IN THE SUPREME COURT OF FLORIDA

HEIDE M. HESS JONES,

Appellant,

vs.

CURTIS LEE JONES,

Appellee.
_____/

CASE NO.: 80,809

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

LOWER COURT
CASE NO.: 91-2258

APPELLANT'S INITIAL BRIEF ON THE MERITS

Jeffrey L. Dees, of
DUNN, ABRAHAM, SWAIN & DEES
347 South Ridgewood Avenue
Post Office Drawer 2600
Daytona Beach, Florida 32115-2600
(904) 258-1222
Florida Bar No. 167906
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

STATEMENT OF THE CASE

HEIDE M. HESS JONES, former wife, appeals the decision of the Fifth District Court of Appeal affirming the denial of her Petition to Modify Final Judgment of Dissolution [the "Petition"] to allow her to take the parties' six year old child to her native homeland of Germany, where she would be reunited with her family and friends.

After an extensive evidentiary hearing before the trial court on September 12, 1991, the court issued an order denying the Petition. (R.1-135,257) The trial court applied the decision of the Fifth District Court of Appeal in Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982) and concluded that, since the move to Germany was voluntary on the part of the former wife, the move should be denied because it would violate the duty imposed by Giachetti upon the custodial parent not to interfere with the non-custodial parent's relationship with the child. (R.257) In addition, applying the test of Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989), the trial court concluded that it did not believe any substitute visitation would be adequate, even though the former wife had a genuine desire to move (no intent to defeat visitation), her quality of life would improve, and she offered to provide and pay for extended visitation with the former husband, which she could afford to do. (Id.) (A complete copy of the trial court's ruling is attached at Appendix B herewith.)

Upon review, the Fifth District Court of Appeal affirmed the decision of the trial court upon the authority of its previous decisions in Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA 1988); Jones v. Vrba, 513 So.2d 1080 (Fla. 5th DCA 1987); and Giachetti. The Fifth District also held that the trial court correctly applied the six-part test set forth in Hill, supra. (A complete copy of the Fifth District Court of Appeal's opinion is attached at Appendix A.)

The Fifth District Court of Appeal rendered its opinion on October 23, 1992. (Id.) The Petitioner filed her Notice of Appeal to this court on November 19, 1992.

STATEMENT OF FACTS

The former wife was born and raised in Germany. (R.62) She went to school and college there and worked as a registered nurse. She met and became engaged to her former husband there, while he was stationed in Germany with the United States Army from 1981 to 1983. (R.63)

Upon discharge from the Army in 1983, the parties were married in Florida. (R.65) The marriage lasted four (4) years. During that time the parties had one son and lived in various locations in Florida, before moving to Germany in 1986. (R.65-68) The family lived in Germany for approximately one (1) year from 1986 to 1987. (Id.)

In late 1987, the husband unilaterally returned to Florida with his son and filed for divorce. (R.69) The wife arranged for an extended visa and returned to Florida for the pendency of the divorce, where she took custody of the son. (Id.) The divorce was granted in May of 1990, awarding the wife primary residential custody, but imposing a residential restriction against leaving the jurisdiction of the court without the consent of the husband or the court. (R.181)

Following the divorce, the former wife became increasingly unhappy living in the United States, where she has no husband, no family and no close friends. (R.62,64-65,105) Her life here since the divorce has consisted of working as a nurse and living alone with her son. (Id.) Each year when she has been able, she and her son visit their family in Germany during her vacation or holiday periods. (Id.) In May, 1991, the wife filed the Petition to allow her to return to her native home in Germany with her son.

During the hearing on the Petition, the evidence showed that all of the wife's relatives and friends live in Germany. (R.72) There she has an extended family, including her parents, two (2) adult sisters (each of them married with a family of

their own), a brother, a grandmother and three (3) uncles, all residing in or near the City of Nuremburg. (Id.)

The evidence also showed that in Germany a job as a registered nurse was waiting for the former wife at the same hospital where she worked in 1987, which would provide substantially increased financial benefits than available to her in Florida, including better pay and more vacation time to be with her son.[1] (R.75) Other benefits in Germany include free health care, free transportation systems, and free education for her son, including her choice of public or private grade schools and colleges.[2] (R.76,80,93) These financial benefits to the wife and son took on added importance in light of the fact that the husband was no longer paying child support due to unemployment and enrollment in an indefinite vocational retraining program. (R.6-13,58,108)

The wife offered to send the son to Florida for extended visitation with the husband for one and one-half (1-1/2) months in the summer (the entire school vacation) and two (2) weeks at Christmas or Easter, each year. (R.91) The wife offered to fully pay for the cost of these trips, and she could afford to do so due to

---

[1]Her rate of pay will be equal to that in the United States, but her salary will actually increase due to increased benefits for weekend work, shift differential benefits, an additional $225.00 vacation bonus pay, and a bonus check in the amount of one month's pay at Christmas, all of which are available to her in Germany. (R.76-78) In addition, she is granted thirty (30) paid vacation days per year in Germany. (Id.)

[2]Heide's expenses would reduce dramatically: (1) By living in the home of her sister, her rent would not exceed $150.00 per month, compared with $395.00 per month in the United States. A savings of $245.00 a month. (R.74,94) (2) No school tuition would be paid for Robert since private and public schools are free in Germany. A savings of $174.50 a month over the present tuition costs. (R.93) (3) No medical or medical insurance costs. Germany offers free medical care for its citizens. This would save Heide $50.00 per month. (R.76,93) (4) No car or automobile costs. Nuremburg and Germany have a free public transportation system throughout the city, state and country. (R.80,94) See Wife's trial exhibit #3 (R.235) for a general summary of these benefits.

the economic benefits of the move.[3] (Id.) The wife even offered to pay for a third yearly trip to Florida for visitation with the former husband if he could provide some child support to assist her. (R.92-96)

When the couple lived in Germany in 1986 and 1987, the son had done well there and had enjoyed the company of his German relatives, including his nieces and cousins (even the husband admitted this). (R.22,67,89) Both the wife and the son are citizens of Germany. (Id.) The wife testified that her son was very positive toward the move to Germany and to settle where they are going to live since the divorce. (R.89-90)

The record also included evidence of substantial educational, cultural and social benefits available to the wife and son as a result of living in Germany, in the province of Bavaria, which is centrally located in Europe as well. (R.81-90,236-254)

As to the husband's relationship with their son, there was (unlike the wife) conflicting evidence, particularly regarding his actual concern. For example, the wife often conferred with the son's teachers, but the husband never did. (R.99,115) The wife attended the son's kindergarten graduation, but the husband did not even though he had been told when it was scheduled. (Id.) The husband never took his son (age 5 and 6 at the time) to playgrounds during weekend or other visitation. (Id.) And frequently, during his alternating weekend visitation, the husband had left his son with the grandmother and gone off alone. (R.59-60,99,115,126)

---

[3]Round-trip air fare varies from $500.00 to $1,000.00, depending upon the airline, the time of year, and other reservation requirements. (R.92) There are direct air flights between Orlando and Nuremburg, which has a modern jet port facility. (Id.) The transportation costs are easily affordable by Heide due to the fact that just her savings in expenses from the move total $587.50 per month (not counting her increased pay). (R.93-95) At the highest round-trip cost, Heide could pay for two (2) trips to the United States within four (4) months just on the savings from her move to Germany. This evidence was not disputed.

The son's only other relative in Florida is his (paternal) grandmother. (R.46) She appeared at the hearing and testified that while she would miss her grandson, she had no objection to him and the wife moving to Germany. (R.122)

SUMMARY OF ARGUMENT

The law of the Fifth District Court of Appeal in post dissolution marital cases where a custodial parent seeks to move to a foreign jurisdiction [Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA 1988); Jones v. Vrba, 513 So.2d 1080 (Fla. 5th DCA 1987); and, Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982)] is in direct conflict with the law announced in such cases in the Second, Third and Fourth District Courts of Appeal [Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989); DeCamp v. Hein, 541 So.2d 708 (Fla. 4th DCA 1989); Bachman v. Bachman, 539 So.2d 1182 (Fla. 4th DCA 1989); Lenders v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990); and, Tamari v. Turko-Tamari, 599 So.2d 680 (Fla. 3rd DCA 1992)].

The evidence before the lower court satisfied the test of Hill v. Hill in that it was proven that the Appellant's desire to move was genuine, the quality of life for both herself and her son would be maintained or improved, and alternate visitation for the husband for extended periods of time was both affordable and feasible. The evidence supported the conclusion that the move was in the best interest of the child and should have been approved.

The lower court's denial of the Appellant's Petition to relocate to her native home in Germany was an erroneous application of law and an abuse of discretion. The holdings of the Fifth District reveal what appears to be an unwritten, irrebuttable presumption against any move that makes alternating weekend visitation no longer possible. Since Giachetti, the Fifth District has never allowed the custodial parent to permanently move out of Florida with the child of the parties. This is in sharp contrast to decisions in the Second, Third and Fourth Districts which do allow such moves. The Fifth District has never offered any legal justification compelling its position exalting weekend visitation and prohibiting moves out of its jurisdiction by a custodial parent.

The decision by the lower court should also be reversed because it obstensibly applies the test of the Third District in Hill v. Hill to produce a different result in this case which involves substantially similar facts as in the Hill case and cases from other district courts of appeal.

Florida needs a single rule to govern situations such as the case at hand, and the Hill test is better suited to accommodate the needs of parents and children and to promote sound judicial decisions.

This court should approve the Hill v. Hill, Lenders v. Durham and DeCamp v. Hein line of cases decided by the Second, Third and Fourth Districts and disapprove the holdings announced in Giachetti v. Giachetti, Cole v. Cole, Jones v. Vrba and Mast v. Reed issued by the Fifth District.

This court should remand the case at hand with instructions to grant the Petition to allow the wife to move with her son to her native home in Germany and to afford the husband extended visitation as offered by the wife below.

ARGUMENT

A. The law of the Fifth District in post dissolution marital cases where a custodial parent seeks to move to a foreign jurisdiction is in direct conflict with the law announced in the Second, Third and Fourth Districts.

The Fifth District Court of Appeal has announced a rule of law that expressly requires the primary residential parent who wishes to permanently move to a foreign jurisdiction to petition for a modification of **custody** and to satisfy the requirements of such a proceeding, namely, by showing a **substantial or material change of circumstances** and that the requested modification would be in the best interest of the children. Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA 1988); Jones v. Vrba, 513 So.2d 1080 (Fla. 5th DCA 1987); and, Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982).

As to this standard, the Fifth District further holds that there is very little difference in the proof required to justify relocation from that required for the court to change custody. See Cole v. Cole, 530 So.2d at 469. And unfortunately, when presented with a petition for relocation, the Fifth District prefers to change custody and deny permission to relocate with the child. For example, in Jones v. Vrba, supra, the mother's desire to move to Washington, D.C., to be with her new husband was apparently deemed "a sufficient basis" (without more) for the Fifth District to order custody changed from herself to the former husband. Similarly, Cole v. Cole, supra. This is also the result ordered below (and affirmed by the Fifth District) in this case if the wife decides to move to Germany (i.e., she loses custody). (Appendix A and B.)

By stark and often deliberate contrast, the District Courts of Appeal in the Second, Third and Fourth Districts have adopted a totally different standard. Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989); DeCamp v. Hein, 541 So.2d 708 (Fla. 4th DCA 1989); Bachman v. Bachman, 539 So.2d 1182 (Fla. 4th DCA 1989); Lenders

v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990); and, Tamari v. Turko-Tamari, 599 So.2d 680 (Fla. 3rd DCA 1992).

These districts have adopted a six-part test as follows:

> The tests used to resolve such relocation dilemmas has evolved through this court's decision in Matilla v. Matilla, 474 So.2d 306 (Fla. 3rd DCA 1985) and the Fourth District's decision in Costa v. Costa, 429 So.2d 1249 (Fla. 4th DCA 1983) to include the following six (6) elements:
>
> (1) Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children.
>
> (2) Whether the motive for seeking the move is for the express purpose of defeating visitation.
>
> (3) Whether the custodian parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements.
>
> (4) Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the non-custodial parent.
>
> (5) Whether the cost of transportation is financially affordable by one or both of the parents.
>
> (6) Whether the move was in the best interest of the child. (The sixth requirement we believe is a generalized summary of the previous five (5).)
>
> Hill v. Hill, 548 So.2d at 706.

Under the tests announced in these districts, no substantial and material change of circumstances need be shown, nor is the relocation issue considered a custody issue (and certainly not grounds to change custody) unlike the situation which prevails in the Fifth District. Id.; Lenders v. Durham, 564 So.2d at 1188; cf. Cole v. Cole, supra; and, Jones v. Vrba, supra. As Chief Judge Schwartz observed in his concurring opinion in the Hill case:

> Inasmuch as it is a priori the case that [the best interests of the child] have already resulted in an award of custody to a particular parent, either by agreement or court order, it follows that the child should live wherever that

> residence may be rather than in what is by definition the less important location of the other parent. To favor, in other words, the home preferred by the visitor over that of the custodian - as was the case in such, I think, wholly misguided decisions as Parker v. Parker, 519 So.2d 673 (Fla. 1st DCA 1988), rev dismissed, 531 So.2d 1354 (Fla. 1988); Costa v. Costa, 429 So.2d 1249 (Fla. 4th 1983); and, Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982) - represents a clear failure of legal logic if nothing more.
>
> * * *
>
> Viewed in this light, I must think that those cases which exalt the father's convenience in seeing the children at the place he makes his living over a sincere desire of the mother to live where she wishes, e.g., Giachetti, 416 So.2d at 27; see, Parker, 519 So.2d at 673, are informed by a thoroughly indefensible attitude that the mother's personal wishes are somehow less worthy and valuable than the desires of the male parent and the preference accorded the place where he pursues the money-making function he still so often performs in our society. This is just the kind of invidious distinction that, with respect to the financial relationship of married partners, the Supreme Court sought to eliminate in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). 548 So.2d at 708.

The Fifth District's standard is so restrictive that other courts have commented critically that "[Giachetti] is widely quoted as authority for the proposition that **the custodial parent cannot move out of State**, because to do so effectively terminates the natural father's visitation." DeCamp v. Hein, 541 So.2d at 710 (emphasis added).

Even the Fifth District itself is internally divided over continued adherence to Giachetti, but appears to be powerless to change its position. See Mast v. Reed, 578 So.2d 304 (Fla. 5th DCA 1991); see also, the decision rendered in this case. (Appendix A.)

B. The evidence before the lower court met the test of Hill v. Hill.

The evidence introduced below before the trial court met the six (6) requirements of Hill v. Hill:

1. Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children.

The trial court found as to the former wife that the general quality of life for her would likely improve. As to the son, Robert, who is six years of age, the evidence does not support the court's conclusion that the move would be a major disruption of his life. Under the evidence below, there is no dispute that the move to the wife's native homeland would improve the quality of life for both herself and her son in almost every conceivable fashion: association with family, economic benefits, cultural and social benefits, educational benefits, emotional and spiritual benefits. The entire center of the wife's life is there. Both she and her son are German citizens and have more relatives there than in the United States. Her son should be entitled to the benefits of this move and to close association with his German family.

The court's ruling as to Robert is thus inconsistent and unsupported by the evidence. The ruling also disregards the following established facts:

(a) Robert would continue to live with his mother (the preferred residential parent) in Germany.

(b) Robert has experienced no deep or settled family life in the United States because none was ever established by the parents. Robert lived the first three years of his life in Lakeland where they had no relatives. He lived the next year in his mother's hometown in Nuremburg, Germany. Since the divorce was filed by his father in Volusia County in 1987, Robert has lived with his mother as soon as she was able to return to the United States with a visa in 1988. Robert's only relative in Florida is his grandmother, whom he sees only occasionally (whenever his father brings him by during weekend visitation). (R.59-62)

(c) As to school, Robert only started first grade in September, 1991, and has no long association with any particular school which would be upset by the move. Further, Robert is a young child; he has a deep German heritage that is natural to him already. He speaks and understands basic German now and should be able to pick up mastery of the language quickly as young children often do. (R.105-107) In addition, English is taught as a required language in the German schools from the fourth grade onward and is commonly spoken in Germany. (R.82-83) This is evidenced by the fact that his mother speaks fluent English.

2. Whether the motive for seeking the move is for the express purpose of defeating visitation.

The trial court found this factor in favor of the wife. The court found that Heide has no desire to defeat visitation, and this is supported by the evidence. The wife's strong desire to return to Germany was evident long before the divorce was filed, was the subject of numerous discussions with her husband and was the motivation for the family moving to Germany for the period of 1986 to 1987 as previously described. (R.65-68)

3. Whether the custodial parent once out of the jurisdiction will be likely to comply with any substitute visitation arrangements.

The trial court found this factor in favor of the wife. The court held that Heide will comply with substitute visitation arrangements. Her unblemished record of compliance with previous court orders during the four (4) years of the previous divorce proceedings to date (during which she has had custody and even travelled to and returned from Germany on vacation several times) has thoroughly established her ability and willingness to abide by court orders. Further in her Petition, the wife expressed her offer to stipulate to the continued jurisdiction of the Florida courts over her child and to submit to periodic review as to the status of his well-being if required. (R.188-193)

4. Whether the substitute visitation will be adequate to foster a continuing and meaningful relationship between the child and the non-custodial parent.

The wife offered substantial extended visitation to the husband, to include the entire summer school vacation period and the entire two week vacation period at Christmas or Easter each year. The wife also offered a third annual visit to the United States if the husband were paying child support. The visitation offered by the wife was practical, affordable and consistent with the policy established by the Second, Third and Fourth Districts in Florida and the circumstances of the parties. However, bound by the holdings of the Fifth District in Giachetti and subsequent cases (against any interference with established weekend visitation), the trial court failed to give any express and meaningful consideration to the substitute visitation arrangement which was offered by the wife. The trial court's flat statement (that no substitute visitation would maintain the "current" relationship with the father) is clearly not the Hill test and is instead the totally prohibitive test of the Fifth District in Giachetti and subsequent cases.

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

This ruling by the trial court (that the wife could afford only a portion of the costs) is clearly erroneous. The visitation arrangements offered by the wife, even without the payment of child support by the husband, was clearly affordable by the wife based on her income and savings alone. Should the husband become employed some day in his new field of computer repair, he will have substantial earnings in the future which will make affordable additional yearly visitation by his son as offered by the wife. (R.9-10)

6. Whether the move is in the best interest of the child.

This factor is directed to be a summing up of the previous factors above. A summing up of the above factors in light of the actual evidence leads to the

conclusion that the move is in the best interest of the child and should be approved under the test in Hill v. Hill.

C. The lower court's denial of the Appellant's petition to relocate to her native home in Germany was an erroneous application of law and an abuse of discretion.

The trial court denied the Petition on the grounds that the move was voluntary on the part of the wife, i.e., that it was not a "no choice" situation, and would violate the Giachetti duty not to interfere unreasonably with the non-custodial parent's relationship with the child.[4] The Fifth District affirmed on the authority of Giachetti and its subsequent decisions.

Clearly implicit in the holding of the Fifth District in this case, and also in Giachetti, Cole, and Jones v. Vrba, is an unstated bias against permitting the primary residential parent to move out of State regardless of the reason. Since Giachetti, the Fifth District has uniformly ruled that where a custodial parent wishes to move to a foreign jurisdiction, thereby making weekend visitation impossible with the noncustodial parent, no substitute visitation is deemed adequate and the move will be denied. The request to move usually will cost the petitioning party the primary residential custody of the children. See Cole v. Cole, supra, and Jones v. Vrba, supra.

The holdings of the Fifth District reveal what appears to be an (unwritten) irrebuttable presumption against any move that makes alternating weekend visitation no longer possible. This has two further aspects. The legal result is that the initial custody/visitation judgment becomes, for these purposes, nonmodifiable for the primary residential parent (but not so for the noncustodial

---

[4]No explanation was offered as to why this move should be considered an "unreasonable" interference with the husband's relationship with the son. Given the facts of this case, the wife's request to return to her native home, where the marriage essentially arose and where the parties even lived, is not unreasonable.

parent). This is a degree of prejudgment that amounts to an abuse of discretion. Further, the Fifth District has failed to provide any reasons (legal or otherwise) why extended visitation is not acceptable, when such has been supported by experts and accepted in reasoned opinions of other district courts of appeal within this state. See, e.g., Matilla v. Matilla, 474 So.2d 306, 307 (Fla. 3rd DCA 1985); Sherman v. Sherman, 448 So.2d 149, 151 (Fla. 3rd DCA 1990) (meaningful visitation can occur where the custodial parent resides in a foreign jurisdiction and extended visits may serve the parental relationship better than the typical weekly visit); Hill v. Hill, supra; Tamari v. Turko-Tamari, supra; DeCamp v. Hein, supra; Bachman v. Bachman, supra; Lenders v. Durham, supra.

For the Fifth District, the issue is predetermined: the parent desiring to move loses custody to the parent who does not move. While it cannot stop a custodial parent from moving out of the jurisdiction, the Fifth District does in effect impound the child in Florida when that happens. This result punishes the child by removing him or her from the parent previously adjudged best for primary residential custody, even though that parent moves away to what is, by definition under the Hill test, a better quality life.

What life is thus created for the child by the Fifth District? The child is taken away from the primary residential parent when it could have a better life elsewhere. If that parent still finds it necessary to move, the child is still deprived of frequent contact with one parent, except that in the Fifth District, it is the parent previously adjudged best suited for primary residential custody. The issue of custody seems to be perfunctorily reopened and reversed in the Fifth District because of some unstated desire to exalt weekend visitation (which may nevertheless be impossible if the custodial parent moves anyway).

By contrast, what life for the child does the Second, Third and Fourth Districts provide under these circumstances? The child is allowed to remain with the parent previously adjudged best to be the primary residential parent and is permitted to move to a better quality of life, when the evidence shows that the move is properly motivated and that meaningful substitute visitation (often extended periods of visitation) with the noncustodial parent is practical and affordable by one or both parties.

The Fifth District has not offered any legal basis compelling the rule of law and decisions it has announced. It has not cited any statute or other Florida law (other than its own decisions) requiring its position.[5] The Fifth District had the opportunity below to reconcile its line of cases beginning with Giachetti with the line of decisions exemplified by Hill v. Hill. (See Appellant's Initial Brief.) Further,

---

[5]Subsection 61.13(2)(b)1, Florida Statutes (1991), though not cited by the Fifth District, does not mandate its position either. That statute requires that the courts determine all matters relating to custody of the minor children of the parties in accordance with "the best interest of the child". While the statute goes on to state that it is the public policy of Florida to assure frequent and continuing contact by the minor child with both parents after the separation or divorce, this section should be read as a policy for the courts to fashion appropriate visitation rights that are consistent with the circumstances of the parties following the divorce or separation.

The legal and practical realities are that once the parties are divorced, the family unit is permanently fractured. In light of the mobile population that is a reality and necessity of our society today, the courts must adopt a more open approach in favor of permitting former spouses to pursue relocations that are properly motivated and that will improve the quality of life for themselves and their children. Insistence by the courts upon close geographic proximity by divorced spouses will not change these realities and can often only add to continued conflicts, deprivation and emotional skirmishing. Often these conflicts and deprivations are experienced by the children and are thus counter-productive to the interest of the children in frequent and continued contact with both of the former spouses.

Further, insistence by the courts upon close geographic proximity is unnecessary to accomplish the statute's purpose. The typical visitation schedule of alternating weekends and one (1) night per week usually provides no more days of contact with the child to the non-custodial spouse (104 days) than does a continuous visitation period for an entire summer school vacation and alternating Christmas or other two (2) week holiday vacations (104 days). More importantly, the number of days is not the sole measure of value. It has been recognized that extended visitations may well provide better quality and more valuable time between the non-custodial parent and child. See, Sherman v. Sherman, 558 So.2d 149, 151 (Fla. 3rd DCA 1990).

since the case at hand involves the appeal by the custodial parent of the denial of a petition to relocate, this should have been the case which the Fifth District indicated in Mast v. Reed that it needed in order to re-evaluate the continued validity of Giachetti, Cole, and Jones v. Vrba. Mast v. Reed, 578 So.2d 304, 305 note 2 (Fla. 5th DCA 1991); see also Judge Diamantis' concurring opinion in the case at hand. (Appendix A attached.) Instead, the Fifth District has clearly decided to adhere to Giachetti and its general and unreasonable prohibition of relocation by the custodial parent.

D. The ruling by the lower court should be reversed because it involves the application of the Hill test to produce a different result in this case which involves substantially similar facts as Hill v. Hill, Lenders v. Durham, DeCamp v. Hein, and other cases from other district courts of appeal.

The facts of this case are virtually identical with those in Hill v. Hill, supra. In that case, the mother was born and raised in Alabama, where she went to school and worked as a teacher and was married. Her son was born in that State. All of her relatives and friends lived in Alabama with the exception of several relatives who lived in Georgia. Following a divorce, the wife gave notice of her wish to leave the area and relocate to the city in Alabama where she had previously lived, with numerous family and friends of both her and her son. As in this case, the court there found that her desire to relocate was sincere and not an attempt to frustrate visitation, and that she had also fully complied with previous custody orders, but was unhappy living in Miami. The cost of transportation to provide visitation was not prohibitive between the parties.

The move in the Hill case, was easily approved by the Third District. But in the case at hand, the Fifth District even ostensibly applying the six-part Hill test summarily denied the wife's petition to move. Other Districts have approved moves highly similar to that requested by the Appellant as well. Bachman v.

Bachman, (4th DCA) supra; DeCamp v. Hein, (4th DCA) supra; and, Lenders v. Durham, (2nd DCA) supra; and even moving to a foreign country (Israel) has been approved where the mother would be reunited with her family. See, Tamari v. Turko-Tamari, supra.

The fact that a proposed move may be voluntary on the part of the custodial spouse (as cited by the trial court below) should not be a factor to be weighed against granting a petition to move. Otherwise, the courts would be illogically prohibiting the custodial spouse from making any move no matter how beneficial or clearly justifiable for themselves and their children, solely because it was voluntary. The Second, Third and Fourth Districts do not weigh voluntariness against the custodial spouse.

Further, the lower court did not raise any issue regarding the length of the distance of the proposed move (to Germany) in the case at hand. Such factor did not militate against a move to Israel in Tamari v. Turko-Tamari, supra, where the wife would be reunited with her family and relatives and where extended visitation by air travel was practical and affordable. In this age of rapid long distance travel by air, in those cases (such as this one) where air travel is feasible, affordable and will provide extended visitation, the length of distance greatly diminishes in any importance. See also Judge Sharp's dissent in Mast v. Reed, 578 So.2d at 310-311.

Finally, the cultural issues in the case at hand also favor the Appellant. The marriage essentially arose in Germany and had extensive German contacts throughout its short life. Germany is the wife's native home, and the family even permanently moved there during the last year of the marriage (and might still be there had the husband not unilaterally left with the parties' son and returned to Florida where he filed for divorce). The son has a German mother and an extended

German family that he is close to, and he has lived and done well there previously. He is a German citizen by virtue of birth to his mother.

The deep and natural interest of a mother following divorce to return to her native home with her young children to enjoy the support, comfort and association of her family and friends is clearly recognized and reasonably accommodated in the other Districts cited above, where as in this case, the evidence established that the desire to move was genuine, the quality of life would be maintained or improved, and alternate visitation for extended periods of time was affordable and feasible. The citizens of the Fifth District, however, are denied these same rights. The Fifth District is in a minority position and appears to be highly inflexible and biased against permitting any move by a custodial parent.

In fact, since Giachetti, the Fifth District (unlike the Second, Third and Fourth Districts) has never permitted a mother to permanently move out of Florida with her children. See, Giachetti v. Giachetti, supra; Jones v. Vrba, supra; Cole v. Cole, supra; and Mast v. Reed, supra.

E. This Court should adopt the Hill test and reverse the order below on the grounds that it is an erroneous application of law.

Florida needs a single rule to govern situations such as the case at hand, and the Hill test is better suited to accommodate the needs of parents and children and to promote sound judicial decisions. See also D'Onofrio v. D'Onofrio, 144 N.J. Super 200, 206-207, 365 A.2d 27, 30 (Ch. Div.) aff'd per curiam, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976). This court has previously well-noted the difficulties inherent when essentially similar cases are decided differently within the State:

> The discretionary power that is exercised by a trial judge is not, however, without limitation, and both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments

> resulting from basically similar factual circumstances. The appellate courts have not been helpful in this regard.
>
> * * *
>
> 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 v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980).

This court should approve the Hill v. Hill, Lenders v. Durham, and Decamp v. Hein line of cases decided by the Second, Third and Fourth Districts and disapprove the holdings announced in Giachetti v. Giachetti, Cole v. Cole, Jones v. Vrba, and Mast v. Reed issued by the Fifth District.

This court should remand the case at hand with instructions to grant the Petition to allow the wife to move with her son to her native home in Germany and to afford the husband extended visitation as offered by the wife below.

CONCLUSION

The Appellant respectfully requests that the court will reverse the judgment rendered below and remand with directions to grant the Appellant's Petition to allow her to move back to her native home in Germany with her son and to afford the husband with the extended visitation as afforded by the wife.

Respectfully submitted,

Jeffrey L. Dees, of
DUNN, ABRAHAM, SWAIN & DEES
347 South Ridgewood Avenue
Post Office Drawer 2600
(904) 258-1222
Florida Bar No. 167906
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to Peter Keating, Esquire, 528 North Halifax Avenue, Daytona Beach, Florida 32118, this 1st day of April, 1993.

Jeffrey L. Dees

M:\D\92-263.BRI

Appendix A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

HEIDE M. HESS JONES,

Appellant,

v.

CASE NO. 91-2258

CURTIS LEE JONES,

Appellee.

Opinion filed October 23, 1992

Appeal from the Circuit Court
for Volusia County,
S. James Foxman, Judge.

Jeffrey L. Dees, Ormond Beach,
for Appellant.

Peter Keating, Daytona Beach,
for Appellee.

PETERSON, J.

Heide M. Hess Jones, former wife, appeals the denial of her motion to modify a final judgment of dissolution to allow her to take the parties' six-year-old child to her native homeland of Germany where she had decided to reside. We affirm. *Cole v. Cole*, 530 So. 2d 467 (Fla. 5th DCA 1988); *Jones v. Vrba*, 513 So. 2d 1080 (Fla. 5th DCA 1987); *Giachetti v. Giachetti*, 416 So. 2d 27 (Fla. 5th DCA 1982). We also note that the trial court correctly applied the six-part test set forth in *Hill v. Hill*, 548 So. 2d 705 (Fla. 3d DCA 1989), *review denied*, 560 So. 2d 233 (Fla. 1990), and made specific findings in the final judgment to determine the best interests of the child.

Paragraph four of the final judgment includes a finding that the former husband was the "prevailing party on the *Giachetti* issue" and awarded attorney's fees against the former wife who "is able to pay same." We are not sure whether the trial court awarded the fees based upon a prevailing party theory or whether the award was made after considering the financial resources of both parties. *Hudgens v. Hudgens*, 411 So. 2d 354, 355 (Fla. 2d DCA 1982)(Absent a spurious claim, "[i]n the final analysis . . . the award of attorney's fees in a dissolution proceeding depends not upon who wins but rather upon the relative financial circumstances of the parties. § 61.16, Fla. Stat. (1981); [citations omitted].").

This court has previously discussed the problems in formulating consistent rules to govern the authority of appellate courts to award attorney's fees in dissolution cases. *Thornton v. Thornton*, 433 So. 2d 682 (Fla. 5th DCA 1983), *review denied*, 443 So. 2d 980 (Fla. 1983). The primary premise set forth in *Thornton* is applicable to the consideration of an award of fees at both the trial and appellate levels and is rooted in the legislative direction set forth in section 61.16, Florida Statutes (1991):

> The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings. . . .

There is no language in section 61.16, however, that authorizes an award of fees on a "prevailing party" theory. Spurious claims in emotionally charged dissolution actions are recognized in *Hudgens* as an exception to the rule of section 61.16.

We remand for the trial court to consider whether either party is entitled to a full or partial award of attorney's fees under section 61.16

and, if so, the appropriate amount of fees for trial counsel. Additionally, we direct the trial court in this action to apply separately the test under section 61.16, to consider the financial resources of both parties, and to determine whether one party has the ability to pay and the other party has a real financial need for an award of attorney's fees for this appeal and, if so, to award a reasonable amount in full or in part.

AFFIRMED; REMANDED.

SHARP, W., J., concurs specially, with opinion.

DIAMANTIS, J., concurs specially, with opinion.

SHARP, W., J., concurring specially.

I reluctantly concur that the judgment appealed must be affirmed because I am bound by a line of cases this court has refused to overrule: *Cole v. Cole*, 530 So.2d 467 (Fla. 5th DCA 1988); *Jones v. Vrba*, 513 So.2d 1080 (Fla. 5th DCA 1987); *Giachetti v. Giachetti*, 416 So.2d 27 (Fla. 5th DCA 1982). *See Mize v. Mize*, 589 So.2d 959 (Fla. 5th DCA 1991); *Mast v. Reed*, 578 So.2d 304 (Fla. 5th DCA 1991). In my view, these cases[1] put the emphasis on the wrong syl-LA-ble. They exalt short but frequent visitation with the noncustodial parent as the primary (if not sole) measure of what is in "the child's best interest."[2]

I disagree that the trial judge properly applied the test in this case, which was adopted by the Third District Court of Appeal in *Hill v. Hill*, 548 So.2d 705 (Fla. 3d DCA 1989), *rev. denied*, 560 So.2d 233 (Fla. 1990). The judge's finding that "no substitute visitation" could be "adequate" was without sufficient basis in the record. Although the alternating weekend visitation pattern of visitation would not be possible if the former wife and child moved to Germany, the former wife offered to pay for and send the minor child of the parties to and from Germany, for extended visits with the husband; 1½ months during the summer and 2 weeks either at Christmas or Easter. In such cases, longer, less frequent visitations are deemed to be an adequate substitute. *See Tamari v. Turko-Tamari*, 599 So.2d 680 (Fla. 3d DCA

---

[1] Where the custodial parent wishes to leave the former marital jurisdiction with the child, thereby making impossible weekend visitation with the non-custodial parent.

[2] Mast v. Reed, 578 So.2d 304 (Fla. 5th DCA 1991) (Sharp, W., J., dissenting).

1992). I conclude that the real basis for the trial court's ruling was its stated conclusion that the proposed move "does violate the *Giachetti* duty of the custodial parent." (emphasis supplied)

DIAMANTIS, J., concurring specially.

I concur in the majority opinion which affirms the denial of appellant's motion to modify the final judgment of dissolution to allow appellant to return to her native homeland of Germany with the parties' six-year-old son. The trial court did not abuse its discretion in denying appellant's request based upon the six-part test set forth in Hill v. Hill, 548 So.2d 705 (Fla. 3d DCA 1989) review denied, 560 So.2d 233 (Fla. 1990) and in determining the best interests of the child which should be the polestar in such matters.

I write to address the apparent misunderstanding or misapprehension concerning whether the plurality opinion in the *en banc* case of Mast v. Reed, 578 So.2d 304 (Fla. 5th DCA 1991), specifically affirmed the doctrine of Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA), appeal after remand, 535 So.2d 355 (Fla. 5th DCA 1988); Jones v. Vrba, 513 So.2d 1080 (Fla. 5th DCA 1987); and Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982). In Mast, the divorcing parents of a minor child had entered into a property settlement agreement providing that neither party would remove the child from Florida "on a permanent basis" without prior order of court. Following her remarriage, the mother petitioned the trial court for leave to move with the child to North Carolina in order to be with her new husband, who was in the military. The trial court denied the mother's petition, from which order the mother did not take an appeal, and granted the father's petition to change residential custody. This court reversed the trial court's order changing custody from the mother to the father because the mother's move to North Carolina with her new husband was not permanent as contemplated by the parties in their property

settlement agreement. It should be noted that because the mother in Mast did not appeal the denial of her petition to relocate the child, that issue was not properly before this court. See Mast, 578 So.2d at 305, n. 2.[1] Mast should be cited for its holding and not for an issue it did not decide.

On the issue of attorney's fees, I concur that this case should be remanded to the trial court to determine both the issues of entitlement by either party to a full or partial award of attorney's fees under section 61.16, Florida Statutes (1991) and the reasonable amount of such fees at both the trial and appellate levels. The trial court erred in awarding fees to appellee at the trial level based upon a prevailing party concept as opposed to making a determination solely based upon the financial resources of the parties, as provided in section 61.16.

---

[1] In footnote 2 of Mast, we stated:

> 2. This denial has caused much discussion among the members of the court as to the current validity of *Cole v. Cole*, 530 So.2d 467 (Fla. 5th DCA 1988), *motion granted*, 535 So.2d 355 (Fla. 5th DCA 1988); *Jones v. Vrba*, 513 So.2d 1080(Fla. 5th DCA 1987); and *Giachetti v. Giachetti*, 416 So.2d 27 (Fla. 5th DCA 1982). However, the denial of the mother's petition was not appealed and thus neither it nor a review of the above cited cases is properly before us.

Mast, 578 So.2d at 305.

Appendix B

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.

CASE NO. 87-4103-CA-01
DIVISION "U"

IN RE: THE MARRIAGE OF

CURTIS LEE JONES,

Petitioner/Former Husband,

and

HEIDE M. HESS JONES,

Respondent/Former Wife.

---/

O R D E R

THIS CAUSE coming on to be heard by the Court on September 12, 1991 upon the Former Wife Heide M. Hess Jones' (hereinafter referred to as Heide) Supplemental Petition for Modification of Final Judgment; and upon the Former Husband Curtis Jones' (hereinafter referred to as Curtis) Counter-Petition for Modification; and there appearing before the Court Jeffrey L. Dees, Esquire, on behalf of Heide, and Peter Keating, Esquire, on behalf of Curtis; and the Court having heard the testimony of the parties and their witnesses, heard argument of counsel, having reviewed case law provided by counsel, and being otherwise fully advised in the premises, finds as follows:

1. BACKGROUND:

Curtis met Heide in Germany while he was serving in the United States Army. Heide was and is a German citizen. They were married in the United States in June of 1983. Robert, age six, the parties only child, was born in St. Augustine, Florida. Since 1987 Robert has lived in the United States.

The parties were divorced in Volusia County, Florida in May of 1990. The Final Judgment (Curtis's Exhibit "1") provides the child cannot be removed from this Court's jurisdiction without Court approval or the other party's consent. Heide now complains about this provision, but this Court notes she did not appeal the provision.

The Final Judgment also allowed a rotating custody scheme. It worked well until January of 1991 when Heide elected to work days instead of nights at her hospital job. Until then Curtis enjoyed three days of each week with Robert. His recent visitation has been reduced to every other weekend and supposedly one day during the middle of each week. The latter visitation has not worked well and has been the cause

of friction between the parties.

Other changes also occurred in 1991. Curtis lost his job as a mechanic. He currently is in a retraining program and attends school learning to repair computers. He still has a few semesters to complete. Right now he has little or no income and lives with his fiance in Flagler Beach, Florida. He is behind in his share of Robert's expenses. Meanwhile Heide continues to work as a Registered Nurse at Halifax Hospital in Daytona Beach, Florida. She makes a good salary (see Heide's Exhibit "9"). She remains a German citizen, is currently here as a resident alien, and does not desire to become a United States citizen.

As stated before, Robert has been in the United States since 1987. He resides with his mother in Volusia County, Florida. He is attending first grade and is apparently doing well in school.

2. GIACHETTI ISSUE (Giachetti vs. Giachetti, 416 So.2d 27 (5th DCA, 1982):

The present controversy arises primarily because Heide wishes to permanently return to her homeland with Robert. Heide argues it would be in her best interest and Robert's best interest to allow the move. Curtis argues that the move would clearly violate Paragraph Ten of the Final Judgment, and would be detrimental to his relationship with Robert.

Initially the Court wants to emphasize that both Heide and Curtis are good parents. They both love Robert and Robert loves them. Either parent is fit to be the residential parent, and Robert would prosper in the custody of either one.

One of the key factors in this case is the fact that Heide's move to Germany is voluntary. She still has her job here in Florida. She is not forced to move to Germany because of economic necessity. While there may be economic and other benefits that would accompany the move, it is not a "no choice" situation; the move is a voluntary situation.

There is no doubt but that the move would hamper and hinder Curtis's close relationship with Robert. Giachetti does hold that the non-custodial parent has a special duty to the non-custodial parent not to unreasonably hamper or hinder the non-custodial parent's relationship with the child. Here, Heide's voluntary move would definitely interfere with the relationship between father and son.

In trying to answer the ultimate question of what is Robert's best interests in this matter, the Court turns to the six part test set forth in Hill vs. Hill, 548 So.2d 705 (3rd DCA, 1989).

1. Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the child(ren):

There is a good chance that the move would improve Heide's quality of life. She is homesick. She misses her homeland and her family. She has a good job with good benefits waiting for her. She would be happier in Germany than in the United States. The Court does not believe the move will benefit Robert. He has lived here in Florida for four of his six years. He is happy here, well adjusted, and doing well in school. He is very close to his paternal grandmother who lives in Volusia County, Florida. Robert also has a very limited command of the German language. The Court feels that a move to Germany at this point would be a major disruption of Robert's life.

2. Whether the motive for seeking the move is for the express purpose of defeating visitation:

The move is not sought expressly to defeat visitation, although it will in effect defeat visitation.

3. Whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements:

Although there is some question, the Court believes Heide would comply with any substitute visitation.

4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the non-custodial parent:

The Court does not believe any substitute visitation would adequately maintain the current meaningful relationship between Curtis and Robert.

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

At this point Curtis could not afford round trip fare to Germany, although he probably will be able to do so in the future. Heide can afford a portion of the transportation costs.

6. Whether the move is in the best interests of the child.

The contemplated move is not in the best interests of the child.

The Court concludes that an intended move does violate the Giachetti duty of the custodial parent. The Court also concludes that per the Hill test the move is not in the child's best interests. Finally, the intended move expressly violates Paragraph Ten of the Final Judgment.

This Court does want to emphasize that it is not without sympathy for Heide. She is a good parent, and the Court understands her homesickness and desire to return to Germany. This international marriage, and subsequent divorce, is immensely

complicated by a growing child cherished by both parents. Under the circumstances of this particular case, the Court finds the best interests of the child will be served by not allowing Heide to permanently remove him to Germany. Should Heide elect to stay in Florida she is entitled to continue as the residential parent. If she elects to move to Germany, custody shall revert to Curtis.

3. CHILD SUPPORT:

The Court reserves ruling on the child support requests until it is clear whether or not Heide will stay in the United States, and, if she does so, whether or not the rotating custody provisions of the Final Judgment remain viable. The situation needs to stabilize before the Court feels comfortable ruling on the child support issue.

4. ATTORNEY FEES:

The Court finds Curtis to be the prevailing party on the Giachetti issue. He is awarded reasonable attorney fees and costs from Heide, whom is able to pay same. Should the parties not be able to agree on the fees, the Court reserves jurisdiction to determine same.

Wherefore, it is ORDERED AND ADJUDGED that:

1. Heide is enjoined from removing Robert from the jurisdiction of this Court for anything other than vacation. Should Heide elect to move back to Germany, Curtis shall become the residential parent of Robert.

2. The Court reserves ruling on the child support requests.

3. Heide is ordered to pay the reasonable attorney fees of Curtis. The Court reserves jurisdiction to determine these fees at a later hearing.

4. The Court specifically retains jurisdiction over the parties hereto and the subject matter hereof.

DONE AND ORDERED this 16 day of September, 1991 at Daytona Beach, Volusia County, Florida.

S. JAMES FOXMAN, CIRCUIT JUDGE

COPIES TO:
Jeffrey L. Dees
Peter Keating