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FILED
SID J. WHITE
JUN 29 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

STATE OF FLORIDA
SUPREME COURT

RICHARD ALLEN DOBSON,

Petitioner,

vs.

CASE NO: 80,028

(5TH DCA Case No. 91-1991)

JULIA HAYDEN SAMSON,

Respondent.

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

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RESPONDENT'S REPLY ON JURISDICTION

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SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in Dobson v. Samson, 17 FLW D990 (Fla. 5th DCA 1992) does not expressly and directly conflict with any decision of this Court or the District Courts of Appeal which would permit discretionary jurisdiction to be invoked by this Court. The standard for the determination of the relocation issue is "the best interest of the child" in all jurisdictions.

ARGUMENT

THE FIFTH DISTRICT DECISION IS NOT 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.

The test for determining whether a primary residential parent should be permitted to move a child out of Florida over the secondary parent's objection is, in all Districts based on the best interest of that child. In Dobson v. Samson, 17 FLW D990 (Fla. 5th DCA 1992) the Fifth District Court of Appeal applied this test, specifically finding that the benefits to the father and his new family from the relocation were "outweighed by the benefit to the child of maintaining frequent and close continuous contact with the mother and the mother's right of continued frequent visitation and effective shared parental responsibility." (APP-1).

While Appellant argues that the standard utilized by the Fifth District is in conflict with the decisions of the Second, Third and Fourth Districts, each of those Districts continues to utilize the "best interest" test. While the other Districts allow the trial court to consider other factors as well, the main criteria which embodies the others is "best interest". In Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989) cited by Appellant and by the the Third and Fourth District cases with which Appellant urges conflict, the court states the sixth

factor for the Court to consider:

> "6. Whether the move is in the best interest of the child (this sixth requirement we believe is a generalized summary of the previous five)" P.706

Thus, the standard of review does not differ between the Fifth District as set forth in Dobson v. Samson and the other Districts but is simply a different enumeration of factors.

In this case, the trial court in fact considered all of the factors outlined in Hill. Specifically, the Final Order on Former Wife's Supplemental Petition for Modification of Final Judgment and Former Husband's Supplemental Petition for Modification of Final Judgment states at paragraph "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." (APP-4)

However, the trial court also found at paragraph "J":

> "As a result of this child's young age, six and a 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." (APP-4)

The Court went on to hold in paragraph "K", as follows:

> "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 outweighed by the benefit to the child of maintaining frequent and continuing contact with the mother." (emphasis added) (APP-5)

This specific finding was cited by the Fifth District in Dobson v. Samson which also cited Canakaris v. Canakaris, 382

So.2d 1197 (Fla. 1980) indicating that the Appellate Court must affirm the trial court because Judge Russell was well within her bounds of discretion.

Appellant argues that the Third District Court of Appeal in Sherman v. Sherman, 558 So.2d 149 (Fla. 3rd DCA 1990) holds, as a matter of law, that meaningful visitation can occur where the custodial parent resides in a foreign jurisdiction. Further, Appellant asserts that Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd DCA 1985) stands for the proposition that the "new family unit" consists only of the children and the custodial parent. These are clearly questions of fact, not law and the trial court's findings of fact should not be distrubed. Judge Russell's Final Order, affirmed by the Fifth District, specifically found that since she was two years old, Alex had the benefit of liberal contact with her mother, including alternating weekends from Friday until Monday and every Wednesday evening until Thursday morning. This contact schedule provides contact between the mother and child sixteen (16) days out of each twenty-eight (28) day cycle. Additonally, her mother's home consisted of her mother, her stepfather and her half-brother. All of Alex's grandparents, paternal and maternal, live in Orlando and regularly spend time with her. In its Order the Court specifically agreed with the testimony of the mother's expert that the frequency of contact is important to maintain the

existing relationship between this six and one-half year old child and her mother. These are clearly factual issues, concluded by the trial court, and affirmed by the Fifth District utilizing the Canakaris standard of review. Appellant's assertion that all that matters is the primary residential parent's new family is not supported by the evidence, and certainly can not be a valid conclusion of law.

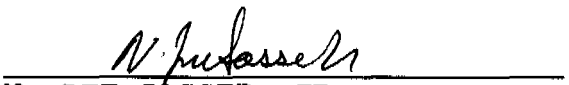
Thus, the same standard is essentially applied in all of the Districts, i.e., "the best interest of the child". The trial court did consider the other factors enumerated in the cases of the Second, Third and Fourth Districts cited by Appellant and even having considered those factors specifically found that it was in the best interest of the minor child for the relocation to be prohibited. The Fifth District found that this was in the broad discretion of the trial court and affirmed. Based on the Canakaris standard of review and the trial court's specific findings, the Final Judgment would have been affirmed in any of the Districts. Thus, there is simply no conflict between Dobson v. Samson and the decisions of the other Districts as urged by Appellant.

CONCLUSION

There being no express and direct conflict between Dobson v. Samson, 17 FLW D990 (Fla. 5th DCA 1992) and the cases cited by Appellant of the Second, Third and Fourth District Courts of Appeal, discretionary review by the Florida Supreme Court should be denied.

DATED this 25th day of June, 1992.

SASSER AND WEBER, P.A.



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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that the original and five (5) copies of the foregoing have been served to Sid J. White, Clerk, Supreme Court of Florida, 500 S. Duval Street, Tallahassee, FL 32399-1927. and a copy thereof to JOHN M. BRENNAN, Suite 900, 111 North Orange Avenue, Post Office Box 285, Orlando, Florida, 32801, Attorney for Appellant, by U.S. Mail this 25th day of June, 1992.

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APPENDIX

* * *

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?"

* * *

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)