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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 REPLY BRIEF

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SUMMARY OF THE REPLY ARGUMENT

The petitioner, Richard Allen Dobson ("Dobson"), respectfully submits that the issue presented by this case is the proper rule of law to be applied when a custodial or primary residential parent seeks to relocate the residence of a minor child to another state, over the objection of the non-residential parent.

Dobson submits that the Florida Supreme Court should adopt the six factor test applied by the Second, Third and Fourth District Courts of Appeal as the rule of law governing relocation requests. Further, that legitimate, good faith relocation requests such as Dobson's should ordinarily be approved.

The respondent, Julia Hayden Samson ("Samson"), has not seriously challenged the six factor test or offered an alternative test for deciding the relocation issue. Instead, Samson argues that the trial court did not abuse its discretion by denying Dobson's relocation request and that the party seeking to relocate should have a heavier burden of proof in a post-judgment relocation

proceeding and when the shared parenting, residential care and visitation arrangement has been established by agreement.

Dobson submits that Samson overlooks the application of the correct rule of law as a distinct judicial function and misconstrues the discretionary power of the trial court. Further, that Samson's heavier burden of proof arguments are wrong and should be rejected.

Applying the six factor test to the undisputed facts of this case leads to the conclusion that Dobson's relocation request should be granted and the decision of the Fifth District Court of Appeal should be reversed.

REPLY ARGUMENT

A. Samson Overlooks the Application of the Correct Rule of Law as a Distinct Judicial Function and Misconstrues the Discretionary Power of the Trial Court.

Counsel for Samson acknowledged at trial that the facts of this case were not "in significant dispute," but argued that the law in the Fifth District was different. (R-3, 94). The law in the Fifth District is in conflict with the law in the Second, Third and Fourth Districts on the relocation issue. The Fifth District has never allowed a relocation. The trial court was bound by the law in the Fifth District. Carr v. Carr, 569 So.2d 903 (Fla. 4th DCA 1990) (Trial courts in an appellate district must follow the case law from that district.).

This case deals primarily with the application of the correct rule of law to undisputed facts. The application of the correct rule of law is a distinct judicial function. Walter v. Walter, 464

So.2d 538 (Fla. 1985). Further, 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). Where a trial court's order is manifestly against the weight of the evidence, or contrary to, and unsupported by, the legal effect of the evidence, then it becomes the duty of an appellate court to reverse. (emphasis added). Brumick v. Morris, 131 Fla. 46, 178 So. 564 (1938); Randy International, Ltd. v. American Excess Corp., 501 So.2d 667 (Fla. 3rd DCA 1987); Zinger v. Gattis, 382 So.2d 379 (Fla. 5th DCA 1980.).

Moreover, this court in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) stated that the discretionary power that is exercised by a trial judge is not without limitation. Further, that both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances.

> Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness. Canakaris, 382 So.2d at 1203.

The Fifth District has never permitted a relocation. In Jones v. Vrba, 513 So.2d 1080 (Fla. 5th DCA 1987); Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA 1988); Mize v. Mize, 589 So.2d 959 (Fla. 5th DCA 1991) and Conroy v. Conroy, 585 So.2d 957 (Fla. 5th DCA 1991), 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 a relocation request.

It should also be noted that in Lenders v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990); 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), trial court orders denying relocation were reversed and the trial courts were held to have abused their discretion where the evidence , like the evidence in this case, satisfied the six factor test.

Dobson submits that Samson's argument to the trial court that the law in the Fifth District is different and her argument on appeal that the trial court duly exercised its discretionary authority is simply an attempt to create a Catch - 22 situation in which Samson prevails under any scenario.

The trial court's decision cannot be sustained by the testimony of Samson's expert, Carl Nickeson, Ph.D. since his opinion that consistent and frequent contact is preferable was stated only as a "general proposition" and "not based upon an evaluation of the specific facts of this case." (R-13, 14). Further, he had little knowledge concerning the proposed relocation and conceded that "I haven't done any evaluation of any individual or location in this case." (R-17). This is in sharp contrast to Dobson's expert, Dr. Emmy Freeman, who met with Dobson, his wife, Shelley, and their two daughters. (R-55). Dr. Freeman testified that Dobson had developed a "very cohesive" post-divorce family, that Alexandra identifies family-wise with Dobson's post-divorce

family, that there was no disadvantage to allowing Alexandra to relocate and that a substitute visitation arrangement could be achieved without any detrimental effect on Alexandra. (R-56 - 60, 64, 68).

Significantly, both experts agreed that meaningful visitation can occur where the residential parent resides in a different state than the non-residential parent. (R-14 - 15, 60 - 62). Dr. Nickeson also agreed that "[t]here could be a number of situations that would be justifiable" to support a relocation, such as job changes and economic necessity. (R-16). Moreover, Samson's mischaracterization of Dobson's position as "the best interest of the parent test" ignores the principle set forth in a number of cases that what is in the best interests of the residential parent's post-divorce family unit is in the best interests of the child. Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd DCA 1985); Texter v. Texter, 593 So.2d 553 (Fla. 2nd DCA 1992); DeCamp v. Hein, 541 So.2d 708 (Fla. 4th DCA 1989).

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.

The defense contract industry, in which Dobson is employed in Orlando, is in a "very stagnant" and "depressed" economic condition. (R-43, 142, 143). The requested relocation will allow Dobson to increase his income, resume a stable career as a nuclear engineer and improve the general quality of life for he and his post-divorce family. Samson agreed that "it would be a very good

career move." (R-86). Dobson's request is legitimate and his motives are bona fide. There is no motive to defeat or frustrate Samson's visitation. Dobson offered extended substitute visitation. It is undisputed that Dobson will comply with all substitute visitation arrangements and he has offered to share transportation costs related thereto.

Under these circumstances, Dobson meets the six factor test and relocation should be allowed. Samson's interests should be accommodated by increased summer and holiday visitation. This is a far better legal solution than totally denying Dobson and his post-divorce family the advantages of the relocation or a change in primary residential care, which the trial court expressly found "would not be in the best interests of the child." (R-277, para. L). Dobson's proposed substitute visitation, although changing the pattern of visitation, would provide an equivalent amount of contact time and contact as frequent as Alexandra's school schedule would permit. (R-39 - 42).

With respect to Samson's argument relating to the removal of Alexandra from her grandparents and stepfather, it should be noted that her paternal grandfather supported the move (R-90 - 91), and that her "stepfather" had just married Samson three (3) days prior to the relocation trial. (See the Appendix to this brief). Further, with regard to Alexandra's half-brother, it should be noted that his father lives in Virginia. (R-76 - 77). Samson previously relocated from Virginia to Florida with her son to pursue a career opportunity. (R-34 - 36, 76 - 77). See Texter v.

Texter, 593 So.2d 553 (Fla. 2nd DCA 1992) (Although it is certainly beneficial to the child to remain in close touch with her father, brother and sister, her day-to-day routine and the quality of her general style of life depends upon her mother and the style of life she is able to provide. The child's family unit consists of herself and her mother, and what is best for the unit as a whole is in the child's best interest. It is within this context that the terms of visitation must be considered.).

Finally, Dobson has not used "throwback" terminology or argued a position inconsistent with the adoption of the shared parental responsibility law. The cases which have adopted the six factor test use the terms custodial parent and primary residential parent interchangeably. Cases addressing the issue also note that the change in nomenclature 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.).

B. The Same Six Factor Test Should be Applied in Trial or Post-Judgment Proceedings Without a Heavier Burden of Proof on the Party Seeking to Relocate.

The same six factor test for deciding the relocation issue should be applied whether the issue arises at trial or in a post-judgment proceeding. There is no logic to support the application of a different test or the imposition of a heavier burden in a post-judgment proceeding. This is particularly true where, as here, the relocation issue was not litigated in the original trial. The cases cited by Samson, which deal with post-judgment

proceedings to modify custody, primary responsibility or child support previously established at trial or by agreement, are inapposite.

As Samson noted in her answer brief, none of the cases applying the six factor test has made a distinction between trial and post-judgment proceedings. The only court which has directly addressed the issue held that the same six factor test should be applied whether the issue arises at trial or in a post-judgment proceeding. Bachman v. Bachman, 539 So.2d 1182, 1183 (Fla. 4th DCA 1989) (The same factors should apply to the trial court's consideration of the relocation issue either at trial, or post-judgment when the question had not been addressed earlier.).

Further, Sherman v. Sherman, 558 So.2d 149 (Fla. 3rd DCA 1990); Lenders v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990); Britt v. Shovein, 559 So.2d 749 (Fla. 4th DCA 1990); Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989); Landa v. Landa, 539 So.2d 543 (Fla. 3rd DCA 1989); Eisner v. Markovich, 585 So.2d 312 (Fla. 3rd DCA 1991); Texter v. Texter, 593 So.2d 553 (Fla. 2nd DCA 1992); and Tamari v. Turko-Tamari, 599 So.2d 680 (Fla. 3rd DCA 1992), all involved post-judgment relocation proceedings in which the six factor test was applied without any heavier burden of proof being imposed on the party seeking to relocate.

In Lenders v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990), as in this case, the parties had agreed to the custody arrangement and the judgment neither limited nor restricted the geographical location of the primary care parent and children. Similarly, in

Zugda v. Gomez, 553 So.2d 1295 (Fla. 3rd DCA 1989), the parties had agreed that the mother would have primary residential care and that the father would have scheduled visitation. The six factor test was applied in both cases without any heavier burden of proof on the party seeking to relocate. Tietig v. Boggs, 602 So.2d 1250 (Fla. 1992), cited by Samson, deals only with a "heavy burden" rule in cases where a modification of child support established by agreement is sought.

With regard to the constitutional considerations, Dobson did argue to the trial court that his "fundamental constitutional right to travel" should be weighed in balancing the parties' competing interests. (R-99). Samson's argument that Dobson is free to relocate if he chooses and that the loss of primary residential care is "no infringement" on his fundamental right to travel is at odds with all of the authorities cited at pages 24-26 of Dobson's initial brief, which authorities Samson fails to address.

Samson's self-serving statement that, if she were offered a teaching job out of state she would stay in Florida (R-88, 89), is not a basis for denying the requested relocation. Further, it should be pointed out that Samson moved from Virginia to Florida with her son and away from his father "to go into the navy and be an instructor here at the nuclear power school." (R-77).

Florida does not have an anti-removal statute and prior to 1982 it had been the law in Florida that where the divorce decree is silent on the issue of relocation, the custodial parent was free to move from the state and take the child with him. Bell v. Bell,

112 So.2d 63, 68 (Fla. 3rd DCA 1959); McCrillis v. McCrillis, 147 So.2d 584 (Fla. 2nd DCA 1962). The non-custodial parent's visitation rights were protectable by the court. In 1982, the Fifth District decided Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982) which held that an obligation not to relocate was implied by the visitation provisions in the final judgment. As mentioned in Dobson's initial brief, the Giachetti decision has received considerable criticism. (see Initial Brief at p. 22).

In Ingham v. Ingham, 603 So.2d 74 (Fla. 4th DCA 1992), cited by Samson, the court stated that it agreed with Giachetti only to the extent that there was an implied restriction on the movement of the custodial parent.

> We also note that whatever procedural vehicle is utilized to raise the issue, the trial court remains committed to apply the six point test set forth in DeCamp v. Hein, 541 So.2d 708 (Fla. 4th DCA 1989).

Dobson respectfully submits that this Court should adopt the six factor test applied in the Second, Third and Fourth Districts as the rule of law governing relocation requests. 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 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.).

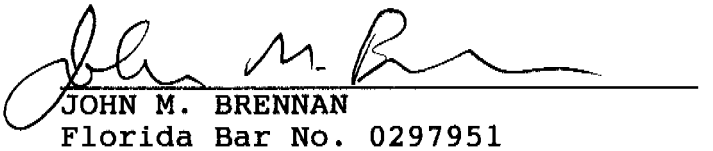
Where, as here, the party seeking to relocate meets the six factor test, the relocation should be permitted and the non-residential parent's interests should be accommodated by a modified visitation arrangement. There is no basis for modifying the six factor test by imposing a heavier burden of proof on the party seeking to relocate.

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 5th day of November, 1992.

Respectfully submitted,



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