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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases:

STATEMENT OF FACTS

The Husband incorrectly asserts that the Wife agreed to the provision in the Final Judgment not to permanently take the child out of the jurisdiction of the State of Florida without permission. (Answer Brief, page 3). This argument was offered by the Husband to the trial court and was rejected. (R.25-28). (See Appendix A attached).

At the hearing, the exhibits clearly showed that after the dissolution of marriage, the judge (McFerrin Smith) issued a letter to the parties on November 7, 1989, in which he announced his ruling that the Wife would have primary residential custody, set the Husband's child support payments, and also imposed of his own accord the restriction against removing the child from the jurisdiction of the court for more than three (3) weeks. (See Appendix B attached for a copy of this letter offered in evidence below at R.28). Thereafter, in recognition of the judge's fundamental rulings, the parties agreed to certain housekeeping matters related to visitation for the Husband and responsibility for support of the child in lieu of the ordered child support payments. (R.25-28). At no time, however, did the Wife ever enter into an agreement with the Husband that the child could not be removed from the jurisdiction of the court, and the Husband's argument in his Answer Brief is not supported by the evidence or the record.

The Husband next asserts that the Wife "voluntarily" changed her work schedule from nights to days in January of 1991, and this led to visitation problems for the Husband. (Answer Brief, page 4). First, the reason for the change was omitted by the Husband, but is important. It was needed to alleviate the accumulated stress and exhaustion suffered by the Wife from a continuous night work schedule for over one (1) year, as she testified below:

> Mr. Dees: What was the reason for [the change from night schedule to day schedule]?

Heide: Well, I worked nights for over a year. I just got really, really tired of working nights. My day-night awareness, body awareness, was just messed up after I came back from vacation. And it was very difficult to go back to the night routine being up when other people were sleeping. And sleeping during the day was very difficult. So for my own health, yes, I went to days. (R.52)

Further, the Husband appears to have suddenly voiced problems with the Wife's new work schedule only at the hearing below, but never previously to the Wife. (R.54-55). The trial court in its order did not find the Wife intentionally acted to defeat visitation by the Husband.[1]

[1]In addition to the affects on her health and well-being, the Wife was the primary residential parent for the parties' minor child (age 4 and 5) during this period of time and had duties toward her son in this regard, which a daytime work schedule would obviously assist.

ARGUMENT

POINT A

The Fifth District's opinion in the case at hand, contrary to the Husband's argument (Answer Brief, page 9), does not "adopt" the six-part test set forth in Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989). The Fifth District merely references the Hill opinion, but makes no decision that the Hill opinion is adopted within the Fifth District.

The Fifth District's affirmance of the trial court is instead expressly based on Giachetti v. Giachetti, 416 So.2d 27 (Fla. 5th DCA 1982), Cole v. Cole, 530 So.2d 467 (Fla. 5th DCA 1988) and Jones v. Vrba, 513 So.2d 1080 (Fla. 5th DCA 1987) as cited in its opinion.

Further, since the Fifth District did not overrule Giachetti and its progeny, but in fact relied on them to affirm, those cases clearly continue to be the controlling standards in the Fifth District.[2] If the Appellee's analysis were even close to being correct, the most that can be said is that the Fifth District must now have two (2) standards, the Giachetti line of cases and Hill. If true, then both lines of cases must be satisfied by a petitioner in the Fifth District seeking a modification of a final judgment to permit relocation with a child of the parties, but not in any other district in the State.

In actuality, the role of Hill v. Hill in the Fifth District (if any) is not clear. It may only be a loose cannon to plague petitioners such as the Appellant. It seems neither to have been adopted nor applied correctly by the Fifth District. In any event, the conflict between the Giachetti line of cases in the Fifth District and those

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[2]This was recognized by Judge Sharp in her concurring opinion, in which she reluctantly concurred that the judgment had to be affirmed based upon Cole v. Cole, Jones v. Vrba and Giachetti v. Giachetti. There is no mention of an affirmance based upon Hill v. Hill in her opinion.

such as Hill, decided in the Second, Third and Fourth Districts, continues. If the Appellee were correct, the Fifth District has two (2) conflicting standards that the Appellant must surmount.

The Appellee argues in favor of the double standard approach and asserts that any court, in the addition to the requirements of the Hill test, should also apply the Giachetti test of the Fifth District as to whether a substantial and material change of circumstances had been shown. (Answer Brief, page 10). This argument by the Appellee admits that the standard of the Fifth District in Giachetti differs from the standard announced in Hill and other cases of the Second, Third and Fourth Districts. Clearly, the latter cases do not require the courts to conclude that a substantial and material change of circumstances has occurred. Only the Fifth District does so. The Appellee simply refuses to admit this, although implicitly he recognizes it in his arguments.

The Appellee then slips off his own point and argues that because the mother's move to Germany would be a substantial and material change for him, trial judges must be allowed an apparently unfettered and unguided "discretion" to deny such relocation requests by custodial parents. The Appellee suggests no standards for the trial courts to follow. By contrast, the Hill test provides a clear standard for trial judges to follow, and one that is fairer and more carefully balanced than Giachetti.

The Appellee argues that the adoption of the Hill test by this court would fail to protect the non-custodial parent's interest in visitation. (Answer Brief, page 11). The Appellee's concerns are unfounded. The Hill test provides for a full consideration of the interests of the non-custodial parent in visitation, expressly in elements (2), (3), (4) and (5), and implicitly in the remaining 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 custodial 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.

The Hill test is expressly designed to focus the trial court on the interests of both the custodial and the non-custodial parents, as well as the ultimate best interests of the child.

By contrast, the Giachetti test is unfocused and fashioned from inapposite principals regarding changing primary residential custody. Giachetti and its progeny simply fail to address the very different issues posed by relocation. Furthermore, in practice, the Fifth District has applied Giachetti simply to deny all relocation petitions and to penalize custodial parents by summarily reversing previous adjudications awarding primary residential custody to the petitioners.

The Appellee's argument that the Hill test amounts to allowing the mother to move anywhere and anytime she wishes is clearly wrong. (Answer Brief, page 11).

Next, the Appellee seems to argue that the "message" of dissolution of marriage should be that the custodial parent can never move outside the State of Florida. (Answer Brief, page 12). (He does not argue that the non-custodial parent should

be so restricted, however). This is not the law of Florida, nor should it be. Such a rule of law as proposed by the Appellee ignores reality and exceeds the constitutional power of the courts and of government in general. The Hill test is appropriately fashioned to insure proper motives, an improved quality of life, and continued visitation, often on an extended basis. That is the appropriate policy for Florida instead of Giachetti's (and the Fifth District's) negative and totally prohibitive approach to relocation.

POINT B

The Appellee argues that the Hill test was correctly applied by the trial court. (Answer Brief, pages 13-16). The Appellee's arguments are not supported by the evidence below.

There was no evidence presented that the child would have any difficulty adjusting to Germany or learning to speak German. The contrary was in fact proven. (R.106). Further, the court had before it the benefit of clear, first-hand evidence that when the parties lived in Germany during 1986 and 1987, their child Robert did well and thrived there. (R.22,67,89). Even the Husband admitted this during his testimony. (R.22-24). Thus, the Husband's arguments to the contrary in the Answer Brief are without merit.

The move to Germany in this case is both logical and consistent, and neither arbitrary or unwarranted. The child's mother is German by birth and by citizenship, whereas in the United States she is only an unmarried resident alien with no family. The parties and their child have had extensive contacts with Germany both prior and subsequent to marriage, and no reason appears why either of them do not have as much right to live there with their child as in Florida after divorce.

The Husband should also be held to have accepted this possibility when (1) he met and became engaged to the Wife while she was living in Germany, (2) he had a child by her after their marriage, and (3) he petitioned for divorce from her.

The case of Petrullo v. Petrullo, 604 So.2d 536 (Fla. 4th DCA 1992), (Answer Brief, page 16) does not support the argument of the Appellee. Contrary to his argument, that case did not hold that the husband was entitled to a change of custody when the wife petitioned to move to Colorado. Actually, the appellate court reversed a summary order issued by the trial court changing custody to the husband, and the case was remanded for an evidentiary hearing as to whether custody should be changed. Presumably the Hill test will apply as previously ruled by the Fourth District in DeCamp v. Hein, 541 So.2d 708 (Fla. 4th DCA 1989) and Bachman v. Bachman, 539 So.2d 1182 (Fla. 4th DCA 1989) cited in the Initial Brief. These cases permit relocation by custodial parents and re-fashioning of visitation rights to non-custodial parents. The Petrullo case, however, does not stand for the propositions argued by the Husband and does not align the Fourth District with the Fifth District on this issue.

In the case at hand, even Judge Sharp in her concurring opinion, concluded that the trial court's conclusion that "no substitute visitation" would be "adequate" was "without sufficient basis in the record." Judge Sharp disagreed that the Hill test was properly applied below. The judge concluded that "the real basis" for the lower court's ruling was its conclusion that Giachetti was violated.

POINTS C AND D

The Husband next asserts in his Brief that the Wife wants all discretion taken away from trial judges in cases of this nature. (Answer Brief, page 19). The contrary is the truth. The Wife avidly seeks to have trial judges in the Fifth District afforded the same discretion to permit relocation which the majority of other districts

allow. The Wife wishes this court to adopt the Hill test and disapprove the Giachetti line of cases. This will give the trial courts a single standard in the State of Florida, guided discretion, and promote better and more uniform decisions. It should also encourage more reasoned appellate review in all the district courts of appeal as well.

The Husband argues that the case of Tamari v. Turko-Tamari, 599 So.2d 680 (Fla. 3rd DCA 1992), is not totally similar to the case at hand (Answer Brief, page 20), but it has more in common with this case than not. That case recognizes a close relationship may be maintained between the non-custodial parent and the child over long distances. This is a proposition which the Appellee fails to acknowledge and will not accept. The Appellee's argument that the Tamari case is distinguishable is grounded on his own unsupported assumption that the distance between the non-custodial parent and the child in Florida established ipso facto the lack of a "close relationship" with the child. The Appellee has no basis for this argument and stubbornly refuses to recognize that extended visitation can be as good or better than alternating weekly visitation. This proposition has been accepted in the Second, Third and Fourth Districts and in many other individual cases. It is not sound policy to reject it out of hand as the Fifth District seems to have done.

POINT E

The Hill test will promote the discretion of the trial courts in cases such as this. The Giachetti test denies needed discretion to the courts. Increased discretion will benefit the trial judges, the parties who appear before them, and the legal system. The Appellee would tie the hands of the trial courts by continued adherence to Giachetti and its progeny.

The Appellee concludes with a confusing argument seeking this court to approve both the Hill test and the Giachetti test. The Appellant submits that the two (2) cases are in direct conflict, both in principal and as applied.

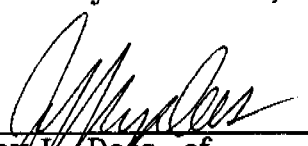
The Appellant submits that the trial court in the case at hand leaned heavily on Giachetti (and so did the Fifth District on review) and may well have rendered a different decision if the Giachetti line of cases had been overruled and the Hill test was the only test which the court had to consider.

CONCLUSION

For the foregoing reasons, the Appellant requests that this court will approve the Hill v. Hill, Lenders v. Durham, 564 So.2d 1186 (Fla. 2nd DCA 1990) 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, 578 So.2d 304 (Fla. 5th DCA 1991) issued by the Fifth District.

The Appellant further 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 extended visitation as offered by the Wife below.

Respectfully submitted,



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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 July, 1993.

Jeffrey L. Dees

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