IN THE SUPREME COURT OF FLORIDA

HEIDE M. HESS JONES,

Petitioner,

vs.

CURTIS LEE JONES,

Respondent.
_____/

CASE NO.:

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

LOWER COURT
CASE NO.: 91-2258

PETITIONER'S BRIEF AS TO JURISDICTION

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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 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 (not 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. (See Appendix B for a copy of the trial court's ruling.) (Id.)

Upon review, the Fifth District Court of Appeal affirmed the decision of the trial court citing 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, supra. The Fifth District Court of Appeal also noted that the trial court correctly applied the six-part test set forth in Hill, supra. See Appendix A for a copy of the Fifth District Court of Appeal opinion.

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, and also for approximately one (1) year in Germany from 1986 to 1987. (R.65-68)

In late 1987, the husband 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 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)

In May, 1991, the wife filed a Petition to Modify the Final Judgment to allow her to return to her native home in Germany with her son.

The evidence showed that all of the wife's relatives and friends live in Germany. (R.72) There she has an extended family, including parents, two (2) sisters (each of them married with a family of their own), a brother, a grandmother and three (3) uncles, all residing in the vicinity of Nuremburg. (Id.) She has no relatives or close friends in Florida, and life has become difficult and unhappy for her here since her husband obtained the divorce. (R.62,64,105)

The evidence showed that in Germany, a job as a registered nurse was waiting for the former wife that would provide substantially increased financial benefits, including better pay and more vacation time to be with her son. (R.75) Other

benefits there, not available in Florida, include free health care, free transportation systems, and free education for her son, including her choice of public or private schools and colleges. (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. (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 the economic benefits of the move. (Id.) The wife even offered to pay for a third trip to Florida for visitation with the former husband, if the former husband could provide some child support to assist her. (R.92-96)

When the couple had 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. Both the wife and the son are citizens of Germany. (R.22,67,89)

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

Unlike the wife, there was conflicting evidence regarding the husband's actual concern for his son. For example, while the wife often conferred with the son's teachers, the husband never did. (R.99,115) He never took his son (age 5 and 6 at the time) to playgrounds. (Id.) And frequently, during his alternating weekend visitation, the husband had left his son with the grandmother and went off alone. (R.59-60,99,115,126)

The son's only relatives in Florida are a grandmother (his father's mother). (R.46) She testified at the hearing that while she would greatly miss her grandson, she had no objection to the wife and son moving to Germany. (R.122)

SUMMARY OF ARGUMENT

Jurisdiction exists under Article V, Section 3(b)(3), Florida Constitution, to review the instant case because (a) it announces a rule of law which conflicts with a rule previously announced by several other district courts of appeal, to-wit: Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989), rev. denied, 560 So.2d 233 (Fla. 1990); 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); Tamari v. Turko-Tamari, 599 So.2d 680 (Fla. 3rd DCA 1992); and, (b) it involves the application of a rule of law to produce a different result in this case which involves substantially similar facts as the prior cases cited above.

ARGUMENT AS TO JURISDICTION

Article V, Section 3B(b)(3), Florida Constitution, provides that this court "may review any decision of a District Court of Appeal ... that expressly and directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law.".

This jurisdiction based on conflict has been explained by this court in Mancini v. State, 312 So.2d 732 (Fla. 1975) to include both of the following situations:

> As pointed out in Nielsen v. City of Sarasota, Fla., 117 So.2d 731, are jurisdiction to review to decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. 312 So.2d at 733.

See also, Florida Power & Light Co. v. Bell, 113 So.2d 697, 698 (Fla. 1959).

A. Jurisdiction based on conflict exists because the Fifth District has announced a rule of law that conflicts with the rule of law announced in the Second, Third and Fourth Districts.

The Fifth District Court of Appeal has announced a rule of law that expressly requires a custodial parent who wishes to leave the former marital 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 Court of Appeal has stated 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. In

fact, in one case, the mother's petition to move was held to be of sufficient basis to change custody from her to the former husband. Jones v. Vrba, supra.

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 Court of Appeals. 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 Court of Appeal'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.

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

B. Jurisdiction based upon conflict applies in this case because it involves the application of a rule of law by the lower court to produce a different result in this case which involves substantially similar facts as in a prior case in another district, to-wit: Hill v. Hill; DeCamp v. Hein.

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 Court of Appeal. But in the case at hand, the Fifth District Court of Appeal, even ostensibly applying the six-part Hill test, denied the wife's petition to move. Other Districts have also approved moves highly similar to that requested by the Petitioner here. 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 deep and natural interest of a mother following divorce to return to her native home with her children and to enjoy the support and comfort of her family and friends is clearly recognized and reasonably accommodated in the other Districts cited above, where as here, 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, the Fifth District has never permitted a mother to permanently move out of State with her children. See, Giachetti v. Giachetti, supra; Jones v. Vrba, supra; and, Cole v. Cole, supra.

An analysis of the foregoing cases reveals that the Fifth District Court of Appeal has in practice, since Giachetti, uniformly ruled that where a custodial parent wishes to leave the former marital jurisdiction, thereby making weekend visitation impossible with the non-custodial parent, no substitute visitation is deemed adequate and the move will be denied. The request may even cost the petitioning mother the custody of her children. See, Jones v. Vrba, 513 So.2d at 1082.

CONCLUSION

The Supreme Court is faced with a clear conflict of both legal principal and application of law in this case, between that espoused by the Fifth District and that adopted in the Second, Third and Fourth Districts. It also clearly appears that the Fifth District is not going to recede from its position.

This conflict is important to the citizens of this State and is resulting in vastly different treatment among our citizens dependent upon the District in which they happen to reside (or choose to file for divorce).

Jurisdiction exists under Article V, Section 3(b)(3), and the Petitioner respectfully requests that this Court will hear this cause.

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 24th day of November, 1992.

Jeffrey L. Dees, P.A., of
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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

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[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.

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[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.

I hereby certify that the above and foregoing is a true copy of instrument filed in my office.

FRANK J. HABERSHAW, CLERK
DISTRICT COURT OF APPEAL OF
FLORIDA, FIFTH DISTRICT

Per _____ Deputy Clerk

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.

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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:
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Peter Keating