami and sought to return to her native home in Chili where she was an owner of a family business and where she and the children would reside with other members of her family.

Appellant's frequent and continuing use of the term "custody" and the position presented for appeal essentially requests this Court to use "throwback" terminology and arrive at a position inconsistent with the adoption of the shared parental responsibility law. Under the present law, the Legislature has determined that it is the "public policy of this State to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the

parties is dissolved and to encourage parents to share the rights and responsibility of child rearing." Fla.Stat. 61.13 (5)(2)(B) (1991). Appellant's argument that relocation should generally be granted in the "best interest of the parent", without consideration to the best interest of the child, promotes old law that essentially gave the custodial parent the right to do anything which he or she may please with the child, subject only to the other parent's right of "visitation".

It is respectfully submitted that Appellant's relocation request under the facts and circumstances of this case would have been denied in all of the districts. One may not simply add up the first five factors of the six factor test and if they are "three to two" in favor of relocation, then the relocation must be granted. The sixth test is the all important test and should continue to be the standard upon which relocation requests are judged. Judge Russell considered all of the relevant factors and specifically found that while relocation may be in the best interest of Mr. Dobson, it is clearly not in the best interest of Alex. It cannot be said that what is simply good for Mr. Dobson must also be good for Alex when that activity would remove the frequent and continuing contact with her mother which this child has enjoyed continuously since the divorce and substitute a visitation plan proposed by Mr. Dobson which would not permit the child to maintain that relationship with her mother. This is supported by the evidence presented at trial and

through the testimony of Dr. Nickerson, with whom Judge Russell specifically agreed in her final order.

II. THERE IS A HEAVIER BURDEN UPON A PARTY SEEKING TO MODIFY AN EXISTING PATTERN OF SHARED PARENTING THAN THE BURDEN IN MAKING THE INITIAL DETERMINATION OF A SHARED PARENTING ARRANGEMENT.

None of the "six factor" cases have made a distinction between the application of that standard in a modification case as opposed to an initial decree of parental responsibility.

However, the courts of the State of Florida have long held that in modification of custody or primary responsibility, a court has considerably less discretion to modify than it had when it made the initial determination. Adams v. Adams, 385 So.2d 688 (3rd DCA 1980). The test for modification has always been that there must be a determination that it is clearly in the best interest of the child to modify the initial primary residential responsibility or custody order. See Culpepper v. Culpepper, 408 So.2d 782 (2nd DCA Fla. 1982), Adams v. Adams, 385 So.2d 688 (3rd DCA Fla. 1980), Frye v. Frye, 205 So.2d 310 (4th DCA Fla. 1967), Belford v. Belford, 32 So.2d 312 (1947). No lesser burden should be required to modify the shared parenting arrangement under which a child has lived for two-thirds of her life and is of such a young age that she has no likely recollection of any parenting arrangement other than shared parental responsibility.

If the focus continues to be the best interest of the child, then a higher standard must be met by a party seeking to radically alter a pre-existing pattern of frequent and continuing

contact and access between the child and the non-primary residential parent. In an action involving an initial residential responsibility determination, and a relocation request attached to it, the trauma to the child occurs only once. For instance, under circumstances where the parties and child previously resided outside of the State of Florida and have extended family and emotional and financial support for the parent and child in another state, perhaps the burden to receive permission to return to that state at the time of the divorce should be less. The complete restructuring of the child's life occurs only once, at the time of the initial determination of primary residential responsibility and the relocation request.

In a modification proceeding, the child is subjected to the trauma for a second time. The first occurs during the initial divorce proceeding wherein the child of divorced parents regrettably no longer lives with both. However, if a true method of shared parenting occurs after the divorce, then a relocation would necessarily subject the child to a second trauma, by taking away the regular contact between the child and the secondary parent.

While Appellant cites Bachman v. Bachman, 539 So.2d 1182 (Fla. 4th DCA 1989) in support of his position, the Bachman court likewise found that additional consideration must be made based upon the facts and circumstances of each case:

> "Further, D'Onofrio's factors are not the only ones to be considered by the trial court. We can envision others such as the effect on the children by the new blended

> family (the non-residential parent with new spouse and that spouse's additional children or new ones) vis-a-vis they're moving away with the residential parent alone to an environment non-competitive for love and affection. New and creative considerations should be welcomed by trial courts when faced with the vexing dilemma of children's relocation away from the non-residential parent." P.1183

Accordingly, while Appellant argues that it is only the "new" family consisting of the residential parent, new spouse, etc. which should be considered, the Bachman case has also recognized that the relationship of the non-residential parent's family the child must also be considered. This is particularly important in light of the facts and circumstances of this case wherein Alex's relationship with her half-brother, step-father and grandparents would be significantly changed if the relocation should be permitted.

These principles presently exist in Fla.Stat.61.13 (3) (1991). In making the initial determination of primary residential responsibility and considering the welfare and interest of the child, the court is directed to consider:

> "(A) The parent who is more likely to allow the child frequent and continuing contact with the non-residential parent."
>
> .....
>
> (D) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity."

If these factors are to be considered by the trial court in making an initial determination of primary residential responsibility, are they any less important in considering the

modification of an existing shared parenting arrangement? Appellant's argument that the only factors to be considered are those in the "six factor test" would ignore these elements if the motives of the relocating parent are good. These factors are critical in evaluating the best interest of the child, whose life has been lived under an existing pattern of shared parenting permitting the love, affection, role model and security of having frequent contact with both a mother and a father.

III. THERE IS A HEAVIER BURDEN UPON A PARTY SEEKING TO RELOCATE THE PRIMARY RESIDENCE OF A MINOR CHILD, THEREBY RADICALLY ALTERING A PATTERN OF EFFECTIVE SHARED PARENTING REACHED BY AGREEMENT BETWEEN THE PARENTS.

Appellant ignores the fact that this shared parenting arrangement was created by agreement between the parties. The Final Judgment of Dissolution was granted by Judge Edwards on April 21, 1987 (R.107-110). Judge Edwards provided for temporary primary residential care with the Former Husband for six months and set a review hearing on the issue of primary physical care for Wednesday, October 28, 1987. In the interim, the parties arrived at a "Settlement Agreement Regarding Shared Parental Responsibility, Primary Residential Care, Visitation and Child Support" on October 22, 1987 (R.115-118). While agreeing that the Former Husband would have primary residential responsibility, the Agreement further provided that... "the Former Wife shall have liberal and open visitation for extended periods of time to foster a loving atmosphere and to allow the child free and open access to both parties" (R.116). (Emphasis added).

The Former Wife's contact schedule was agreed as follows:

"(A) Alternative weekends from Friday at 4:00 p.m. to Monday at 8:00 a.m.;

(B) Each Wednesday beginning at twelve noon until 8:00

a.m. Thursday;

(C) The Former Wife shall also be permitted to have sixty (60) minutes of unsupervised telephone contact with the minor child each week;

(D) Four weeks in the summer, at a time mutually agreed to by the parties, during which the Husband shall be permitted to visit with the child; and

(E) Alternate holidays (and holiday periods) on an alternate years with exact holiday periods and times to be agreed upon by the parties;

(F) Any other times as the parties can mutually agree on."(R.116).

Judge Russell found that not only had the parties adhered to the contact schedule with minor exceptions as agreed between the parties (R.275), she further announced at the conclusion of the trial her concern about the difficulty of this case as a result of the following:

> "This is the nightmare case that we all dread because you are both excellent parents, and I have never seen shared parenting done to the tee like you have done it." (R.103).

It is respectfully submitted that in this case the designation of "primary residential parent" is simply nomenclature in light of the mother's contact with this child on parts of sixteen out of every twenty-eight days. While on October 22, 1987 she agreed that the Former Husband could be designated as the primary residential parent, she did so only upon reliance on the effective and frequent contact schedule

granted to her and the child under the terms of the agreement and has adhered to it, as found by Judge Russell.

Not only has Julia Samson adhered to the contract but she will continue to do so in the future. While Mr. Dobson is designated the primary residential parent, Julia has no intention of relocating so as to alter her roll in the parenting of her daughter. This concerned Judge Russell at the trial, resulting in the following question:

> The Court: "What if you are offered a real hot job out in Washington State and the child is here?
>
> The Witness: "I stay. I am not a totally career oriented person. Right now I wouldn't be taking a full load out at UCF instead of trying to work things out so that I am able to schedule my classes at some time when the kids are in school try and work things out so that, you know, I can be driving Alex back and forth to school when she's there, so that on days when she gets out early from school, which is Wednesday, I've got Wednesday afternoon clear. And it's been real good for all of us that I am not working full time because I spend a lot more of time with them." (R.88-89).

This Court has recently addressed the burden to modify a Final Judgment based upon a contract. In Tietig v. Boggs, 602 So.2d 1250 (Fla. 1992), this Court held that there is a heavier burden required to decrease child support when it is based upon a contract. This principal relating to agreements, as well as the previously cited cases by the courts of this State determining

that there is a higher burden to change custody than there is to originally award it would justify a heavier burden in permitting a relocation which would significantly and substantially alter a pattern of frequent and continuing contact to which the parties have adhered by agreement.

Appellant appears to find some significance in the fact that the original shared parenting agreement did not specifically prohibit a relocation. This premise has been found to be irrelevant by the Fifth District in Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982), and in the Fourth District as well. In Ingham v. Ingham, 603 So.2d 74 (Fla. 4th DCA 1992), the Fourth District noted that it agreed with Giachetti that a provision requiring the parties to "maintain free access and create a feeling of affection between the parties and the minor child" imposes a restriction on the movement of the custodial parent. Thereafter, the Fourth District in Petullo v. Petullo, 17 FLW D1881 (Fla. 4th DCA 1992) held that when there is a specified contact arrangement providing for great frequency of contact, the party seeking to relocate and significantly alter that frequency of contact must have prior court approval for the move, absent the consent of the other party.

Since the burden is on the party seeking to alter the contact schedule, there clearly should be a heavier burden when that contact schedule is based upon an agreement. While Julia Samson agreed to Mr. Dobson having primary residential responsibility, she did so only due to her substantial and

significant day to day involvement in Alex's life. Mr. Dobson also agreed to this. He should not now be permitted to repudiate his agreement, so as to diminish the mother-daughter relationship.

While not set forth as a specific argument or issue for this appeal, some mention must be made of Appellant's constitutional argument.

For the first time, the Appellant has raised a constitutional issue. This was neither plead nor argued at the trial level, nor plead or briefed in the Appeal to the Fifth District Court of Appeal. This Court should not consider issues not presented to the trial court unless the error is fundamental error. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). Fundamental error occurs when regardless of what was or could have been said at the trial, the resulting Final Judgment is flawed. See Wagner v. Nottingham Assoc., 464 So.2d 166 (Fla. 3rd DCA), Rev. Denied, 475 So.2d 696 (Fla. 1985).

For this Court to conclude that "fundamental error" occurred, permitting Appellant to argue the constitutional issue for the first time before this Court, this Court would necessarily find that the courts of the State of Florida have no ability to restrict the residence of a minor child subject to a shared parenting agreement.

There is no prohibition against interstate relocation of the parent. Mr. Dobson is free to relocate to Cedar Rapids, Iowa if he chooses. However, if he does so choose, Julia Samson

is ready, willing and able to have Alex reside with her on a primary basis. There is simply no infringement upon Appellant's right to travel or relocate and no state imposed restriction on Alex's right to travel.

Secondly, the implied restriction on Alex's residence was by agreement of the parties in their Shared Parenting contract of October 22, 1987.

If this Court were to approve Appellant's constitutional argument that once a determination of primary residential responsibility has been made that parent is presumptively entitled to change the residence of the child to any area of the country, or even the world, the result would be the collapse of the entire concept of shared parental responsibility under Florida law.

CONCLUSION

The decision of the trial court should be affirmed, as it is well within the trial court's discretion, based upon the facts of this case and the "best interest of the child". Further, a party seeking to modify an existing shared parenting arrangement, particularly one reached by agreement between the parties, has a heavier burden than in the original dissolution action determining the parenting arrangement.

DATED this 28th day of October, 1992.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the original and seven (7) copies of the foregoing have been furnished by mail delivery to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a copy thereof to John M. Brennan and Brian J. Moran, of Subin, Shams, Rosenbluth & Moran, P.A., Post Office Box 285, Orlando, Florida 32801-2373, attorneys for Petitioner, this 28th day of October, 1992.

N. LEE SASSER, JR.

APPENDIX ONE

Richard Allen DOBSON, Appellant,

v.

Julia Hayden SAMSON, Appellee.

No. 91-1991.

District Court of Appeal of Florida, Fifth District.

April 17, 1992.

Rehearing and Rehearing En Banc Denied May 19, 1992.

Father having primary residential responsibility petitioned for permission to relocate child. The Circuit Court, Orange County, Dorothy J. Russell, J., denied relief, and father appealed. The District Court of Appeal, Cowart, J., held that denial of request to relocate to distant location in order to take advantage of better job opportunity was not abuse of discretion.

Affirmed.

Divorce ⇐300

Denial of request by parent having primary residential responsibility, to relocate to distant location in order to take advantage of better job opportunity, was not abuse of discretion; desires and benefits to father were outweighed by benefit to child of maintaining frequent and close continuous contact with mother and mother's right to continued frequent visitation and effective shared parental responsibility.

John M. Brennan of Subin, Shams, Rosenbluth & Moran, P.A., Orlando, for appellant.

N. Lee Sasser, Jr., of Sasser and Weber, P.A., Orlando, for appellee.

COWART, Judge.

The marriage of the parties was dissolved and the parties for four years participated in "shared parental responsibility" with the father having primary residential responsibility. The parties live sufficiently close to the original marital domicile and each other that the mother could, and has, exercised her right to frequent and close visitation with the child. The father received an offer of employment in a distant location that would greatly enhance his career and his immediate salary and petitioned the trial court to permit him to relocate the child to the distant location. The relocation of the child would greatly impair meaningful sharing of parental responsibilities by the non-custodial parent and frustrate frequent visitation between the non-custodial parent and the child. The father presented expert testimony to the effect that after dissolution a child establishes a "new family unit" and, in effect, that what is in the best interest of the "new family unit" is also in the best interest of the child.[1] The father also proposed a substitute visitation program.[2] The trial judge found that under the facts and circumstances the desire and benefits to the father and his new family and the child were outweighed by the benefit to the child of maintaining frequent and close continuous contact with the mother and the mother's right to continued frequent visitation and effective shared parental responsibility.

1. This argument is a twist of the famous statement that "anything that is good for General Motors is good for the United States". The innuendo of the argument is actually that by becoming part of the "new family unit", consisting of the custodial parent and new spouse, etc., the child's need for contact with its natural non-custodial parent is lessened. This argument ignores the fact that the non-custodial spouse has the right to enjoy frequent contact and association with the child and the right to share some parental obligations and that effective sharing of parental responsibilities requires an opportunity to observe the child and to exercise independent judgment about its condition and needs rather than depend on the custodial parent to recognize the child's needs and to initiate communication about them.

2. In response to this argument in cases, where both parents are equally fit, some trial judges have been known to apply the old "turn about is fair play" country maxim, and ask the custodial parent: "If custody were changed, would you be content and happy with the proposed substitute visitation plan as your visitation rights?"

The father appeals and cites the dissent in *Mast v. Reed*, 578 So.2d 304 (Fla. 5th DCA 1991).

We agree with the trial judge and affirm on the authority of *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla.1980); *Conroy v. Conroy*, 585 So.2d 957 (Fla. 5th DCA 1991), *rev. denied*, 595 So.2d 556 (Fla.1992); *Baldwin v. Baldwin*, 576 So.2d 400 (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); *Elebash v. Elebash*, 450 So.2d 1268 (Fla. 5th DCA 1984); *Giachetti v. Giachetti*, 416 So.2d 27 (Fla. 5th DCA 1982); and the majority opinion in *Mast v. Reed*, 578 So.2d 304 (Fla. 5th DCA 1991) (en banc).

AFFIRMED.

GOSHORN, C.J., and DIAMANTIS, J., concur.

A P P E N D I X T W O

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: DR 86-13121

IN RE: THE FORMER MARRIAGE OF:

JULIA HAYDEN SAMSON, Former Wife,

and

RICHARD ALLEN DOBSON, Former Husband.

_____/

FINAL ORDER ON FORMER WIFE'S SUPPLEMENTAL PETITION FOR MODIFICATION OF FINAL JUDGMENT AND FORMER HUSBAND'S SUPPLEMENTAL PETITION FOR MODIFICATION OF FINAL JUDGMENT

This matter came to be tried before the Court on July 26, 1991 upon the Former Wife's Supplemental Petition for Modification of Final Judgment seeking to restrict the relocation of the primary residence of the minor child of the parties, ALEXANDRA LEE DOBSON, born December 20, 1984 from Central Florida, or in the alternative, to change primary residential responsibility of the minor child to the Former Wife, and further upon the Former Husband's Supplemental Petition for Modification of Final Judgment seeking to allow the relocation of the minor child's primary residence to Cedar Rapids, Iowa and to modify the contact schedule between the minor child and the Former Wife. The Court having considered the evidence presented, the argument of counsel, the Court makes the following findings:

A. The Court has jurisdiction over the parties, the subject matter hereto, and the minor child pursuant to the Uniform Child Custody Jurisdiction Act.

B. The parties previously entered into a Settlement Agreement Regarding Shared Parental Responsibility, Primary Residential Care, Visitation and Child Support dated October 22, 1987 which was incorporated into a Supplemental Final Order Regarding Shared Parental Responsibility, Primary Residential Care, Visitation and Child Support entered October 22, 1987. Neither the parties' settlement agreement nor the supplemental final order specifically prohibited a relocation of the former husband with the minor child.

C. For the past four (4) years, the parties have participated in shared parenting of their child with the father having primary residential responsibility, but the mother having liberal visitation which she has exercised pursuant to the terms of their agreement, including alternating weekends from Friday with a return on Monday morning, plus Wednesday evening with a return on Thursday morning each week. The scheduled contact the Former Wife has not exercised is the four weeks of summer visitation where the parties continued to maintain the regular schedule of contact so as not to disrupt the child, and the sixty (60) minutes per week of telephone visitation with the child, due in part to the age of the child.

D. Each of the parties has remarried and the child's primary home is with the father, which consists of the father, his new wife, and a step-daughter, Autumn, age twelve. The home of the mother consists of the mother, her new husband, the child's half-brother by a former marriage, Chris, age eleven, and Alex when she

is with the mother.

E. The father has received an offer of employment in Cedar Rapids, Iowa which he believes would provide more future stability to his career, as well as an immediate increase in salary of $8,000.00 which would be shared by the father, his wife, Autumn and Alex.

F. The father continues to have employment in Central Florida, he has no dire need to relocate, and the intended move on his part is not mandatory.

G. The child's maternal grandmother, with whom she has regular contact, and paternal grandparents, with whom she has regular contact, all reside in the Orlando area.

H. Were the Court to permit the relocation, the Court finds that the father is likely to comply with any reasonable substitute visitation order and further that his motives for seeking to relocate are genuine and bona fide, and his motive is not to defeat or frustrate the contact between the child and the mother.

I. The father testified that in the event that the Court were to deny the relocation, that he would not relocate without the child, would attempt to find a position as an engineer and continue his employment in the Central Florida area.

J. As a result of this child's young age, six and one-half years, the Court agrees with the testimony of the mother's expert, Carl Nickeson, Ph.D., that frequency of contact is important to maintain the existing relationship between the child and the mother.

K. While there may be circumstances in the future justifying a relocation, the Court finds that under the facts and circumstances of this case the desire to relocate by the father is out weighed by the benefit to the child of maintaining frequent and continuing contact with the mother. As a result of there being no direct flights between Orlando and Cedar Rapids, Iowa and considering the financial position of the parties, the Court does not believe that the current pattern of frequent and continuing contact between the minor child and the mother could be maintained in the event of the relocation.

L. Based on the facts and circumstances of this case, changing primary residential care and custody from the Former Husband to the Former Wife would not be in the best interests of the child.

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED:

1. The Court retains jurisdiction over the parties, the minor child and the subject matter hereto pursuant to the Uniform Child Custody Jurisdiction Act.

2. The request of the Former Wife for a change in the primary residential responsibility of the minor child from the father to the Former Wife is denied.

3. The request of the Former Wife to impose a relocation restriction prohibiting the father from changing the primary place of residence of the minor child from the Central Florida area is granted. However, this Order is based solely on the facts

presented in this case and is without prejudice to the father's right to petition the Court for an order allowing him to relocate the residence of the minor child in the future based upon different facts and circumstances.

4. The Supplemental Petition to Modify the Final Judgment filed by the father to permit the relocation of the residence of the minor child to Cedar Rapids, Iowa is denied.

5. All other terms and condition of the final judgment of dissolution and supplemental final order, which are not inconsistent with the foregoing, are hereby reconfirmed.

DONE AND ORDERED this 13th day of August, 1991 at Orlando, Orange County, Florida.

/s/ DOROTHY J. RUSSELL

Dorothy J. Russell
Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by mail to N. Lee Sasser, Jr., P. O. Box 531161, Orlando, FL 32853-1161, attorney for Former Wife, and to John M. Brennan, P. O. Box 285, Orlando, FL 32801, attorney for Former Husband, this 13th day of August, 1991.

John M. Brennan

~~(Judicial Assistant)~~(Attorney)