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IN THE SUPREME COURT OF FLORIDA

01A5-6-94

RAY DEAN RUSSENBERGER,

Petitioner/Former Husband,

and

CYNTHIA L. RUSSENBERGER-STELTENKAMP,

Respondent/Former Wife.

SUPREME COURT CASE #:82,587

FIRST DCA CASE NO: 93-1589

CIRCUIT COURT CASE NO: 91-1374

PETITIONER/FORMER HUSBAND'S INITIAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

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PRELIMINARY STATEMENT

The parties will be referred to as petitioner or respondent, or Mr. Russenberger or Mrs. Russenberger Steltenkamp, respectively. References to exhibits contained in the Appendix are designated as Exhibit, followed by the exhibit number.[1] References to the transcript of the hearing on the Motion to Compel Examination of Persons held on April 27, 1993, are cited as "T-_" and the appropriate page number. (A copy of this transcript is attached hereto as Exhibit 1)

STATEMENT OF THE CASE AND FACTS

On January 5, 1993, the Final Judgment of Dissolution of Marriage was entered by the Circuit Court In and For Escambia County, Florida dissolving the marriage of Ray Dean Russenberger and Cynthia L. Russenberger [Steltenkamp]. A copy of the Final Judgment is attached hereto as Exhibit 2. The Final Judgment incorporated the terms of a marital settlement agreement entered into between the parties on December 22, 1992. The marital settlement agreement provided that it would be in the best interest of the parties' five minor children for the parties to have shared parental responsibility. Mrs. Russenberger Steltenkamp was designated as the residential custodian subject to liberal and reasonable rights of visitation by Mr. Russenberger.

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[1] An appendix pursuant to Florida Rule of Appellate Procedure, Rule 9.220, accompanies this brief.

After being informed by Mrs. Russenberger Steltenkamp that she intended to relocate permanently to Suffern, New York, Mr. Russenberger filed a Petition to Enforce the Final Judgment on February 25, 1993 (attached hereto as Exhibit 3), and later filed a Petition for Modification of the Final Judgment on April 30, 1993. The Petition for Modification (attached hereto as Exhibit 4) requested the circuit court to modify the Final Judgment and designate Mr. Russenberger as the residential custodial parent of the children.

On April 21, 1993, Mr. Russenberger filed a Motion to Compel Examinations of Persons pursuant to Rule 1.360, Florida Rules of Civil Procedure. Mr. Russenberger moved the Court to enter an order allowing for psychological examination of the parties' five minor children (whose ages ranged from four to sixteen). A copy of the Motion to Compel Examination of Persons is attached hereto as Exhibit 5. On April 27, 1993, a hearing was held before the circuit court on the Motion to Compel Psychological Evaluations. The trial judge orally ruled on the motion at the time of the hearing and the written order was entered on May 14, 1993. A copy of the Order Upon Petitioner/Former Husband's Motion to Compel Examination of Persons is attached hereto as Exhibit 6.

The circuit court's order provided in relevant part as follows:

> This court . . .finds that it is in the best interest of the minor children to designate the former husband as the parent responsible for the psychological

> care and concern of the minor children. This responsibility will include the right to decide if any psychological examinations of the minor children would be in their best interest. Should he determine that a psychological examination would be in the children's best interest, he shall be permitted, in his discretion to schedule the necessary examinations with a qualified psychologist of his choosing and the former wife shall make the children available . . . Appendix, Exhibit 6, T-23.

Mrs. Russenberger Steltenkamp appealed the circuit court's non-final order. The First District Court of Appeal found the circuit court's order did not conform with the essential requirements of law and may have caused material injury throughout subsequent proceedings for which remedy by appeal would have been inadequate. A copy of the District Court's per curiam decision is attached hereto as Exhibit 7.

The District Court determined that the "essential requirements of law" which relate to a person being required by a court to undergo a psychological examination are set forth in Florida Rule of Civil Procedure 1.360. This rule provides for compulsory examinations "only upon a showing of good cause, when the party's mental or physical condition is in direct controversy." Appendix, Exhibit 7, p.2 (citations omitted). In order to meet the essential requirements of law, the District Court held that the party's mental condition must be clearly demonstrated to be directly involved in some material element or cause of action or defense and it must be clearly demonstrated that expert medical testimony is

necessary. The First District court held that conclusory allegations alone do not put the child's mental health "in controversy" or demonstrate "good cause". Appendix, Exhibit 7, p. 3. In its ruling, the court noted that its holding conflicted with its sister court's decision in Gordon v. Smith, 615 So. 2d 843 (Fla. 4th DCA 1993) and Pariser v. Pariser, 601 So. 2d 291 (Fla. 4th DCA 1992). On October 19, 1993, petitioner timely filed his notice to invoke discretionary jurisdiction and on January 24, 1994, this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The First District Court of Appeal erred by failing to review the trial court's decision under the abuse of discretion standard. The trial court exercised its discretion pursuant to Section 61.13, Florida Statutes (1991), in a reasonable manner when it delegated Mr. Russenberger as the parent responsible for the psychological welfare of the minor children. Therefore, its ruling should not have been disturbed upon appeal.

The First District further erred by holding that an evidentiary hearing is required before a child's psychological well-being may be placed in controversy. An evidentiary hearing is not a prerequisite to the granting of a psychological examination under all circumstances, as recognized by the Fourth District Court in Pariser v. Pariser, 601 So. 2d 291 (Fla. 4th DCA 1992). See also Schagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L.Ed. 2d 152 (1964). The verified pleadings demonstrated good cause and in controversy as required by Rule 1.360, Florida Rules of Civil Procedure. Further, Chapter 61, Florida Statutes, and the recent decision of Mize v. Mize, 621 So. 2d 417 (Fla. 1993)[2] recognize that the psychological and emotional condition of both parents and children are directly relevant in relocation

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[2] In its Order upon Petitioner/Former Husband's Motion for Temporary Injunction (attached hereto as Exhibit 9), the trial court correctly held that its ultimate decision on relocation would be based upon the factors enunciated in Hill v. Hill, 548 So. 2d 705 (Fla. 3rd DCA 1989). See Appendix, Exhibit 9.

and child custody proceedings. Therefore, the trial court did not abuse it discretion in granting petitioner's Motion for Psychological Examinations of Persons.

Furthermore, public policy and the present statutory framework in Florida support the conclusion that the trial judge has the discretion to allow a psychological examination of a child in relocation and custody proceedings. When making a decision regarding the best interest of the children, the trial judge must be able to utilize the full array of tools available to him.

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.

A. The trial court's decision should have been reviewed under an abuse of discretion standard.

The District Court of Appeal for the First District should have denied the Petition for Writ of Certiorari because the petition failed to demonstrate error by the trial court which constituted a departure from the essential requirements of law. Bridges v. Williamson, 449 So. 2d 400 (Fla. 4th DCA 1984).

The granting or denying of an order for a psychological evaluation is a discretionary act. Pariser v. Pariser, 601 So. 2d 291 (Fla. 4th DCA 1992); see also Pepsi Cola Bottling Co. of Miami v. Modesto, 107 So. 2d 43 (Fla. 3d DCA 1958). The abuse of discretion standard recognizes that the trial judge is in a superior position to evaluate the facts and circumstances involved to determine whether evaluations are relevant to the proceedings. Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

On appellate review, the court should have fully realized the superior vantage point of the trial judge, and therefore should have applied the "reasonableness" test to determine whether the trial judge abused his discretion. Canakaris v. Canakaris, 382 So. 2d at 1203. A trial judge's discretionary ruling should not be disturbed when the decision satisfies the test of reasonableness. Id. Under the Canakaris standard, the trial court's decision should be overturned only upon a conclusion that no judge could have reasonably allowed such an evaluation. Id.

The Fourth District, following Canakaris, has applied the abuse of discretion standard to review orders granting authorization of psychological evaluations. Pariser v. Pariser, 601 So. 2d at 292; Gordon v. Smith, 615 So. 2d 843, 844 (Fla. 4th DCA 1993). In Pariser, the Fourth District Court found that the trial court did not abuse its discretion in ordering the psychological evaluations without an evidentiary hearing. The Fourth District Court held that not all situations require evidentiary hearings. Pariser v. Pariser, 601 So. 2d at 292.

In the case at bar, the First District Court of Appeal reversed the trial court and held that the lower court proceeding departed from the essential requirements of law by:

> [f]ailing to determine whether the mental condition of the children was "in controversy"; failing to determine whether "good cause" was demonstrated requiring the requested psychological evaluations; relying on conclusory

> allegations and argument of counsel instead of sworn testimony and other evidence; and attempting to side-step the issue presented by the motion by improperly abrogating its decisional power to the former husband.

Russenberger v. Russenberger, 623 So. 2d 1244 (Fla. 1st DCA 1993); Appendix, Exhibit 7 at p. 4.

The First District Court did not specify which standard of review it was applying to the trial court's order. However, by requiring the record to "clearly demonstrate" the "in controversy" and "good cause" requirements set forth in Rule 1.360, Florida Rules of Civil Procedure, the court appears to be applying the substantial competent evidence or de novo standard of review. See Zediker v. Zediker, 444 So. 2d 1034 (Fla. 1st DCA 1984)(the court applied the competent and substantial evidence standard in reviewing a modification of custody proceeding).

This standard gives little or no weight to the trial court's findings, and allows a losing party to re-litigate the facts before the appellate court. It further ignores the trial court's inherent ability to weigh the facts and circumstances of each individual case and base its decision upon the analysis of the totality of the circumstances and review of all the pleadings. The appellate court must only look to see if there is logic and justification for the trial court's decision. Canakaris v. Canakaris, 382 So. 2d at 1203.

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.

Shared parental responsibility is defined as the court ordered relationship in which both parents continue to enjoy full parental rights and responsibilities. See Section 61.046(11), Florida Statutes. Each parent has the duty to use his or her best efforts to do what is in the best interest of the child(ren). When major decisions must be made regarding the welfare of the child(ren), the parents must confer with one another and make a joint decision. The fact that one parent is given primary custodial responsibility does not affect his or her duty to confer with the other. Markham v. Markham, 485 So. 2d 1299 (Fla. 5th DCA 1986).

Unfortunately, parents (and especially parents in custody and relocation disputes) do not always agree upon major decisions involving their children. When this joint responsibility breaks down, the statutory framework allows the trial judge to designate ultimate responsibility over specific aspects of the child's welfare. Martinez v. Martinez, 973 So. 2d 37 (Fla. 1st DCA 1990); Peaden v. Slatcoff, 522 So. 2d 959 (Fla. 1st DCA 1988); see also Vasquez v. Vasquez, 443 So. 2d 313 (Fla. 4th DCA 1983), rev. den. 451 So. 2d 851 (Fla. 1984).

In the case at bar, the trial court recognized its ability to decide matters affecting the welfare of the minor children when the parents could not agree. Transcript of Hearing On Motion To Compel Examination of Persons, Appendix, Exhibit 1, T- 20-23.

The trial court acted within its discretion when it designated Mr. Russenberger as the party who should be responsible for determining the psychological care and concern of the minor children.

Section 61.13 2(b) 2. a., Florida Statutes, provides that:

> [i]n ordering shared parental responsibility, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those responsibilities between the parties based on the best interests of the child. Areas of responsibility may include primary residence, education, medical and dental care, and any other responsibility which the court finds unique to a particular family.

As pointed out by the court in Martinez v. Martinez, 573 So. 2d 37, this statutory language contemplates that parents, not the courts, have the responsibility of making decisions regarding medical care and any other areas which the court finds unique to the particular family. But, in situations where parents are unable to agree, as in this case, the court is allowed to designate one parent to have the ultimate responsibility for making a decision regarding a particular

aspect of the children's welfare. Martinez v. Martinez, 573 So. 2d at 41.

The record in this case clearly demonstrated sufficient findings on which the trial court could base its decision. This discretionary ruling should only have been overturned if no judge could have reasonably entered the order in dispute. Gordon v. Smith, 615 So. 2d at 844. Clearly, the pleadings, including, but not limited to, the verified Petition to Enforce Final Judgment, Answer to Petition to Enforce Final Judgment (attached hereto as Exhibit 9) and the Petition for Modification of Final Judgment show the parties do not agree on what is in the best interest of the children. See Appendix, Exhibits 3, 9 and 4, respectively.

In its decision, the First District Court of Appeal found that this case did not present the kind of situation contemplated by Section 61.13(2)(b)2.a., Florida Statutes. Russenberger, 623 So. 2d at 1245. Appendix, Exhibits 7, p. 4. The court found that failure to hold an evidentiary hearing under Rule 1.360, Florida Rules of Civil Procedure, constituted reversible error.

This decision contradicts the First District opinion in Peaden v. Slatcoff, 522 So. 2d 959. In Peaden, the First District upheld the trial court's decision granting the mother responsibility for her child's choice of schools. Although reversed on other grounds, the First District approved the designation based upon "the single factual finding" that the

parties had been unable to reach an agreement otherwise. Peaden, 522 So. 2d at 960.

This case is similar to Peaden, in that in addition to the child's educational needs, Section 61.13(2)(b)2a. includes medical treatment as a responsibility which may be designated to a particular parent. The trial court did not err in assigning this responsibility to the husband. To the contrary, the court is given specific authority to do so under the statute.

It should be noted that in designating the father as the parental authority to determine the needs for the psychological care of the children, the trial court did not prevent the mother from also having the children examined. Appendix, Exhibit 1, T-31.

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.

In the event this Court finds, as did the First District, that the actions to the trial court amounted to a compulsory examination pursuant to Rule 1.360, Florida Rules of Civil Procedure, the verified pleadings are sufficient to satisfy the "in controversy" and "good cause" requirements. See Pariser v. Pariser, 601 So. 2d 291; see also Schlagenhauf v. Holder, 379 U.S. 104.

Rule 1.360, Florida Rules of Civil Procedure, provides that a party may request a person to undergo a psychological evaluation when the condition that is the subject of the requested examination is in controversy and the petitioning party shows good cause for the examination.

What constitutes good cause or places the mental or physical condition of a party in controversy is not made entirely clear by Florida case law. Anderson v. Anderson, 470 So. 2d 52 (Fla. 4th DCA 1985).

The Fifth District Court of Appeals, in Fruh v. State Dept. of Health & Rehabilitative Services, 430 So. 2d 581 (Fla. 5th DCA 1983), defines "in controversy" as meaning that the party's condition is directly involved in some material element of the cause of action or defense, and "good cause" as meaning the condition could not be evidenced adequately without the assistance of expert medical testimony. Fruh v. State, 430 So. 2d at 584.

Rule 1.360, Florida Rules of Civil Procedure is similar to Rule 35, Federal Rules of Civil Procedure. The Federal rule was explored by the United States Supreme Court in Schlagenhauf v. Holder, 379 U. S. 104. The United States Supreme Court in Schlagenhauf set forth the "in controversy" and "good cause" requirements discussed in Fruh.

In the case at bar, the First District Court of Appeal announced a "clear demonstration" standard in proceedings involving custody of children, requiring that an evidentiary

hearing be held before a trial judge may order a psychological examination of a child. Appendix, Exhibit 7, p. 2. The First District relied on Schlagenhauf in ruling that an evidentiary hearing is required before a psychological examination may be allowed in a custody proceeding. To the contrary, Schlagenhauf specifically found that an evidentiary hearing is not required, and that affidavits or other usual methods short of hearing are sufficient to demonstrate the "in controversy" and "good cause" standards. Schlagenhauf, 379 U.S. at 118, 119. The United States Supreme Court explained that there are situations in which pleadings alone will meet the requirements, and cited the following example:

> A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides a defendant with good cause for an examination and extent of such injury. Id.

In Mr. Russenberger's verified Petition to Enforce Final Judgment (Appendix, Exhibit 3), Mrs. Russenberger Steltenkamp's Answer to Petition to Enforce Final Judgment (Appendix, Exhibit 9), and the Petition for Modification of Final Judgment (Appendix, Exhibit 4) sufficient grounds were alleged to warrant "good cause" to evaluate the children and clearly demonstrated that their emotional and mental well being were in controversy. It is undisputed that the former wife intended to move with the five minor children to the state of New York. The ultimate issues to be determined by the trial court included, but were not limited to, what impact

the relocation of the five minor children would have on the relationship between the children and the noncustodial parent, whether there is any adequate visitation schedule which would foster meaningful relationship between the children and the noncustodial parent, what is in the best interest of the children, and as it concerns custody, the love, affection and other emotional ties existing between the parents and the children, and the reasonable preference of the children. See Mize v. Mize, 621 So. 2d 417 (adopting the Hill v. Hill factors) and Section 61.13, Florida Statutes. Logic dictates that an expert in the area of child psychology is the one best to make such determinations, particularly in light of the children's ages[3]. Thus, the ordering of the evaluations was not abuse of discretion since the pleadings themselves squarely placed the mental and emotional state of the children in issue. Under Schlagenhauf, the requirements of "good cause" and "in controversy" are satisfied. Schlagenhauf v. Holder, 379 U.S. at 118, 119.

Further, for the purposes of shared parental responsibility, Section 61.13, Florida Statutes, expressly requires a judge in a custody proceeding to consider and evaluate issues that relate to the best interest of the children. See Gordon v. Smith, 615 So. 2d at 845.

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[3] At the time of the hearing, the parties' five children ranged in ages from four years to sixteen years old.

The Gordon court specifically found that the enumerated factors in the shared parental responsibility statute make the psychological condition of children relevant in a modification of custody proceeding. Gordon v. Smith, 615 So. 2d at 845. Even Mrs. Russenberger Steltenkamp, at the hearing on the Motion to Compel Examination of Persons, agreed that it was an issue to be addressed by the trial judge. See Appendix, Exhibit 1, T-12.

In determining what is in the best interests of the children and the primary residence, Section 61.13(3) requires the trial court to examine the following factors:

> (a) The parent who is more likely to allow the child frequent and continuing contact with the non-residential parent.
> (b) The love, affection, and other emotional ties existing between the parents and the child.
> (c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or remedial care recognized and permitted under the laws of the state in lieu of medical care, and other material needs.
> (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
> (e) The permanence as a family unit of the existing or proposed custodial home.
> (f) The moral fitness of the parents.
> (g) The mental and physical health of the parents.
> (h) The home, school, and the community record of the child.
> (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.

These factors clearly place the mental condition of the children in controversy. See Gordon v. Smith, 615 So. 2d 845.

The record on its face contained sufficient information, not merely conclusory allegations relating to the case, that would support the trial judge's discretionary ruling to allow Mr. Russenberger to seek a psychological examination of the children in this instance. The Fourth District Court rulings in Gordon and Pariser should be controlling.

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.

A trial judge is expected to use all available means to determine the best interests of minor children affected by divorce. In Kern v. Kern, 333 So. 2d 17 (Fla. 1976), this Court cited with approval the following quote:

> "[T]he burden on a Judge when he acts as parens patriae is perhaps the most demanding which he must confront in the course of his judicial duties... The test is whether the deviation will on the whole benefit the child by obtaining for the Judge significant pieces of information he needs to make the soundest possible decision." Lincoln v. Lincoln, 24 N.Y. 2d 270, 272; 229 N.Y.S. 2d 842, 843-44; 247 N.E. 2d 659, 660-61 (1969).

Section 61.20, Florida Statutes (1991), gives a trial judge express authorization to order a social investigation and study concerning both parents and children in custody proceedings. This social investigation may include the examination(s) and opinion(s) of a psychologist.

Prior to 1989, the court was limited to information from the Department of Health and Rehabilitative Services or "other

qualified staff." Section 61.20, Florida Statutes (1987). The statute was amended in 1989, allowing placement agencies, clinical and social workers, marriage and family therapists, mental health counselors, or psychologists licensed under Section 409.175, Florida Statutes to conduct the social investigation and study and provide the court with their findings. Clearly, the legislature intended to broaden, not restrict, the trial court's ability to protect and defend children in custody matters.

If the trial judge has the ability, under Section 61.20, to order a psychological evaluation pro se, it follows that he should be able to appoint the child's parent with a similar responsibility. Based upon the numerous hearings held since the entry of the Final Judgement 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.

No conflict exists between Rule 1.360, Florida Rules of Civil Procedure and the statutory provisions of Chapter 61 (specifically, Section 61.13 and Section 61.20). The rule determines the procedure by which a motion for compulsory examination may be granted, whereby the statutory framework defines the substantive requirements of the procedure.

It is well settled that procedural rules established by the judiciary and statutes defines by the legislature should be construed, where possible, to harmonize with one another.

Seaboard Airline Ry. Co. v. Hess, 73 Fla. 494, 74 So. 500 (Fla. 1917). Under Rule 1.360, Florida Rules of Civil Procedure a party may request examination of another party, or person in that party's custody, when the physical or mental condition of the person is "in controversy". Section 61.13, Florida Statutes further defines the "in controversy" element as it applies in child custody proceedings. For example, if the court finds from the facts presented that the "love, affection and other emotional ties existing between the parents and child" is relevant to the particular proceedings, the court has discretion to order a compulsory examination of both parent and child pursuant to the provisions of Fla. R. Civ. P. 1.360. See Section 61.13 (2)(b)2.a.

Accordingly, the trial court used the statutory tools available to aide in determining the best interests of the children. The trial court's discretion in matters such as these should be afforded great weight by the appellate courts.

CONCLUSION

For the foregoing reasons, Mr. Russenberger respectfully requests this Court to reverse the decision of the First District Court of Appeal and reinstate the decision of the trial court.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the Initial Brief of Appellant has been furnished to JOHN L. MYRICK, ESQ. and E. JANE BREHANY, ESQ., and R. BROOKS DAVIS, ESQ., 625 North Ninth Avenue, Pensacola, Florida 32501, this the 18th day of February, 1994, by U.S. Mail.

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APPENDIX