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

PETITIONER'S INITIAL BRIEF ON THE MERITS

JOHN M. BRENNAN
Florida Bar No. 0297951
BRIAN J. MORAN
Florida Bar No. 0827241
Subin, Shams, Rosenbluth &
Moran, P.A.
Suite 900, 111 N. Orange Avenue
Post Office Box 285
Orlando, Florida 32801-2373
(407) 841-7470
Attorneys for Petitioner,
RICHARD ALLEN DOBSON

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE

CASES PAGE

CONSTITUTIONS

OTHER AUTHORITIES

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 custodial father to relocate the residence of his daughter and modify the existing visitation schedule so that he could accept an excellent out of state career opportunity and improve the general quality of life for his post-divorce family, while maintaining the relationship between his daughter and former wife.

B. Course of Proceedings and Disposition Below

The petitioner, Richard Allen Dobson ("Dobson"), and the respondent, Julia Hayden Samson ("Samson"), were divorced by final judgment dated April 21, 1987. (R-107)[1]. Dobson was awarded the temporary primary residential care for the parties' minor child, Alexandra Lee Dobson (then age 2), for a period of 6 months. Samson was awarded liberal visitation. The court scheduled a hearing, on October 28, 1987, to review and finally decide the

[1]References to "R-" are to the record on appeal and references to ("App") are to the appendix to this brief.

primary physical residential care, visitation and child support issues in the case. (R-107).

On October 22, 1987, the parties entered into a settlement agreement regarding shared parental responsibility, primary residential care, visitation and child support. (R-115). The parties agreed to have shared parental responsibility for their daughter. They agreed that Dobson would have the primary residential care for the minor child and Samson would have liberal visitation. This settlement agreement was confirmed in a supplemental final order regarding shared parental responsibility, primary residential care, visitation and child support, dated October 27, 1987. (R-111).

Neither the parties' settlement agreement nor the supplemental final judgment prohibited Dobson, as the primary residential parent, from moving his daughter's residence outside Florida.

Dobson is a nuclear engineer by academic and on the job training. (R-23, 34, 272). A career in nuclear engineering is not viable in the Central Florida area as there are no such positions available. (R-44, 145). The defense contract industry, in which Dobson is employed in Orlando, is in a "very stagnant" and "depressed" economic condition. (R-43, 142, 143). In June of 1991, Dobson was offered a position as a nuclear engineer for Iowa Power in Cedar Rapids, Iowa. (R-270). This career opportunity offered improved income and job stability. (R-25, 29-30, 270). The move will also provide access to better public schools and a very family oriented community, and promote a less stressful family

environment. (R-29-31, 37, 87). In July, 1991, Samson filed a petition for modification seeking to prevent Dobson from relocating the residence of the minor child to Iowa, or alternatively, for a change in primary residential care. (R-121-124). Dobson requested that the court allow the relocation and modify the visitation schedule between the minor child and Samson. (R-125-131).

The matter was tried before the Orange County Circuit Court (Russell, J.) on July 26, 1991. The trial court denied Dobson's request to relocate his daughter's residence to Iowa and granted Samson's request to prohibit Dobson from changing the primary residence of the minor child from the Central Florida area. (R-274). Samson's request for a change in the primary residential responsibility for the minor child was denied with the court expressly finding that this would not be in the best interests of the child. (R-277, App. 2, p.4, para. L.).

The trial court specifically found that: 1) Dobson received an offer of employment in Cedar Rapids, Iowa, which he believed would provide more future stability to his career as well as an immediate increase in annual salary of $8,000; 2) Dobson's motives for seeking to relocate were genuine and bona fide; 3) his motive for seeking to relocate is not to defeat or frustrate the contact between Samson and the child; and 4) were the court to allow the relocation, Dobson is likely to comply with any substitute visitation order. (R-276, App. 2, p.3, paras E and H).

Nevertheless, the trial court denied Dobson's request to relocate his daughter's residence, finding that: 1) he had "no dire

need to relocate;" 2) Samson had generally exercised her visitation rights; 3) the child's grandparents reside in the Orlando area; and 4) frequency of contact is important to maintain the existing relationship between the child and Samson. (R-275, 276, App. 2, pp. 2, 3, paras C, F, G and J). The trial court also found that "the current pattern of frequent and continuing contact between the minor child and the mother could [not] be maintained in the event of a relocation." (R-277, App. 2, p.4, para K). Further, the trial court noted Dobson's testimony that, if the court were to deny the relocation, he would not move without his daughter. (R-276, App. 2, p.3, para I).[2] Counsel for Samson stated at trial that the facts were not in significant dispute, but argued that the law in the Fifth District was different. (R-3, 94).

The Fifth District Court of Appeal (Cowart, J., Goshorn, C. J. and Diamantis, J., concurring) acknowledged that the reason for Dobson's petition to relocate was to pursue an offer of employment "that would greatly enhance his career and his immediate salary." Nevertheless, the Fifth District affirmed the denial of the relocation on the ground that it 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." Dobson v. Samson, 598 So.2d 139 (Fla. 5th DCA 1992) (App. 1).

---

[2]The trial court also based its ruling, in part, on the fact that there were no direct flights between Orlando and Cedar Rapids, Iowa. (R-277, App. 2, p. 4, para. K). This finding is of no consequence in view of Dobson's testimony that the child would never be permitted to travel alone. (R-50).

The Fifth District rejected the principle that what is in the best interest of the residential parent's post-divorce family unit is in the best interest of the child, calling this principle "a twist of the famous statement that 'anything that is good for General Motors is good for the United States'." Further, the court rejected Dobson's proposal of a substitute visitation program citing the maxim "turn about is fair play."

C. Statement of the Facts

Dobson received a Bachelor of Science degree in nuclear engineering in 1977 from Texas A & M University, and began his career in the United States Navy as an engineer officer of Navy nuclear power plants. (R-23, 272). He left the Navy in 1985 after eight years. (R-34, 272). Since there are no nuclear power plants in Orlando, Dobson secured employment with various defense contractors in Central Florida, as a computer systems engineer. (R-24, 43).

The defense contract industry is very volatile, as the need for engineers expires with each contract (R-43, 44). As a result of the instability in the defense contract field, Dobson has worked for five different defense contractors since leaving the Navy in 1985. (R-43, 44, 272). This situation has been the source of considerable stress for Dobson and his family. (R-30). Further, there has been limited opportunity for advancement or salary increases in the defense contract industry. (R-24, 43).

Dobson works for Tracor Applied Sciences in support of the Naval Training Systems Center (NTSC). (R-22). Tracor/Orlando is

performing a small part of a large contract with the Naval Sea Systems Command (NAVSEA). (R-24). However, the work which Dobson is doing is peripheral to the main contract and could possibly be stopped at any time. (R-24). NTSC has lost all future work in his area. NTSC's role in the NAVSEA program will end in early 1993. (R-25). In October, 1990, Tracor's contract was almost stopped, which would have resulted in a loss of Dobson's job. (R-25).

Engineering consultant, Gary Parsons, testified that the defense contract industry in Central Florida is "depressed" and "very stagnant". (R-142-144). Many companies are "laying off" and none are hiring. Further, there is no market for nuclear engineers in Central Florida. (R-142-144). Dobson observed that "a number of [defense] companies have gone bankrupt", "a number of friends have been laid off", and several were required "to take significant pay cuts to obtain employment." (R-43).

Dobson has continually attempted, without success, to obtain a stable and secure position in the Orlando/Central Florida area. (R-43-47, 272). At least as early as February of 1991, Dobson advised Samson of his concern about personnel cuts at the Orlando Naval Training Systems Center and the decline in the defense contract industry in Central Florida. (R-44, 45). This decline led Dobson to seek employment in the nuclear power plant industry. (R-29, 30).

Dobson sent out several resumes in May, 1991, to prospective employers in the nuclear industry. (R-45). In June, 1991, he was offered a position as a nuclear engineer for Iowa Power, in Cedar

Rapids, Iowa. (R-25, 270). Dobson's annual salary with Tracor is $42,000 (R-22), whereas Iowa Power offered him $50,000/year as a starting salary. (R-25, 270). Samson agreed with the wisdom of Dobson's proposed career move:

> I think it would be a very good career move for him. (R-86).

Dobson also cited other legitimate reasons supporting the relocation: 1) Iowa public schools are consistently ranked near the top in the nation; 2) Cedar Rapids, Iowa is a very family oriented community; 3) the stability of the Iowa Power position would reduce Dobson's stress concerning his job situation; and 4) the Iowa Power position would require less travel for Dobson. (R-29-31, 37, 86).

Dobson has remarried. (R-22). He and his daughter, Alexandra (now age 7), reside with his wife, Shelley, and her daughter, Autumn, age 13. (R-21, 22). Dobson's motivation and purpose to relocate outside the state of Florida is to provide himself and his post-divorce family, including his daughter, Alexandra, with an improved and more stable quality of life. (R-25, 29, 30).

Dobson testified (R-38, 39), Samson stipulated (R-86-87), and the trial court found (R-276, App. 2, p. 3, para. H.) that his motives for seeking to relocate were genuine and bona fide and that there was no intent to defeat or frustrate the contact between Samson and the child.

Dobson testified (R-38, 39), Samson acknowledged (R-87) and the trial court found (R-276, App. p.3, para. H.) that Dobson is likely to comply with any substitute visitation arrangement ordered by the court.

Dobson's expert was Dr. Emmy Freeman, a clinical psychologist (R-54-55). She has been in private practice for close to 20 years and has conducted approximately 60 child custody evaluations (R-55, 65). Dr. Freeman testified that a substitute visitation arrangement could be achieved and would be adequate to foster a continuing meaningful relationship between the child and the non-custodial parent. (R-60-62). Similarly, Samson's expert testified that meaningful visitation can occur where the residential parent resides in a different state than the non-residential parent. (R-14-15) ("We see situations in which children are adequately raised in all kinds of situations."). Samson's expert also acknowledged that job changes and economic necessity would justify a relocation to another state. (R-16).

Dr. Freeman had an opportunity to meet with Dobson, his wife, and their two daughters. (R-55). She found that Alexandra identified family-wise with Dobson's post-divorce family unit, and that Dobson's present wife, Shelley, is the mother figure in Alexandra's life. (R-57-58). Further, Dr. Freeman testified that Dobson has developed a "very cohesive family" and that Alexandra sees Autumn as her sister. (R-59). Dr. Freeman also concluded that "it would be detrimental" for Alexandra not to go to Iowa with

Dobson and his family and that there was no "disadvantage for her to leave and go to Iowa with this family." (R-60, 64).

> Q Dr. Freeman, is it your opinion that if a relocation were to be ordered that a substitute visitation arrangement could be arrived at without a detrimental effect on Alex?
>
> A Yes. (R-68).

Samson's expert stated his opinion that consistent and frequent contact is preferable only as a "general proposition" and "not based upon an evaluation of the specific facts of this case." (R-13, 14). He did not know to where Dobson was proposing to relocate. Further, he conceded that "I haven't done any evaluation of any individual or location in this case." (R-17).

Dobson offered to pay his fair share of the expense of the substitute visitation schedule, including the cost of two round trip travel tickets and for telephone contact. (R-41, 42). Dobson's father also offered his assistance in transporting the child for substitute visitation. Further, he confirmed that the proposed career move by his son was necessary. (R-90, 91).

Dobson proposed a realistic and reasonable substitute visitation schedule. (R-39, 40). He offered extended summer visitation in lieu of the visitation provided by the Settlement Agreement Regarding Shared Parental Responsibility, Residential Care, Visitation, and Child Support, as well as other increased visitation and contact. (R-39, 40).

Samson previously pursued a career opportunity which required that she relocate to Florida from Virginia with her young son. Her son's father and grandparents remained in Virginia. Her son has continued to maintain a meaningful relationship with his father. (R-34-36, 76-77). By her own actions, Samson has admitted that a legitimate career change is an appropriate reason for a relocation and that a meaningful relationship can be maintained between the child and non-residential parent with one month of visitation in the summer, every other Christmas, Easter, plus other incidental visitation. This is less visitation than Dobson proposed in this case.

ISSUE PRESENTED FOR REVIEW

The issue presented for review is:

1. What is the proper rule of law to be applied when a custodial parent seeks to relocate the residence of a minor child to another state, over the objection of the non-residential parent?

SUMMARY OF THE ARGUMENT

The Florida Supreme Court should adopt the six-factor test applied by the Second, Third and Fourth Districts as the rule of law governing relocation requests. Legitimate, good faith relocation requests should ordinarily be approved.

After divorce, a child becomes part of the custodial parent's family unit. The child's well-being depends primarily on the custodial parent. What is advantageous to the custodial parent's post-divorce family unit is in the best interests of the child. A

custodial parent's good faith decision to seek a better life for his post-divorce family should be respected. The advantages of the relocation should not be forfeited solely to maintain weekly visitation. Meaningful visitation can occur where the parties reside in different states. The non-residential parent's interests can be accommodated by increased summer and holiday visitation.

Applying these principles to the facts of this case, Dobson's relocation request should be granted. Dobson was granted the primary residential care for his daughter by agreement of the parties. There is no restriction on Dobson's right to relocate his daughter's residence contained in the parties' agreement or the dissolution orders.

Dobson has developed a very cohesive post-divorce family, with which his daughter identifies. His decision to relocate, as the head of this family and primary care parent, should be respected.

Dobson is a nuclear engineer by academic and job training. The defense contract industry, in which Dobson is employed in Orlando, is in a very depressed economic state. Dobson has been offered a much improved job as a nuclear engineer in Iowa. This move will permit Dobson to increase his income and resume his career as a nuclear engineer. This move will also serve to improve the general quality of life for Dobson and his post-divorce family.

Dobson's motives for seeking the move are bona fide. His motive is not to defeat or frustrate Samson's visitation. Dobson offered extended substitute visitation which Dr. Freeman testified and Samson admits by her own past actions, would allow her to

maintain her relationship with the child. Dobson will comply with all substitute visitation arrangements and has offered to share transportation costs related thereto. Under these circumstances, Dobson should be afforded the same freedom to move as Samson.

The Fifth District's decision should be reversed and this case should be remanded to the trial court with instructions to grant Dobson's petition to relocate his daughter's residence, to set reasonable alternative visitation and to fairly allocate the cost of transportation associated therewith.

ARGUMENT

A. THE FLORIDA SUPREME COURT SHOULD ADOPT THE SIX FACTOR TEST APPLIED IN THE SECOND, THIRD AND FOURTH DISTRICTS AS THE RULE OF LAW GOVERNING RELOCATION REQUESTS.

1. LEGITIMATE, GOOD FAITH RELOCATION REQUESTS SHOULD ORDINARILY BE APPROVED.

2. UNDER THE PROPER RULE OF LAW, DOBSON'S RELOCATION REQUEST SHOULD BE GRANTED.

Divorce, the separation of parents and children, remarriage, the creation of new family units and residence relocation are frequent occurrences in today's society. Resolving the judicial dilemma of whether to grant a request by a primary residential parent to relocate the residence of a minor child to another state, over the objection of the non-residential parent, is a difficult task. The resolution of the relocation issue involves a balancing of competing interests: 1) the residential parent's interest in pursuing a chosen career and settling where he or she believes the best interests of his or her post-divorce family would be served; 2) the interest of the child in having meaningful relationships

with both parents; and 3) the non-residential parent's interest in maintaining regular visitation with his or her child.

Dobson respectfully submits that this Court should adopt the six factor test applied in the Second, Third and Fourth District Courts of Appeal as the rule of law governing relocation requests. The Second, Third and Fourth Districts all favor legitimate, good faith relocation requests and have adopted a six factor test for deciding the relocation issue:

1. The likelihood of the move improving the general quality of life for both the primary residential spouse and the children.

2. The integrity of the motives for seeking the move to insure it is not done 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. That the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the noncustodial parent.

5. That the cost of transportation is financially affordable by one or both of the parents.

6. That the move is in the best interests of the children.

Lenders v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990) (Order denying relocation request reversed); Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989) (Order denying relocation reversed); Sherman v. Sherman, 558 So.2d 149 (Fla. 3rd DCA 1990) (Order denying relocation reversed); DeCamp v. Hein, 541 So.2d 708 (Fla. 4th DCA 1989) (Order disallowing relocation reversed).

Further, the proper application of this test should be as stated by Judge Schwartz, in his specially concurring opinion in Hill v. Hill, 548 So.2d 705, 707-708 (Fla. 3rd DCA 1989):

> [S]o long as the parent who has been granted the primary custody of the child[3] desires to move for a well-intentioned reason and founded belief that the relocation is best for the parent's and, it follows, the child's well being, rather than from a vindictive desire to interfere with the visitation rights of the other parent, the change in residence should ordinarily be approved.

See also, Ferguson v. Baisley, 593 So.2d 319 (Fla. 4th DCA 1992) (Anstead, J., dissenting).

In Sherman v. Sherman, 558 So.2d 149, 151 (Fla. 3rd DCA 1990), the court reversed an order denying the former wife's request to relocate to California where she had shown that: 1) the move is likely to vastly improve the quality of life for the custodial parent and the child; and 2) the custodial parent has agreed to comply with meaningful substitute visitation and has offered to pay the transportation costs thereof. The purpose of the move was to permit the mother and her new husband to accept better employment offers in California. Under these circumstances, the court held that "there is no basis for denying the parent's request to move to another jurisdiction".

Similarly, in Bachman v. Bachman, 539 So.2d 1182 (Fla. 4th DCA 1989), the court held that an order permitting the former wife to

---

[3]The 1982 Shared Parental Rights Legislation and nomenclature (primary residential care vs. custody) does not materially alter the law in this area. Hill v. Hill, 548 So.2d at 707, n.1; Mast v. Reed, 578 So.2d 304, 311 (Fla. 5th DCA 1991) (en banc) (Sharp, J., partially concurring and dissenting).

remove the children from Florida to New Jersey and granting the former husband extended summer and Christmas visitation, with the costs of transportation divided equally, was not an abuse of discretion. There was evidence that the former wife had better employment opportunity in New Jersey and there was no indication of any desire to defeat or frustrate the father's contact with the children.

Further, in Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989), the court reversed the denial of the former wife's petition to move herself and her child to Alabama. The court followed the six factor test set out in DeCamp v. Hein, wherein the wife was permitted to relocate with her two daughters to New Jersey. Moreover, in Lenders v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990), the court reversed a trial court order denying the former wife's request to move her children to Tennessee because the move would improve the general quality of life for the former wife and the children and the purpose of the move was not to defeat the visitation rights of the former husband. The former wife had found stable employment in Tennessee. The former wife also demonstrated that she would freely comply with any court ordered visitation and that a substitute visitation schedule could be achieved.

> . . . when a noncustodial parent objects to the relocation of the minor children, the trial court should resolve the question by applying the test enunciated in Hill v. Hill. Lenders v. Durham, 564 So.2d at 1188.

Relocations have also been sanctioned under the six factor test in a number of other cases similar to the Dobson v. Samson

case. See, Britt v. Shovein, 559 So.2d 749 (Fla. 4th DCA 1990) (The court affirmed an order allowing the newly remarried former wife to move with her children to Minnesota. There, the former husband conceded that the move would be a positive improvement for the former wife, she suggested feasible, substitute visitation arrangements and the motive for the move admittedly was neither to prevent or defeat the former husband's access to the children); Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd DCA 1985) (The court affirmed an order allowing the former wife to move to Michigan with the minor child.); Landa v. Landa, 539 So.2d 543 (Fla. 3rd DCA 1989) (The former wife was allowed to move to Chile with her children based on her opportunity to become an owner in a family business and obtain a higher living standard and the potential for a safer and more comfortable environment for herself and her children.); Zugda v. Gomez, 553 So.2d 1295 (Fla. 3rd DCA 1989) (The trial court order was reversed and the former wife's request to move the child to Michigan was granted. The court noted that there were good reasons for the move and that "meaningful visitation can occur where the mother and child live in Michigan and the father lives in Florida."); Tamari v. Turko-Tamari, 599 So.2d 680 (Fla. 3rd DCA 1992) (Order permitting Wife to move from Miami to Israel with the parties' seven year old son was affirmed under the six factor test); Pintada v. Leggett, 545 So.2d 311 (Fla. 3rd DCA 1989) (Mother permitted to move with child to Virginia where she had a job waiting for her); Eisner v. Markovich, 585 So.2d 312 (Fla. 3rd

DCA 1991) (Order allowing former wife to move with children to California affirmed under the six factor test).

As Judge Anstead wrote in his dissent in Costa v. Costa, 429 So.2d 1249, 1254 (Fla. 4th DCA 1983), "the gist of the holdings in these cases is that the courts should utilize other means, such as increased summer visitation or a shift in the financial burden of visitation to deal with the problems and reserve the power to bar moves for the extreme cases." Accord, Mast v. Reed, 578 So.2d 304, 311 (Fla. 5th DCA 1991) (en banc) (Sharp, J. partially concurring and dissenting).

When parents are divorced, the original family unit is broken. A child's subsequent relationship with both parents can never be the same as before the divorce when the family lived together. It is documented that, following a divorce, a child's well-being depends primarily on the custodial parent. Mast v. Reed, 578 So.2d at 310 (Sharp, J., partially concurring and dissenting); Cooper v. Cooper, 99 N.J. 42, 491 A.2d 606, 612 (N.J. 1984), citing Tessman, L., Children of Parting Parents, 516 (1978) (The well-being of the child is closely related to the well-being of the home parent) and Wallerstein, J. and Kelly, J., Surviving the Break-up, 114, 224-225 (1980) (Following the divorce, there is an increased emotional dependence on the custodial parent and children were in trouble when the home parent-child relationship was affected by stress on the home-parent, such as loneliness and discouragement.).

Samson is completely free to move from Florida to seek a better or different lifestyle for herself. She previously moved

from Virginia to Florida to further her career. Clearly, Dobson, who bears the primary burden and responsibility for his daughter, is entitled, to the greatest possible extent, to the same freedom to seek a better life for himself, his daughter and his post-divorce family. Cooper v. Cooper, 99 N.J. 42, 491 A.2d 606, 613 (N.J. 1984); D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 207, 365 A.2d 27,30 (N.J. Super. Ct. Ch. Div. 1976) (This is particularly true where the exercise of the option to relocate is truly advantageous to the custodial parent and child and the non-custodial parent's interests can be accommodated even if by a different visitation arrangement.).

Some of the leading relocation cases have been decided in New Jersey courts. There, the courts look favorably upon legitimate, good faith relocation requests, even though New Jersey, unlike Florida, has an anti-removal statute. In D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 365 A.2d 27 (N.J. Super. Ct. Ch. Div. 1976), the court allowed the custodial parent to move from New Jersey to South Carolina with the parties' minor children. The court noted that, after divorce, the children become part of the custodial parent's family unit and that "what is advantageous to that unit" is in the best interests of the children. The D'Onofrio court suggested that the following factors be considered in deciding whether to allow the relocation: 1) the prospective advantages of the move; 2) the integrity of the motives of the custodial parent in seeking the move; 3) whether the custodial parent is likely to comply with substitute visitation orders; 4) the integrity of the

non-custodial parent's motives in resisting the move; and 5) that a realistic substitute visitation arrangement can be established.

The New Jersey Supreme Court first addressed the relocation issue in Cooper v. Cooper, 99 N.J. 42, 491 A.2d 606 (N.J. 1984). There, the trial court allowed a relocation from New Jersey to California so that the custodial parent could pursue a good employment opportunity. The intermediate appellate court reversed. The New Jersey Supreme Court reversed the appellate court and remanded the case to the trial court for consideration of the D'Onofrio standard, which was essentially adopted by the New Jersey Supreme Court.

The court in Cooper noted that the realities of divorce "compel the realization that the child's quality of life and style of life are provided by the custodial parent." Further, that "the interests of the child are closely interwoven with those of the custodial parent." The court outlined three factors to be considered in deciding a relocation case, after the custodial parent makes a threshold showing that there is a real advantage to the move: 1) the prospective advantages of the move for either maintaining or improving the quality of life of both the custodial parent and the children; 2) the integrity of the custodial parent's motives in seeking to move and the noncustodial parent's motives in seeking to restrain such a move; and 3) whether a realistic and reasonable visitation schedule can be reached if the move is allowed.

Following D'Onofrio, the court in Cooper concluded that trial courts should not insist "that the advantages of the move be sacrificed and the opportunity for a better and more comfortable life style . . . be forfeited solely to maintain weekly visitation . . . where reasonable alternative visitation is available and where the advantages of the move are substantial." Cooper, 491 A.2d at 614. See also, DeCamp v. Hein, 541 So.2d 708, 711-712 (Fla. 4th DCA 1989). Thus, the burden was placed on the non-custodial parent to show that a "proposed alternative visitation schedule would be impossible or so burdensome as to affect unreasonably and adversely his or her right to preserve his or her relationship with the child. Cooper, 491 A.2d at 614.

Later, in Holder v. Polanski, 111 N.J. 344, 544 A.2d 852 (N.J. 1988), the New Jersey Supreme Court liberalized the right of the custodial parent to relocate out of state. The Court held that "any sincere, good faith reason will suffice" to establish good cause for the relocation.

Similarly, in Auge v. Auge, 334 N.W. 2d 393 (Minn. 1983) (en banc), the Minnesota Supreme Court adopted a presumption favoring good faith relocation requests and held that "removal may not be denied simply because the move may require an adjustment in the existing pattern of visitation." The court also noted the importance of continuity and stability in relationships for the child and that "courts should be restricted in their authority to interfere with post-divorce family-unit decision-making."

> Decisions concerning the welfare of the child should be left to the custodial parent, who,

> by virtue of his or her relationship to the child, is best-equipped to determine the child's needs. Auge, 334 N.W. 2d at 399.

There is no reported Fifth District case approving of any relocation request. Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982) (Order denying relocation request affirmed); Jones v. Vrba, 513 So.2d 1080 (Fla. 5th DCA 1987) (Order allowing relocation reversed); Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA 1988) (Order allowing relocation reversed); Mize v. Mize, 589 So.2d 959 (Fla. 5th DCA 1991), petition for review granted (Fla. June 19, 1992) (Order permitting relocation reversed based on conflict with Cole, Giachetti and Jones v. Vrba); Conroy v. Conroy, 585 So.2d 957 (Fla. 5th DCA 1991) (Order allowing relocation reversed based on conflict with Cole, Giachetti and Jones v. Vrba); Dobson v. Samson (Order denying relocation request affirmed based on Cole, Jones v. Vrba, Giachetti and Conroy).

In Mast v. Reed, 578 So.2d 304 (Fla. 5th DCA 1991) (en banc) (Sharp, J., partially concurring and dissenting), Judge Sharp, joined by Judge Griffin, urged that the Fifth District should overturn Giachetti, Jones v. Vrba and Cole and adopt the six factor test followed by the Second, Third and Fourth Districts. Judge Sharp recognized the validity of a relocation to pursue an "out-of-state improved job opportunity" and further that "[F]ocusing narrowly on the noncustodial parent's biweekly visitation rights entirely ignores the devastating impact on the custodial parent if he or she cannot leave the state." Judge Sharp also pointed out that a child's day-to-day welfare depends much more on the

custodial parent's circumstances and that prohibiting a move might deprive the child of improved living conditions.

> I submit that in this day and age of our mobile population, the jet airplane and the UCCJA[4], it 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.
>
> There is no reason why lengthy, extended summer visitation. . . such as Mast offered in her petition could not be worked out in lieu of every other weekend visits. Mast v. Reed, 578 So.2d at 311, 312.

The Giachetti, Jones v. Vrba, and Cole line of cases from the Fifth District has been the subject of substantial criticism. Mast v. Reed, 578 So.2d 304, 310, 311 (Fla. 5th DCA 1991) (en banc) (Sharp, J., partially concurring and dissenting) (Cole and Giachetti are "fundamentally erroneous". . . Our sister courts have adopted a better view than Cole, Giachetti and Jones. See Sherman; Zugda; Hill; Hein; Bachman; Landa; Nissen; Matilla. I think this Court should overturn Cole, Giachetti, and Jones and follow their lead.); DeCamp v. Hein, 541 So.2d 708, 710 (Fla. 4th DCA 1989) (Much has been written in criticism of Giachetti, citing articles); Hill v. Hill, 548 So.2d 705, 708 (Fla. 3rd DCA 1989) (Schwartz, C.J., specially concurring. Judge Schwartz states that Giachetti is "wholly misguided" and represents a "clear failure of

---

[4]The Uniform Child Custody Jurisdiction Act (which has been adopted in both Florida and Iowa) has eliminated one of the principal historic reasons for denying relocation, potential loss of jurisdiction over custody issues. Cooper v. Cooper, 99 N.J. 42, 491 A.2d 606 (N.J. 1984).

legal logic." Further, that he "strongly disagrees" with Cole, Jones v. Vrba and Giachetti for their failure to apply the principle that so long as the primary residential parent desires to move for a well-intentioned reason and well-founded belief that the relocation is best for the parent's and, it follows, the child's well-being, rather than from a vindictive desire to interfere with the visitation rights of the other parent, the change in residence should ordinarily be approved.).

Further, the Fifth District's conclusion in Dobson v. Samson that the child and non-residential parent cannot maintain a meaningful relationship if a relocation is allowed is directly at odds with Sherman v. Sherman, 558 So.2d 149, 151 (Fla. 3rd DCA 1990) and other cases which have held that:

> [M]eaningful visitation can occur where the custodial parent resides in a foreign jurisdiction.

See also, Zugda v. Gomez, 553 So.2d 1295 (Fla. 3rd DCA 1989) and Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd DCA 1985).

Moreover, the Fifth District's rejection of the principle that what is in the best interests of the residential parent's post-divorce family unit is in the best interests of the child is contrary to the holdings of Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd DCA 1985) (The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interest of the children.), Texter v. Texter, 593 So.2d 553 (Fla.

2nd DCA 1992) (The child's family unit consists of herself and her residential parent, and what is best for the unit as a whole is in the child's best interest.) and DeCamp v. Hein, 541 So.2d 708, 712 (Fla. 4th DCA 1989) (What is advantageous to the new family unit as a whole. . . is obviously in the best interests of the children.).

Dobson submits that the Fifth District's decision in the Dobson v. Samson case, and the other decisions of the Fifth District in relocation cases do not demonstrate a properly balanced approach to deciding the relocation issue. Instead, they reflect a rule in which relocation is denied, as a matter of law, where the non-residential parent objects and has previously exercised his or her visitation rights. The Fifth District's approach places undue weight on the interests of the non-custodial parent and ignores the legitimate interests of the custodial parent and child.

A per se or de facto prohibition against interstate relocation would appear to violate the custodial parent's rights of travel and privacy guaranteed by the Federal and Florida constitutions. U.S. Const. Amend. XIV, Section 1; Art. I, Sections 2 and 23, Fla. Const.; Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986) (The freedom to travel throughout the United States has long been recognized as a basic right under the constitution. . . The right to migrate is firmly established and has been repeatedly recognized by our cases. Infringements on the right to travel are strictly scrutinized and a compelling justification must be presented to sustain them. Restrictions which deter, impede or penalize the exercise of the right to travel

have been held to be unconstitutional.); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (This court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.); Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982) (Residency requirement under homestead statute held unconstitutional.); Winfield v. Div. of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985); In re T.W., 551 So.2d 1186 (Fla. 1989) (Florida's constitutional right of privacy is the right to be let alone and free from governmental intrusion into one's private life.).

Clearly, the loss of primary residential care which would result from a per se or de facto relocation restriction would constitute an impermissible penalty upon the custodial parent's fundamental right to travel. Mast v. Reed, 578 So.2d 304, 308, 311 (Fla. 5th DCA 1991) (en banc) (Sharp J., partially concurring and dissenting) (It is both parochial and punitive to confine Florida's custodial parents to this state, as a matter of law, or face loss of residential custody of their children.); Bell v. Bell, 572 So.2d 841 (Miss. 1990) (Relocation restriction in settlement agreement held to be unenforceable. Each person enjoys an enforceable right to travel grounded in the federal constitution.); Jaramillo v. Jaramillo, 823 P.2d 299 (N.M. 1991) (Favoring the resisting parent with a presumption that relocation is not in the child's best

interest unconstitutionally impairs the relocating parent's right to travel. Commentators have widely discussed the implications of this right with respect to a relocating parent's right to move from one state to another without the constraints imposed by the risk that he or she will lose custody of his or her child.).

The proper rule of law to be applied in relocation cases should be the six factor test which has been adopted in the Second, Third and Fourth Districts. Legitimate, good faith relocation requests should ordinarily be approved with the pattern of visitation modified to accommodate the interests of the non-residential parent. No constitutional dilemma is presented by the six factor test.

Counsel for Samson acknowledged at trial that the facts were not "in significant dispute," but argued that the law in the Fifth District was different. (R-3, 94). Samson should not now be heard to argue that the final order should be affirmed based on the exercise of discretion by the trial court. This case is not about the trial court's exercise of discretion. Rather, it concerns the proper rule of law to be applied in relocation cases. As previously noted, the Fifth District has never allowed a relocation. In Jones, Cole, Mize, and Conroy, the Fifth District reversed trial court orders allowing relocation. Surely, it cannot be said that the trial court acts within its discretion only when it denies the relocation request.

The application of the correct rule of law and a trial court's reasonable exercise of its discretionary authority are two separate

and distinct matters. Walter v. Walter, 464 So.2d 538 (Fla. 1985). Findings and conclusions drawn from undisputed evidence, rather than conflicts in the testimony, are in the nature of legal conclusions subject to plenary review. Holland v. Gross, 89 So.2d 259 (Fla. 1956); In re Estate of Donner, 364 So.2d 742 (Fla. 3rd DCA 1978). This case deals with the application of the proper rule of law and not the exercise of discretion. Samson cannot have it both ways by arguing to the trial court that the law in the Fifth District is different and then arguing on appeal that the trial court exercised its discretion.

In this case, the record establishes all of the critical factors for granting the relocation request: 1) there are good reasons for the move; 2) the move is likely to improve the general quality of life for Dobson, his daughter and his post-divorce family; 3) Dobson's motives are bona fide and his purpose is not to frustrate or defeat visitation; 4) Dobson will comply with any substitute visitation arrangement; 5) the proposed substitute visitation is adequate to foster a continuing meaningful relationship between Samson and her daughter; and 6) the cost of transportation is affordable and Dobson is willing to pay his fair share. Accordingly, the relocation request should be granted under the six factor test applied in the Second, Third and Fourth Districts.

CONCLUSION

The Fifth District's decision should be reversed. This case should be remanded to the trial court with instructions to grant Dobson's petition to relocate his daughter's residence, to set reasonable alternative visitation and to fairly allocate the cost of transportation associated therewith.

DATED this 12th day of October, 1992.

Respectfully submitted,

JOHN M. BRENNAN
Florida Bar No. 0297951
BRIAN J. MORAN
Florida Bar No. 0827241
Subin, Shams, Rosenbluth & Moran, P.A.
Suite 900, 111 N. Orange Avenue
Post Office Box 285
Orlando, Florida 32801-2373
(407) 841-7470
Attorneys for Petitioner,
RICHARD ALLEN DOBSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail delivery to N. LEE SASSER, JR., Sasser & Weber, P.A., Post Office Box 531161, Orlando, Florida 32853-1161 this 12th day of October, 1992.

John M. Brennan

JMB/sld
dobson(2)/brief.sup

APPENDIX

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.

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)