OA 5-6-94

047

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 10 1994
CLERK, SUPREME COURT
By
Chief Deputy Clerk

RAY DEAN RUSSENBERGER,

Petitioner/Former Husband,

and

CYNTHIA L. RUSSENBERGER,

Respondent/Former Wife.

_______________________________________/

SUPREME COURT CASE NO: 82,587

FIRST DCA CASE NO: 93-1589

CIRCUIT COURT CASE NO: 91-1374

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Ms. Russenberger submits that the issue as phrased by Mr. Russenberger in his initial brief is improper for purposes of this Supreme Court Appeal. This appeal should address the conflicting application of Florida Rule of Civil Procedure 1.360 in the Florida District Courts of Appeal. Accordingly, Ms. Russenberger first will restate the issue on appeal and will follow with argument on the restated issue. After this discussion, Ms. Russenberger will address the issues set forth by Mr. Russenberger in his initial brief.

ISSUE AS RESTATED BY RESPONDENT

WHETHER IN DOMESTIC RELATIONS PROCEEDINGS, BEFORE ORDERING PSYCHOLOGICAL EXAMINATIONS, THE TRIAL COURT MUST MAKE AN AFFIRMATIVE FINDING THAT (i) THE MENTAL CONDITION OF THE PARTY OR CHILD IS DIRECTLY INVOLVED IN SOME MATERIAL ELEMENT OF THE CAUSE OF ACTION OR DEFENSE AND (ii) WHETHER THE PARTY SUBMITTING THE REQUEST HAS ESTABLISHED GOOD CAUSE FOR THE REQUESTED EXAMINATION.

SUMMARY OF ARGUMENT

The United States Supreme Court first addressed the subject of compulsory mental examinations in 1964. Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234 (1964). After reviewing a rule almost identical to the Florida rule, the United States Supreme Court held that the rule requires discriminating application by the trial court. Mental examinations should not be required unless a party has affirmatively put into issue his own mental condition. Over the years, the rule has been addressed by all of the Florida district courts of appeal. Every district has acknowledged an individual's right to be free from compulsory mental examinations. The districts have noted that psychological examinations should not be automatic and that a trial court cannot ignore the right of a person to be free from a compulsory mental examination. Accordingly, only upon a showing of good cause, when the party's mental condition is in direct controversy will a psychological examination be ordered.

Rule 1.360 has been correctly applied by all of the districts, including the fourth district. Only recently, in 1992 and 1993 did the fourth district pose a potential conflict. The fourth district has suggested that a psychological examination may be automatic in every custody case. According to the fourth district, the custody factors of Section 61.13 and the social investigation authorized by Section 61.20, give the trial court authority to grant psychological examinations in every case.

The Florida Rules of Civil Procedure and the overwhelming case law in the state of Florida, cannot support the recent interpretation of the fourth district court of appeal. In order to protect parties and their children from unwarranted invasions of privacy, the trial court must carefully review the circumstances of each case and determine whether the mental condition is in controversy and whether good cause is necessary to evaluate that condition.

ARGUMENT

A. SUMMARY OF DOMESTIC RELATIONS CASE LAW INVOLVING COMPULSORY PSYCHOLOGICAL EXAMINATIONS

I. First District Court of Appeal

1. In the Interest of S.N. v. State of Florida, Department of Health and Rehabilitative Services, 529 So. 2d 1156 (Fla. 1st DCA 1988).

The trial court ordered the mother of a dependent child to submit to a mental examination before the mother could regain custody of her child. The child had previously exhibited severe behavioral and emotional problems and the Department of Health and Rehabilitative Services case worker testified that she found it difficult to believe that the child had reached a point where he had to be removed from the home if the mother did not suffer from any psychological problems. Based upon this information, the trial court ordered the mother to be examined by a psychologist of her own choice.

The first district court of appeal granted the mother's common law writ of certiorari and quashed the decision of the trial court. The first district court of appeal explained that the Department of Health and Rehabilitative Services had failed to satisfy the requirements of Florida Rule of Civil Procedure, 1.360. The first district explained that the requirements of Rule 1.360 cannot be

> met by mere conclusory allegations of the pleadings - nor by mere relevance to the case - but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely

in controversy and that good cause exists for ordering such particular examination.

Id. at 1158.

The court further explained that a showing of good cause sufficient to warrant a court compelled mental examination of a parent seeking custody of a dependent child should be based upon evidence that the parent "has been unable to meet the special needs of the child." Id. at 1159. The conclusion cannot be inferred and must be demonstrated based upon the parent's past conduct or behavior.

2. In the Interest of T.M.W., 553 So. 2d 260 (Fla. DCA 1989).

In this case, the trial court ordered a psychological examination of a minor child in an adoption proceeding. The adult attempting to adopt the child objected to the compulsory examination and requested a writ of common law certiorari to review the trial court's order. First, the first district court of appeal noted that common law certiorari was appropriate because later review on appeal "would provide an inadequate remedy after compulsory mental examination of a 12-year-old child . . ." Id. at 260. The first district stated that the trial court must strictly comply with the requirements of Florida Rule of Civil Procedure 1.360. The court noted that certiorari had been frequently granted and relief afforded to parents who requested review of orders compelling them to submit to mental examinations. The first district cited several cases from other jurisdictions and explained that a compulsory mental examination had been traditionally deemed an invasion of privacy which will only be tolerated upon a showing of good cause. Id. at 263.

3. <u>Russenberger v. Russenberger</u>, 623 So. 2d 1244 (Fla. 1st DCA 1993).

The first district court of appeal granted a writ of common law certiorari to review an order of the trial court requiring compulsory examinations of the parties' five minor children. The court explained that the "essential requirements of law" before a person may be required by a court to undergo a psychological examination are set out in Rule 1.360. The rule provides for compulsory examinations "only upon a showing of good cause, when the party's mental or physical condition is in direct controversy." <u>Id</u>. at 1245. The petition for writ of certiorari was granted and the trial court's order was quashed.

II. Second District Court of Appeal.

1. <u>Williams. v. Williams</u>, 550 So. 2d 166 (Fla. 2nd DCA 1989).

The trial court first restricted and then terminated a father's visitation with his minor son until the father submitted to a court ordered psychological examination. After the hearing on the visitation issues, the trial court on its own motion ordered the father to submit himself for a complete psychological examination. The court found that the father's psychological well-being was in question and could have a detrimental affect on the child. Referring to Rule 1.360, the appellate court held that the trial court must first determine whether the mental health of the father was in controversy. The court noted that the only evidence in the record which put the mental stability of the father in

controversy was the conclusory allegations contained in the pleadings of the mother. Citing Fruh v. State, Department of Health & Rehabilitative Services, 430 So. 2d 581 (Fla. 5th DCA 1983) and Kristensen v. Kristensen, 406 So. 2d 1210 (Fla. 5th DCA 1981), the second district held that conclusory allegations alone were insufficient to put the father's mental health in controversy and that the conclusory allegations did not demonstrate good cause for submission to a mental examination. Further, the court noted that the showing of good cause which would warrant a court compelled mental examination should be based upon evidence that the parent has been unable to meet the needs of the child. In addition, in order to establish good cause, it must be demonstrated that expert medical testimony is necessary to resolve the issue. After finding that the record did not reflect that the father's mental health was in controversy and that the record did not demonstrate good cause for a psychological examination pursuant to Rule 1.360, the decision was reversed.

2. Schouw v. Schouw, 593 So. 2d 1200 (Fla. 2nd DCA 1992).

The father in a custody proceeding sought a writ of certiorari reviewing an order which granted his wife's motion to compel a psychological examination. Both parties questioned whether the other parent was psychologically fit to be the minor children's custodial parent. The court noted that the mental health of a parent in a child custody case is relevant, but stated that mere allegations that a parent is mentally unstable are not sufficient to place that parent's mental health at issue. Furthermore, the

court made it clear that psychological examinations are not automatic in custody cases and should only be ordered upon a showing of good cause. The court explained that good cause requires evidence that the parent has been unable to meet the needs of the child. In this case, the husband had primary custody of the children for six months prior to the final hearing. No evidence was presented that he was unable to meet the children's needs. Under these circumstances, the appellate court found that there was no factual basis for the court to order the psychological examination. The order of the trial court granting the examination was quashed.

3. Nobbe v. Nobbe, 627 So. 2d 59 (Fla. 2nd DCA 1993).

In the husband's counterpetition, he asked the court to order psychological examinations of the parties to assist the judge in determining the primary residence of the children. The counterpetition contained no allegations that the examination of the mother was necessary or that the mother was unable to meet the needs of the children. The trial court granted the husband's motion based upon representations from the husband's counsel that the wife had been undergoing psychiatric care for the past year and was taking Prozac. Counsel also stated that the daughter was undergoing psychiatric counseling and that the son suffered from attention deficit disorder. The husband did not testify. The trial court required the psychological examination of the mother. On appeal, the decision of the trial court was quashed. The appellate court found that the circuit court "departed from the

essential requirements of law in ordering a psychological evaluation because the pleadings do not contain any allegations establishing good cause for the examination." Id at 59.

III. Third District Court of Appeal

1. Paul v. Paul, 396 So. 2d 853 (Fla. 3rd DCA 1979).

In a dissolution proceeding that did not involve custody of children, the wife filed a motion to require the husband to submit to a physical and mental examination. After a hearing on the motion, the trial court ordered the examination. In her motion, the wife recited several grounds for the examination, including her allegations that her husband was unstable neurologically, was incompetent and mentally deranged. The district court held that the wife's motion did not adequately fulfill the required showing that the husband's mental or physical condition was in controversy and that there was good cause for the examination. On these grounds, the husband's petition for certiorari was granted and the order of the circuit court was quashed.

2. Schottenstein v. Schottenstein, 384 So. 2d 933 (Fla. 3rd DCA 1980).

In a modification proceeding, the father filed a motion seeking psychological evaluation and counseling of the parties' minor children. After testimony, the court appointed a psychologist and ordered the minor children to undergo psychiatric counseling and evaluation. The third district court of appeal reversed this decision.

> While the trial judge may be a proselyte of psychological evaluations and consultations

> for every minor child of divorced parents, we cannot ignore the countervailing right of a person to be free from a compulsory mental examination. See Schlagenhauf v. Holder 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); Schuppin v. Unification Church, 435 F.Supp. 603 (D.Vt. 1977). A compulsory mental examination has been traditionally deemed an invasion of privacy which will only be tolerated upon a showing of good cause. Martroni v. Matey, 82 F.R.D. 371 (E.D.Pa.1970); Schuppin v. Unification Church,, supra; Paul v. Paul, 366 So. 2d 853 (Fla. 3rd DCA 1979). This requirement of good cause is simply not met by a showing that the children were sometimes upset when they returned from a visitation with their father, or by the father's desire to give his children a sense of value about money.
> Id. at 936.

IV. Fourth District Court of Appeal.

1. Anderson v. Anderson, 470 So. 2d 52 (Fla. 4th DCA 1985).

In this dissolution proceeding, the husband claimed that the wife drank, abused drugs, and was susceptible to undue influence. Since the wife was not seeking alimony, or custody of children, the fourth district court of appeal found that these allegations were irrelevant. Citing Rule 1.360, the fourth district held that the trial court may order physical or mental examinations on a showing of good cause when the mental or physical condition of a party is in controversy. Because of the limited relief sought, the appellate court determined that the mental condition of the wife was not in controversy. Accordingly, the decision of the trial court requiring the mental examination was reversed.

2. Frisard v. Frisard, 453 So. 2d 1150 (Fla. 4th DCA 1984).

In a modification proceeding involving custody, the father of a minor child sought the appointment of a psychiatrist to examine

the mother because she had been hospitalized for mental problems several years prior to the modification proceeding. The trial court denied the motion. The trial court's decision was affirmed on appeal. The fourth district noted that psychological examinations are not automatic and that they are not always warranted.

> Mental or psychological examinations are not automatic, and should not be. First, these clearly are not always warranted, as in the case here; therefore, court appointment is unjustified. See Fla. R. Civ. P. 1.360(a) concerning the requirement of a "good cause" showing and Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). Second, the costs may be an unnecessary burden on the parties.
>
> Id. at 1152.

3. Pariser v. Pariser, 601 So. 2d 291 (Fla. 4th DCA 1992).

This case involved a modification action requesting a change of custody of minor children. Finding that the granting or denying of an order for psychological evaluation is a discretionary act, the court concluded that the trial court did not depart from the essential requirements of law in ordering the psychological examinations. The decision does not refer to Rule 1.360 and notes that an evidentiary hearing is not always required before the entry of an order granting psychological examinations.

4. Gordon v. Smith, 615 So. 2d 843 (Fla. 4th DCA 1993).

Gordon involved post dissolution proceedings to modify custody and visitation. The original final judgment approved the parties' agreement that the mother would have primary residential custody.

In the modification action, the mother sought sole custodial responsibility charging the father with inappropriate conduct and possible sexual abuse during overnight visitation with the parties' five year old child. The father responded with allegations that the mother had concocted lies about the sexual abuse and had violated the court's directives regarding shared parental responsibility.

A psychologist testified at the hearing that he had been treating the child for more than one year and concluded that visits with the father should be suspended. The trial court ordered psychological examinations of the entire family. The fourth district held that the psychologist's testimony alone furnished a sufficient basis for the good cause necessary for psychological examinations. In addition, the fourth district court held that independent statutory authorization exists to order psychological evaluations in child custody proceedings. First, the court referred to the custody factors set forth in Section 61.13, Florida Statutes. The fourth district held:

> It seems to us that subdivisions (f), (g), (i) and (j) clearly make the psychological condition of parents and child especially relevant in this modification of custody proceeding in light of the accusations by both parties. In short, her accusation that he has allegedly sexually abused the child and his allegation that she has deliberately concocted these charges to achieve sole custody - both equally reprehensible conduct - furnish a relevant foundation for the examinations of both parents as well as the child.

Id at 845.

The factors referred to above as subdivisions (f), (g), (i) and (j) are the following:

> (f) The moral fitness of the parents.
>
> (g) The mental and physical health of the parents.
>
> (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
>
> (j) Any other fact considered by the court to be relevant.

Next, the fourth district found that Section 61.20, which provides for social investigations, provides the tool for psychological examinations in custody cases.

The fourth district noted its possible conflict with the first district and stated:

> The First District has hinted that even in custody proceedings there must be a strictly particularized showing for such an order. <u>See In the Interest of T.M.W., 553 So. 2d 260 (Fla. 1st DCA 1989)</u>... Section 61.20 is not cited or considered in the opinion.

Finally, the fourth district held "that it would simply disagree with <u>T.M.W.</u>'s essential holding to the extent that it would be thought to apply to custody disputes with the kind of allegations made here." <u>Id</u>. at 846.

V. Fifth District Court of Appeal.

<u>Kristensen v. Kristensen</u>, 406 So. 2d 1210 (Fla. 5th DCA 1981).

In <u>Kristensen</u>, the mother in a custody dispute argued that the mental health of any parent seeking custody is in controversy simply because there are allegations that one parent would be the more appropriate custodial parent. The court noted that the wife's

motion merely asserted in a conclusory way that her husband's mental condition was at issue. The appellate court found that there was no basis to sustain the lower court's conclusion that there was good cause to order the psychological examinations. Citing Gasparino v. Murphy, 352 So. 2d 933 (Fla. 2d DCA 1977) and Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234 (1964), the fifth district also held that the two requirements of good cause and in controversy

> [a]re not met by mere conclusory allegations of the pleadings - nor by mere relevance to the case - but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering such particular examination.
>
> Id. at 1212.

2. Fruh v. State of Florida, 430 So. 2d 581 (Fla. 5th DCA 1983).

The father of three dependent children was ordered by the trial court to undergo a mental examination upon the motion of the Department of Health and Rehabilitative Services. As the grounds for its motion, HRS argued that (i) the father had voluntarily declined to undergo a mental health examination; (ii) that the mental health of the father was material and relevant to the dependency proceedings because of the nature and extent of visitation and the advisability of returning the children to their father and (iii) the father was engaged in behavior calling his mental health into question in that he was convicted and sentenced for the offense of writing bad checks. The court applied Rule

1.360 and held that a mental examination may be ordered only when the mental condition of the party is in controversy and good cause is shown for the necessity of the examination. The court granted the father's writ of certiorari and quashed the order requiring him to submit to a mental examination. The court noted that there was no showing that the offense of writing bad checks was related to any mental infirmity. Also, the court determined that the Department of Health and Rehabilitative Services failed to show that the father's mental state could not be adequately evidenced without the assistance of expert medical testimony.

VI. United States Supreme Court.

1. Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234 (1964).

Schlagenhauf involves the validity and construction of Rule 35(a) of the Federal Rules of Civil Procedure. Rule 35(a) provides:

> Physical and mental examination of persons.
> (a) Order for examination.
> In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

In Schlagenhauf, the district court ordered Mr. Schlagenhauf, a defendant in a personal injury suit, to submit to several physical and mental examinations. Mr. Schlagenhauf applied for a

writ of mandamus in the court of appeal to have the examination set aside. The court of appeal denied mandamus.

The United States Supreme Court vacated the judgment of the court of appeal and remanded the case to the district court for consideration in light of the guidelines presented by the Supreme Court. The Supreme Court held that the rule requires

> discriminating application by the trial judge . . . this does not, of course, mean that the movant must prove his case on the merits in order to meet the requirement for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the rule. Id. at 243.

Next, the United States Supreme Court sets forth situations where the pleadings alone will be sufficient to meet the requirements of the rule. For example, a plaintiff in a negligence action who asserts mental or physical injury, places that mental or physical injury in controversy and provides the defendant with good cause for an examination. The United States Supreme Court explained that this would also apply to a defendant who asserts his mental or physical condition as a defense to a claim, such as, for example, where insanity is asserted as a defense.

Finally, the United States Supreme Court holds that the good cause and in controversy requirement make it apparent

> that sweeping examinations of a party who has not affirmatively put into issue his own physical or mental condition are not to be

> automatically ordered merely because that person has been involved in an accident . . . mental and physical examinations are only to be ordered upon a discriminating application by the district judge of a limitation prescribed by the rule. To hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases. The plain language of Rule 35 precludes such an untoward result.
>
> Id. at 244.

B. SUMMARY OF CASE HOLDINGS

Cases requiring compliance with Rule 1.360 by requiring a demonstration of in controversy and good cause.

1. In the Interest of S.N. v. State of Florida, Department of Health and Rehabilitative Services, 529 So. 2d 1156 (Fla. 1st DCA 1988).

2. In the Interest of T.M.W., 553 So. 2d 260 (Fla. DCA 1989).

3. Russenberger v. Russenberger, 623 So. 2d 1244 (Fla. 1st DCA 1993).

4. Nobbe v. Nobbe, 627 So. 2d 59 (Fla. 2nd DCA 1993).

5. Williams. v. Williams, 550 So. 2d 166 (Fla. 2nd DCA 1989).

6. Schouw v. Schouw, 593 So. 2d 1200 (Fla. 2nd DCA 1992).

7. Schottenstein v. Schottenstein, 384 So. 2d 933 (Fla. 3rd DCA 1980).

8. Paul v. Paul, 396 So. 2d 853 (Fla. 3rd DCA 1979).

9. Anderson v. Anderson, 470 So. 2d 52 (Fla. 4th DCA 1985).

10. Frisard v. Frisard, 453 So. 2d 1150 (Fla. 4th DCA 1984).

11. Fruh v. State of Florida, 430 So. 2d 581 (Fla. 5th DCA 983).

12. Kristensen v. Kristensen, 406 So. 2d 1210 (Fla. 5th DCA 1981).

13. Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).

Cases that do not require strict compliance with Rule 1.360.

1. Pariser v. Pariser, 601 So. 2d 291 (Fla. 4th DCA 1992).

2. Gordon v. Smith, 615 So. 2d 843 (Fla. 4th DCA 1993).

ARGUMENT

In pertinent part, Rule 1.360, Florida Rule of Civil Procedure provides:

> (a) **Request; Scope.**
> (1) A party may request any other party to submit to, or to produce a person in that other party's custody or legal control for, examination by a qualified expert when the condition that is the subject of the requested examination is in controversy.
>
> (2) An examination under this rule is authorized only when the party submitting the request has good cause for the examination. At any hearing the party submitting the request shall have the burden of showing good cause.

"In controversy" means that the parties' condition is directly involved in some material element of the cause of action or defense. "Good cause" means that the mental condition of the party, even though in controversy, could not adequately be evidenced without the assistance of expert medical testimony. In the Interest of S.N., 529 So. 2d 1156 (Fla. 1st DCA 1988); Fruh v. State of Florida, 430 So. 2d 581 (Fla. 5th DCA 983); Kristensen v. Kristensen, 406 So. 2d 1210 (Fla. 5th DCA 1981); Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); and In the Interest of T.M.W., 553 So. 2d 260 (Fla. DCA 1989).

Also, as explained in cases involving examinations of parents, good cause can also require a showing that the parent has been unable to meet the needs of the child.

The most recent district court of appeal decision addressing the proper application of Rule 1.360 is Russenberger v. Russenberger, 623 So. 2d 1244 (Fla. 1st DCA 1993). As noted in

Russenberger, "the essential requirements of law before a person may be required by a court to undergo a psychological examination are set out in Rule 1.360, which provides for compulsory examinations only upon a showing of good cause, when the party's mental or physical condition is in direct controversy." Id. at 1245. As noted in the summary of case law, the first, second, third and fifth district courts of appeal agree with the holding of the Russenberger first district decision. Only the two most recent cases out of the fourth district, Pariser and Gordon present a conflicting viewpoint. It is quite possible, however, that all of the districts would have required psychological examinations in Gordon. Gordon presents a unique set of facts. Specifically, the mother accused the father of sexual abuse against the parties' minor child and the father alleged that the mother's allegations were concocted to obtain sole custody of the child. With these types of allegations, a trial court may reasonably conclude that the mental condition of the parties is in controversy. Furthermore, it is reasonable to conclude that good cause for expert evaluation is necessary to determine whether or not a minor child has actually been sexually abused. In short, despite the fact that both the first and fourth district courts of appeal have acknowledged a conflict on this issue, a closer examination shows that the "conflict" may not exist.

If, however, Gordon is interpreted to support a position that mental examinations are appropriate in every custody case, despite the facts, then an obvious conflict between the districts exists.

It is Ms. Russenberger's position that a compulsory mental examination is an invasion of privacy that must be carefully considered by the trial court prior to compulsion. As explained by Judge Pearson in Schottenstein v. Schottenstein, 384 So. 2d 933 (Fla. 3rd DCA 1980):

> While the trial judge may be a proselyte of psychological evaluations and consultations for every minor child of divorced parents, we cannot ignore the countervailing right of a person to be free from a compulsory mental examination. See Schlagenhauf v. Holder 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); Schuppin v. Unification Church, 435 F.Supp. 603 (D.Vt. 1977). A compulsory mental examination has been traditionally deemed an invasion of privacy which will only be tolerated upon a showing of good cause.
>
> Id. at 936.

In short, every person has the right to be free from compulsory mental examinations. It is important that a distinction be made between evaluation or examinations of children by a psychologist for the purposes of litigation, on the one hand, and individual and family therapy on the other. If parents and children voluntarily decide to undergo family therapy, it may be extremely beneficial under those circumstances. However, in the middle of litigation, parents quite often, without considering the best interests of the children, insist upon hiring experts to "examine" the children. Without the protection of Rule 1.360, children could be subjected to compulsory mental examinations without any safeguard or concern for their privacy and well-being.

The proper application of Rule 1.360 protects children and parents in custody proceedings by requiring a showing that the

mental condition is in controversy and that expert medical testimony is necessary to resolve the problem. In some cases, the pleadings alone may demonstrate in controversy and good cause. For example, in a criminal matter, if a defendant raises the defense of insanity, it is clear that the in controversy and good cause requirements could be established based upon the pleadings alone. In such a case, an evidentiary hearing would not be needed. In Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), the United States Supreme Court addressed this issue. Schlagenhauf concerned the application of Federal Rule of Civil Procedure 35(a). Rule 35(a) is almost identical to Florida Rule of Civil Procedure 1.360. The United States Supreme Court noted that the requirements of in controversy and good cause must be established, however, there may be cases when an evidentiary hearing is not needed. As explained in Schlagenhauf, a plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury in controversy and provides the defendant with good cause for an examination to determine the existence and extent of the asserted injury. As a second example, the United States Supreme Court explained that the in controversy and good cause requirements would be established in a case where a defendant asserts his mental or physical condition as a defense, such as where insanity is asserted. In the majority of the cases, however, an evidentiary hearing will be needed before the trial court can make a determination whether the mental condition is in controversy and whether expert medical testimony is necessary.

Clearly, in the Russenberger case, which is the subject of this appeal, an evidentiary hearing was needed to make this determination. A complete discussion on this issue is set forth in the portion of this brief that responds to Mr. Russenberger's initial brief.

Despite the fact that an evidentiary hearing may not be necessary in every case, it is important that conclusory allegations alone not be utilized to place the mental health of a party or the parties' children in a custody case in controversy. As explained by the United States Supreme Court and cited in numerous Florida decisions, the requirements of in controversy and good cause

> are not met by mere conclusory allegations of the pleadings - nor by mere relevance to the case - but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering such particular examination. Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).

Schlagenhauf explains that the requirements of good cause and in controversy make it

> very apparent that sweeping examinations of a party who has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered . . . Mental and physical examinations are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the rule . . . The plain language of Rule 35 precludes such an untoward result.
>
> Id. at 244.

The importance and protection of Rule 1.360 cannot be disregarded in custody cases. The fourth district seems to suggest, however, that Rule 1.360 is not relevant in a custody proceeding. As a matter of fact, the Gordon decision does not reference the rule on even one occasion. Gordon relies on Section 61.20, which provides in part:

> In any action where the custody of a minor child is at issue, the court may order a social investigation and study concerning all pertinent details relating to the child and each parent when such an investigation has not been done and the study provided therefrom provided to the court by the parties or when the court determines that the investigation and study that have been done are insufficient.

First, a social investigation is not the same as a compulsory mental examination. Second, Section 61.13 must be read to harmonize with Rule 1.360. Seaboard Airline Railway Co. v. Hess, 73 Fla. 494, 74 So. 500 (Fla. 1917). Accordingly, even if Section 61.13 is construed to allow psychological examinations, as opposed to social investigations, it must be read in conjunction with Rule 1.360. Rule 1.360 sets forth the specific requirements in all cases, including domestic relations cases, before a physical or mental examination can be ordered. It is incorrect to automatically assume that the mental condition of the parties or their children is in controversy just because there is a custody dispute.

In addition to the privacy concerns, the cost of custodial evaluations often pose an unnecessary burden on the parties in a custody case. Quite often the cost can run into several thousand

dollars. "With regard to child custody determinations, mental or psychological examinations of parties are not automatic, and should not be, since they are not always warranted by the circumstances and since the costs of the examination may pose an unnecessary burden on the parties." Frisard v. Frisard, 453 So. 2d 1150 (Fla. 4th DCA 1984).

CONCLUSION

The Supreme Court should require strict compliance with Florida Rule of Civil Procedure 1.360 in all domestic relations proceedings. An individual's right to privacy should only be disturbed upon a showing of good cause, when their mental condition is in controversy.

ANSWER BRIEF TO PETITIONER'S INITIAL BRIEF

STATEMENT OF THE CASE AND FACTS

Ms. Russenberger accepts Mr. Russenberger's Statement of the Facts with one clarification. The Petition for Modification seeking a change of custody was not filed until after the hearing on Mr. Russenberger's Motion to Compel the Psychological Examinations. Accordingly, at the time of the hearing on the motion, only the relocation pleadings were before the trial court.

SUMMARY OF ARGUMENT

The trial court properly granted Ms. Russenberger's request for a writ of certiorari to review the trial court's order granting compulsory mental examinations of the parties' five minor children. Since the order was entered based solely upon argument of counsel, and the pleadings only contained conclusory allegations, the first district court of appeal properly granted the writ and quashed the order of the trial court. As explained by the first district court of appeal, before a compulsory mental examination of a child in a custody proceeding can be ordered, the trial court must find that the mental condition of the child is in controversy and that good cause is shown requiring the examination. Mr. Russenberger did not establish sufficient testimony or other documentation supporting these findings. Accordingly, pursuant to Rule 1.360, the decision of the appellate court must be affirmed.

Mr. Russenberger's argument that the trial court had authority to grant him the decision making authority with regard to mental examinations is without merit. Shared parental responsibility division does not contemplate a division of responsibility during the litigation process. Decisions which affect the litigation process must be decided by the trial court and cannot be delegated to one of the parties. Furthermore, even if a decision of this type could properly be delegated to one of the parties, such a delegation can only be made on a case by case basis after an evidentiary finding concerning the best interests of the child.

Ms. Russenberger agrees with Mr. Russenberger's argument that an evidentiary hearing is not required in every case. Cases which involve pleadings that obviously put the mental condition of a party in controversy will satisfy the requirements of Rule 1.360. A standard relocation or custody case, however, such as the Russenberger case, does not automatically meet the requirements of the rule.

Finally, Mr. Russenberger argues that public policy favors the granting of broad discretion to the trial court in determining what is in the best interests of the child in custody proceedings. Once again, Ms. Russenberger agrees with this argument, however, the trial court must properly apply Florida law and protect children and parties from unreasonable and unwarranted invasions of privacy.

In short, a compulsory mental examination has traditionally been deemed an invasion of privacy that requires a showing of good cause and in controversy. In order to continue to protect the privacy rights of individuals, strict compliance with Rule 1.360 should be required.

ARGUMENT

ISSUE

WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT ORDER DESIGNATING THE FATHER AS THE PARENT RESPONSIBLE FOR THE PSYCHOLOGICAL CARE AND CONCERN OF THE MINOR CHILDREN. (AS PHRASED BY PETITIONER).

A. The trial court's decision should have been reviewed under an abuse of discretion standard.(As phrased by Petitioner).

Ms. Russenberger requested a writ of certiorari from the first district for review of a final order compelling the Russenberger children to undergo psychological examinations. A writ of certiorari will be granted when an order "does not conform to the essential requirements of law and may cause material injury through subsequent proceedings for which remedy by appeal will be inadequate." West Volusia Hospital Authority v. Williams, 308 So. 2d 634, 636 (Fla. 1st DCA 1975).

Mr. Russenberger states that the first district did not apply the correct standard of review. To the contrary, the opinion begins with a reference to the Williams case cited above and specifically finds that the trial court's order did not conform to the essential requirements of law and that the order could cause material injury through subsequent proceedings. Next, the first district carefully explained the meaning of essential requirements of law in the context of court ordered psychological examinations under Rule 1.360. After reviewing the facts of the Russenberger case and the requirements of Rule 1.360, the first district

granted the writ of certiorari and quashed the decision of the trial court requiring the psychological examinations.

In this section, Mr. Russenberger argues that "the trial court's decision should have been reviewed under an abuse of discretion standard". More appropriately, however, the standard of review in Russenberger amounted to "error as a matter of law." Since the trial court failed to correctly apply Rule 1.360, the district court was forced to step in and grant the writ of certiorari to review the incorrect application of the law. Assuming for purposes of argument, however, that an abuse of discretion standard is appropriate, the decision granting the psychological examinations must be reversed. As explained by Mr. Russenberger, Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) explains the abuse of discretion standard, i.e. the trial court's decision should be overturned only upon a conclusion that no judge could have reasonably allowed such an evaluation. In Russenberger, no judge could have reasonably allowed a psychological evaluation after only hearing argument of counsel. Prior to the hearing on this motion, the trial court had heard very little testimony in this case. The parties entered into a settlement agreement during the initial dissolution proceeding and that agreement was approved by the trial court at an uncontested dissolution hearing. Only one hearing involving testimony took place before the hearing on the motion to compel psychological examinations. Moreover, at the time of the psychological examination hearing, the petition seeking modification of custody had not been filed. No testimony was taken

at the time of the hearing and no evidence whatsoever was presented by Mr. Russenberger showing that the mental health of the children was in controversy or that there was good cause for psychological examinations. The entire hearing consisted of argument from counsel. Furthermore, the motion requesting the examinations consisted of nothing more than unverified conclusory allegations. Under these circumstances, even assuming that abuse of discretion is the appropriate means of review, Ms. Russenberger is able to establish that no reasonable person could have reached the decision reached by the trial judge.

Mr. Russenberger further argues that the appellate court should have "fully realized the superior vantage point of the trial judge . . ." The trial court did not have a superior vantage point in this case. The trial court was not in a position to judge the creditability and demeanor of the witnesses, since the whole hearing consisted of argument from counsel. The appellate court was in exactly the same position as the trial court.

In summary, the review of a non-final order granting psychological examinations during litigation is properly appealable by writ of certiorari. In order to grant review by writ of certiorari, the appellate court must find that the order does not conform to the essential requirements of law and may cause material injury through subsequent proceedings for which remedy by appeal will be inadequate. Fla. R. App. P. 9.030(b)(2).

B. Under an abuse of discretion standard, the trial court's order was appropriate and should not have been disturbed upon appeal.

1. Pursuant to Chapter 61, Florida Statutes, the trial judge retains jurisdiction to decide matters affecting the welfare of children when the parents cannot otherwise agree. (As phrased by Petitioner)

Ms. Russenberger agrees with the majority of the statements made by Mr. Russenberger in this section, however, she disagrees with his ultimate conclusion. Specifically, Ms. Russenberger disagrees that Section 61.13 (2)(b)2.a., Florida Statutes, provided the trial court in this case with authority to grant Mr. Russenberger the decision making responsibility with regard to compulsory mental examinations during the litigation process. The three cases cited by Mr. Russenberger discuss the delegation of authority to one parent when the parents cannot agree regarding the appropriate school for the child. Martinez v. Martinez, 573 So. 2d 37, (Fla. 1st DCA 1990); Peaden v. Slatcoff, 522 So. 2d 959 (Fla. 1st DCA 1988); and Vasquez v. Vasquez, 443 So. 2d 313 (Fla. 4th DCA 1984). In each case, after hearing the testimony, pursuant to Section 61.13 (2)(b)2.a. and pursuant to the concept of shared parental responsibility, the trial court designated one parent in charge of the school decision. These cases make it clear that under the concept of shared parental responsibility, the court should not decide where the children should go to school. One parent should make that decision. In these cases, if one parent were not granted the ultimate responsibility for making a decision regarding the child's education, the dispute would continue on a

regular basis until the child reached the age of majority. This type of constant dissension would not serve the child's best interests.

These cases are distinguishable from Russenberger because in Russenberger the primary issues for consideration were whether or not relocation should be permitted and whether or not custody should be modified, not whether mental examinations should be allowed. The mental examinations, if allowed, would be used by the trial court in order to make these final determinations. Section 61.13 (2)(b)2.a. is not designed to allow a trial court to delegate its decision making authority during the pendency of litigation to one of the parents. The first district properly determined that this delegation was an improper abrogation of the court's authority. Section 61.13 (2)(b)2.a. provides: "[i]n ordering shared parental responsibility, the court may consider the expressed desires of the parents as to the division of responsibilities for the children." This section also states that areas of responsibility include primary residence, education, and medical and dental care. Examples showing proper application of this section are set forth in each of the three cases cited by Mr. Russenberger. After the shared parental responsibility determination is made, in the event the parents cannot agree as to specific aspects of the child's welfare, the trial court can designate one parent responsible for a particular responsibility. At no point, does the statute suggest that compulsory mental examinations during the pendency of litigation should be considered

as part of the shared parental responsibility division. Accordingly, the trial court did not act within its discretion when it designated Mr. Russenberger as the party responsible for determining whether or not the children should undergo psychological examinations. As explained in the Russenberger decision, the sole effect of the delegation to Mr. Russenberger was to grant the psychological examinations. Since Mr. Russenberger filed the motion requesting the examinations, the decision of the trial court amounted to a grant of that request. The trial court attempted to sidestep the requirements of Rule 1.360 and improperly delegated the court's decision making authority to Mr. Russenberger during the pendency of this relocation and custody proceeding.

In summary, the decision concerning whether the children should undergo psychological examinations for the purpose of litigation is a one time decision that should be made by the court as contemplated by Rule 1.360 and the applicable case law. Mr. Russenberger does not cite even one case that supports a finding that one parent should be delegated the court's authority to decide this issue during the litigation process. Furthermore, decisions granting one parent ultimate responsibility over a particular issue must be made on a case by case basis after an evidentiary finding concerning the best interest of the child. Hollen v. Hollen, 458 So. 2d 81 (Fla. 5th DCA 1984).

2. An evidentiary hearing is not always required in order to compel a psychological examination pursuant to Rule 1.360, Florida Rules of Civil Procedure.

First, Mr. Russenberger states that the verified pleadings in this action were sufficient to satisfy the in controversy and good cause requirements. At the time of the hearing on the motion to compel psychological examinations, the only verified pleading before the court was Mr. Russenberger's petition to enforce the final judgment. A copy of his petition to enforce final judgment is attached to Petitioner's Initial Brief as Exhibit "3". In that petition, Mr. Russenberger first explains that the parties share parental responsibility of the five minor children. He notes that Ms. Russenberger is designated as the primary residential parent and that Mr. Russenberger has liberal and reasonable visitation with the children. Next, Mr. Russenberger notes that his former wife intends to move to Suffern, New York with her new husband and that the move is approximately 1,240 miles from Pensacola, Florida. He notes his objection to the move and then pleads several conclusory allegations, i.e.:

1. Moving the five minor children is a major decision which affects their welfare.

2. Removal of the children would impair, impede and destroy the father's right to free access to his children's love and respect.

3. There is no bona fide reason for the move to Suffern, New York.

4. The move to Suffern, New York will not improve the general quality of life for the children.

5. No substitute visitation would be adequate to foster a continuing meaningful relationship between the children and their father.

6. The Respondent/Former Wife, once out of the jurisdiction, will not be likely to comply with any substitute visitation arrangement as evidenced by her past blatant violations of the agreement.

7. The Respondent/Former Wife is in part motivated by anger and vindictiveness and is attempting to frustrate visitation by the father.

8. To allow removal of the children, thereby restricting access to them by their father, would not be in the children's best interest.

The petition to enforce does not satisfy the "in controversy" and "good cause" requirements as suggested by Mr. Russenberger. Mr. Russenberger cites Schlagenhauf v. Holder in support of his position. Schlagenhauf, however, supports Ms. Russenberger's argument. As cited several times throughout this brief, Schlagenhauf provides that the two requirements of good cause and in controversy are not met

> [b]y mere conclusory allegations of the pleadings - nor by mere relevance to the case - but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for

> ordering such particular examinations. (Emphasis Supplied).
>
> Schlagenhauf 379 U.S. at 118, 85 S.Ct. at 242 - 243.

Next, Mr. Russenberger argues that after Russenberger, an evidentiary hearing is required in every case before a trial judge may order psychological examinations. The court did not make such a broad sweeping statement. In Russenberger the first district stated:

> Under these circumstances, the determination of whether the children should be required to undergo psychological examinations, and if so, by whom, may not be delegated, but must be made by the trial judge after he has heard the evidence presented by the parties. If the trial judge determines from the evidence presented that the mental condition of the children is in controversy and that good cause has been shown necessitating psychological examinations, he may order independent examinations by appropriate professions.
>
> (Emphasis Supplied). Russenberger at 1246.

Earlier in the decision, the court noted that conclusory allegations alone were insufficient. Since only conclusory allegations were presented by Mr. Russenberger in his petition to enforce, the court noted that an evidentiary hearing was necessary under the circumstances of this particular case. It is not correct to assume that an evidentiary hearing would be required in every single case. As noted above, there may be cases where it is evident from the pleadings that the mental condition of the party is in controversy and that good cause is established.

If this court adopts Mr. Russenberger's argument that the pleadings in this case satisfy the in controversy and good cause

requirements, then psychological examinations could be required routinely in every single case. Mr. Russenberger made no unique allegations in this case. This case was simply a relocation proceeding that evolved into a modification of custody proceeding. Such a broad sweeping application of the rule should not be allowed. In order to protect children and parties in custody proceedings, the trial judge, in each case, must carefully evaluate the pleadings, and if necessary, the evidence, to determine whether or not the requirements of Rule 1.360 have been established.

In support of his argument that the psychological condition is relevant in every custody proceeding, Mr. Russenberger cites Gordon v. Smith, 615 So. 2d 581 (Fla. 5th DCA 1983). Gordon cannot be read as broadly as Mr. Russenberger suggests. Gordon does cite the 61.13 custody factors. Gordon does not, however, hold that these factors give rise to a conclusion in every case that the mental condition of the children is in controversy. Gordon involved allegations of sexual abuse by the mother, and in response, the father argued that the allegations were concocted to help support the mother's petition for sole custody. After setting forth the custody factors, the fourth district court of appeal held:

> It seems to us that subdivisions (f), (g), (i) and (j) clearly make the psychological condition of parents and child especially relevant in this modification of custody proceeding in light of the accusations by both parties. In short, her accusation that he has allegedly sexually abused the child and his allegation that she has deliberately concocted these charges to achieve sole custody - both

> equally reprehensible conduct - furnish a relevant foundation for the examinations of both parents as well as the child.
>
> Gordon at 845.

At no point throughout the Gordon decision, did the fourth district court of appeal state that in every custody case, psychological examinations are warranted.

C. Public Policy Favors The Granting of Broad Discretion To The Trial Court In Determining What Is In the Best Interests Of the Child In Custody Proceedings. (As Phrased by Petitioner).

Ms. Russenberger accepts this statement as accurate, however, as explained by Judge Pearson in Schottenstein v. Schottenstein, 384 So. 2d 933 (Fla. 3rd DCA 1980)

> While the trial judge may be a proselyte of psychological evaluations and consultations for every minor child of divorced parents, we cannot ignore the countervailing right of a person to be free from a compulsory mental examination. A compulsory mental examination has been traditionally deemed an invasion of privacy which will only be tolerated upon a showing of good cause.
>
> Id. at 936.

Next, Mr. Russenberger suggests that Section 61.20, Florida Statutes provides independent grounds for a court compelled psychological examination of the minor children. Section 61.20 provides for a social investigation, not a psychological examination. Furthermore, Section 61.20 must be read in conjunction with Rule 1.360. Since the statute and the rule do not conflict, they must be read with an attempt to harmonize with one another. Seaboard Air Line Railway Co. v. Hess, 73 Fla. 494, 74 So. 500 (Fla. 1917). In short, if the in controversy and good cause

elements of Rule 1.360 are satisfied, the court may order psychological examinations as part of the social investigation authorized by Section 61.20. Section 61.20, however, does not give the court authority in every custody case to order psychological examinations without considering the safeguards of Rule 1.360.

In his initial brief, Mr. Russenberger states as follows: "Based upon the numerous hearings held since the entry of the Final Judgment of Dissolution of Marriage in the present case, usually involving custody and visitation issues, the trial court was intimately familiar with the parties and their children." The final judgment was entered on January 5, 1993. The final judgment was entered upon the stipulation of the parties pursuant to a settlement agreement and after an uncontested dissolution proceeding. After entry of the final judgment and prior to the hearing on the psychological request, only one substantive hearing was heard by the judge. This hearing addressed Mr. Russenberger's motion for a temporary injunction. Mr. Russenberger's statement that the trial court was intimately familiar with the parties and their children is incorrect.

In summary, Ms. Russenberger agrees that the trial court should attempt to determine the best interests of minor children in every dissolution proceeding. In making this determination, however, the trial court must properly apply Florida law and protect children and parties from unreasonable and unwarranted requests.

CONCLUSION

The district court of appeal properly granted the writ of certiorari and quashed the decision of the trial court. The decision of the trial court granting the compulsory mental examinations did not comply with the essential requirements of law set forth in Florida Rule of Civil Procedure 1.360. Accordingly, the decision of the first district should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished on this 9th day of March, 1994, to Crystal Collins, Beggs & Lane, P.O. Box 12950, Pensacola, FL 32576-2950 and to T. Sol Johnson, Johnson, Green, & Locklin, P.O. Box 605, Milton, FL 32572, by U.S. Mail.

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