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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)

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

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in Dobson v. Samson, 17 FLW D990 (Fla. 5th DCA April 17, 1992) expressly and directly conflicts with decisions of the Second, Third and Fourth District Courts of Appeal in Lenders v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990); Texter v. Texter, 593 So.2d 553 (Fla. 2nd DCA 1992); Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989); Sherman v. Sherman, 558 So.2d 149 (Fla. 3rd DCA 1990); and DeCamp v. Hein, 541 So.2d 708 (Fla. 4th DCA 1989) on the frequent and recurring question of the legal standard and circumstances under which a custodial parent should be permitted to relocate the residence of a minor child, over the objection of the non-residential parent.

Family law cases constitute a substantial portion of the caseload in both the trial and appellate courts of Florida. Divorce, the separation of parents and children, remarriage, the creation of new family units and residence relocation are common 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, over the objection of a non-residential parent, is a difficult task. The resolution of the relocation issue involves a balancing of competing interests: 1) the interest of the child in having meaningful relationships with both parents; 2) 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; and 3) the non-residential parent's interest in maintaining regular visitation with his or her child.

The law relating to relocation affects a large number of people and families in Florida. The bar and trial courts of this state need definitive guidance as to the proper test to be applied in deciding relocation cases and the circumstances under which a relocation should be permitted. All Florida citizens should receive equal treatment on this issue. Unfortunately, that is not the case. Rather, the physical location of parents within this state determines whether a custodial parent may relocate the residence of a minor child. The Fifth District has never allowed a relocation and is in express and direct conflict with the Second, Third and Fourth Districts on this important question of law.

This issue should be addressed by the Florida Supreme Court so that a uniform rule of law may be adopted for all Florida courts. The importance of the issue presented by this case has been recognized. For example, in Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989), Chief Judge Schwartz, concurring specially, referred to the relocation issue as "this vital area of the law." Similarly, in Mast v. Reed, 578 So.2d 304 (Fla. 5th DCA 1991) (en banc), Judge Sharp pointed out that relocation is a "serious family law issue" and cited statistics demonstrating that approximately 20% of American families changed household residences during a recent one-year period.

ARGUMENT

THE FIFTH DISTRICT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THE SECOND, THIRD AND FOURTH DISTRICTS CONCERNING THE LEGAL STANDARD AND CIRCUMSTANCES UNDER WHICH A CUSTODIAL PARENT MAY RELOCATE THE RESIDENCE OF A MINOR CHILD.

In Dobson v. Samson, the Fifth District 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." The original settlement agreement and order did not prohibit a relocation. The non-residential parent stipulated and the trial court found that Dobson's motives for seeking to relocate were genuine and bona-fide, and that his motive was not to defeat or frustrate the contact between the minor child and non-residential parent. The parties stipulated and the trial court also found that Dobson was likely to comply with any reasonable substitute visitation order. Dobson offered substantial substitute visitation. Nevertheless, the Fifth District held that the relocation should be denied since 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."

The decision of the Fifth District in Dobson v. Samson, and the underlying decisions of the Fifth District in relocation cases are in express and direct conflict with decisions of the Second, Third and Fourth District Courts of Appeal, all of which have

favored good faith, bona-fide 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).

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) (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). Further, the Fifth District has rejected the six-prong test adopted by the Second, Third and Fourth Districts. Thus, an express and direct conflict exists.

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, acknowledged the conflict and urged that the Fifth District should overturn Giachetti, Jones v. Vrba and Cole and adopt the 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, 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 (emphasis added).

The Fourth District, in DeCamp v. Hein, and the Third District in Hill v. Hill (Schwartz, C.J., specially concurring) have also acknowledged the conflict between the law applied in those districts and the Giachetti, Cole and Jones v. Vrba line of cases followed by the Fifth District in Dobson v. Samson.

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 (Fla. 4th DCA 1989) (Much has been written in criticism of Giachetti, citing articles); Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989) (Schwartz, C.J., specially concurring. Judge Schwartz states that Giachetti is "wholly misguided" and represents a "clear failure of 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 in express and direct conflict with Sherman v. Sherman, 558 So.2d 149, 151 (Fla. 3rd DCA 1990) which 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 new family unit is in the best interests of the child is in express and direct conflict with 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 respectfully 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 proper rule of law to be applied in relocation cases is an issue of exceptional importance which should be considered by the Supreme Court.

The law concerning relocation in the Fifth District is directly at odds with the law in the Second, Third and Fourth Districts. This situation is simply wrong. All Florida citizens should receive equal treatment on this issue. This conflict should be resolved by the Florida Supreme Court so that a uniform rule of law may be adopted for statewide application. Surely, the resolution of the relocation issue should be controlled by a uniform rule of law, rather than the physical location of the parties within the state. A uniform test should be applied whether relocation is requested in a court in Orlando, Tampa, Lakeland, Miami or West Palm Beach. Otherwise, we will continue to see

substantial disparities resulting from basically similar factual circumstances. See Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980) (Both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances. . . Different results reached from substantially the same facts comports with neither logic nor reasonableness.).[1]

CONCLUSION

The Fifth District's decision in Dobson v. Samson is in express and direct conflict with decisions of the Second, Third and Fourth District Courts of Appeal on an issue of great public importance; the circumstances under which a custodial parent should be allowed to relocate the residence of a minor child. The petitioner, Richard Allen Dobson, respectfully requests that this Honorable Court accept jurisdiction of this case and reverse the decision of the Fifth District Court of Appeal.

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[1]The Fifth District's citation to Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980); Baldwin v. Baldwin, 576 So.2d 400 (Fla. 5th DCA 1991) and Elebash v. Elebash, 450 So.2d 1268 (Fla. 5th DCA 1984), which deal with the trial court's discretion, raises a false issue. This case is not about the trial court's 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. Clearly, it cannot be said that the trial court acts within its discretion only when it denies the relocation request.

DATED this 19th day of June, 1992.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail delivery to N. LEE SASSER, JR., ESQ., Sasser & Weber, P.A., Post Office Box 531161, Orlando, Florida 32853-1161 this 19th day of June, 1992.

John M. Brennan

JMB/sld
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A P P E N D I X O N E

* * *

Dissolution of marriage—Child custody—Modification—Petition by father with primary residential responsibility to relocate with child to distant location to accept employment offer which would enhance his career and salary—Trial court properly found that under facts of instant case, desire and benefits to father and his new family and parties' child 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

RICHARD ALLEN DOBSON, Appellant, v. JULIA HAYDEN SAMSON, Appellee. 5th District. Case No. 91-1991. Opinion filed April 17, 1992. Appeal from the Circuit Court for Orange County, Dorothy J. Russell, Judge. 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, J.) 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. 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*, __ So.2d __ (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.)

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[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?"

* * *

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)