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**FILED**

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OCT 27 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

**RAY DEAN RUSSENBERGER,**  
Petitioner/Former Husband,

vs.

SUPREME COURT CASE NO: 82587  
1ST DCA CASE NO: 93-1589  
CIRCUIT COURT CASE NO: 91-1374

**CYNTHIA L. RUSSENBERGER,**  
Respondent/Former Wife.

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**PETITIONER'S JURISDICTIONAL BRIEF**

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

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ROBERT H. RIGSBY, JR.  
BEGGS & LANE  
P. O. Box 12950  
Pensacola, Florida 32576-2950  
(904) 432-2451  
Florida Bar No. 981389  
Attorneys for Petitioner/  
Former Husband

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STATEMENT OF THE CASE AND FACTS

A Final Judgment of Dissolution of Marriage was entered by the Circuit Court in and for Escambia County, Florida, on January 5, 1993, dissolving the marriage of Ray Dean Russenberger and Cynthia L. Russenberger. A copy of the Final Judgment is attached hereto as Exhibit 1. 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. The Wife was designated as the residential custodian subject to liberal and reasonable rights of visitation by the Husband.

After being informed by the Former Wife that she intended to relocate to Suffern, New York, the Former Husband filed a Motion to Enforce Final Judgment on February 25, 1993, and later filed a Petition for Modification of the Final Judgment on April 30, 1993. The Petition for Modification requested the Circuit Court to modify the final judgment and designate the Former Husband as the residential custodial parent of the children.

The Former Husband filed a Motion to Compel Examinations of Persons pursuant to Rule 1.360, Florida Rules of Civil Procedure, on April 21, 1993, requesting court ordered psychological examinations of the five (5) minor children, who range from ages four to sixteen. A hearing was held before the Circuit Court on the Former Husband's Motion to Compel Psychological Evaluations on

April 27, 1993. The trial judge orally ruled on the Motion at the time of the hearing and the written order was entered on May 14, 1993. Copies of the Motion to Compel, the transcript of the hearing and the order are attached hereto as Exhibits "2", "3" and "4" respectively.

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(s) 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. . . .

The Former Wife 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 through 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 "5".

The District Court stated that the "essential requirements of law" related to a person being required by a court to undergo a psychological examination are set out in Fla.R.Civ.P. 1.360, which provides for compulsory examination "only upon a showing of good cause, when the party's mental or physical condition is in direct controversy." In order to meet the essential requirements of

Fla.R.Civ.P. 1.360, the District Court held that the party's mental condition must be clearly demonstrated to be directly involved in some material element of the cause of action or defense and it must be clearly demonstrated that expert medical testimony is necessary.

The District Court held:

. . . that in this case the trial court departed from the essential requirements of law by: failing to determine whether the mental condition of the children was "in controversy"; failing to determine whether "good cause" was demonstrated requiring the requested psychological examinations; relying on conclusory allegations and argument of counsel instead of sworn testimony or other evidence; and attempting to sidestep the issue presented by the motion by improperly abrogating its decisional power to the former husband.

The Petitioner's notice to invoke the discretionary jurisdiction of this court was timely filed on October 19, 1993.

## SUMMARY OF THE ARGUMENT

In this case, the First District Court of Appeal held that in proceedings involving custody of children, Fla.R.Civ.P. 1.360 (providing for psychological evaluations) requires sworn testimony or other evidence be produced at an evidentiary hearing before the trial court may order a psychological examination of a child.

The decision of the First District Court of Appeal cannot be reconciled with the decision of the Fourth District of Appeal in Pariser v. Pariser, 601 So.2d 291 (Fla. 4th DCA 1992), and its progeny, Gordon v. Smith, 615 So.2d 843 (Fla. 4th DCA 1993). The Fourth District Court of Appeal specifically rejected the argument that the trial court is required to hold an evidentiary hearing, and held that the granting or denying of an order for a psychological evaluation is a discretionary act of the trial court, which can only be overturned upon a conclusion after an examination of the record, as a whole, no judge could reasonably have ordered such an evaluation.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. Art. V. § 3(b)(3) Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).



## ARGUMENT

The Decision of the First District Court of Appeal in this Case Expressly and Directly Conflicts with the Decisions of the Fourth District Court of Appeal in Pariser v. Pariser, 601 So.2d 291 (Fla. 4th DCA 1992), and Gordon v. Smith, 615 So.2d 843 (Fla. 4th DCA 1993).

In this case, the First District Court of Appeal announced a "clear demonstration" standard in proceedings involving custody of children, when it held that Fla.R.Civ.P. 1.360 (providing for psychological evaluations) requires sworn testimony or other evidence be produced at an evidentiary hearing before the trial court may order a psychological examination of a child. As explained below, the decision of the First District Court of Appeal conflicts with the decisions of the Fourth District Court of Appeal which has specifically rejected the argument that the trial court is required to hold an evidentiary hearing, and held that the granting or denying of an order for a psychological evaluation is a discretionary act of the trial court, which can only be overturned upon a conclusion that no judge could reasonably have ordered such an evaluation. The petitioner respectfully submits that this court should reverse the decision rendered by the First District Court of Appeal in this case and reinstate the Order of the Circuit Court inasmuch as the Circuit Court's designation of the Former Husband as the parent responsible for the psychological care and concern of the minor children, including the right to decide if any psychological examination(s) of the minor children would be in their best interests, was reasonable upon a review of the record as a whole.

Rule 1.360, Fla.R.Civ.P., 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 such an examination is authorized only "when the party submitting the request has good cause for the examination." The First District Court of Appeal held that the "good cause" and "in controversy" requirements of Fla.R.Civ.P. 1.360 requires a clear demonstration that the party's mental condition is directly involved in some material element of the cause of action or defense and that expert testimony is necessary. Therefore, according to the First District Court of Appeal, conclusory allegations alone in child custody matters fall below the standard to put the child's mental health in controversy or demonstrate good cause for ordering a psychological examination. The First District Court of Appeal made heavy reliance upon its previous decision in In the Interest of T.M.W., 553 So.2d 260 (Fla. 1st DCA 1989), and the United States Supreme Court decision of Schlagenhauf. v. Holder, 379 U.S. 104 (1964), which interpreted the "in controversy" and "good cause" requirements of Federal Rule of Civil Procedure 35(a), which is similar to Fla.R.Civ.P. 1.360(a).

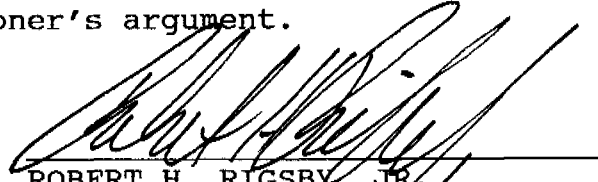
The First District Court of Appeal's decision is in direct conflict with the decisions of the Fourth District Court of Appeal. In Pariser v. Pariser, 601 So.2d 291 (Fla. 4th DCA 1992), and subsequently in Gordon v. Smith, 615 So.2d 843 (Fla. 4th DCA 1993), the Fourth District Court of Appeal specifically rejected the argument that the trial court is required to hold an evidentiary

hearing and held that the granting or denying of an order of psychological evaluation pursuant to Fla.R.Civ.P. 1.360 is a discretionary act governed by the reasonableness standard announced by this court in Canakaris v. Canakaris, 382 So.2d 1197, 1202-03 (Fla. 1980). According to the Fourth District Court of Appeal, if a review of the record provides sufficient information from which the trial judge may form a reasonable belief that a psychological evaluation is warranted, then the trial judge may order a psychological evaluation without undertaking an evidentiary hearing without departing from the essential requirements of law.

The verified pleadings offered by the Petitioner and the Respondent's response to those pleadings clearly put the mental condition of the children in controversy. For example, the record contains the sworn allegations of the Petitioner that removal of the children from the court's jurisdiction would not be in the children's best interest and would not adequately foster a continuing meaningful relationship between the children and their father, and the allegation that it would be in the children's best interest for the Petitioner/Former Husband to be designated as the residential custodian of the children. The record also contains the Respondent/Former Wife's responsive pleadings which contain allegations of abuse and anger directed toward the children by the Petitioner/Former Husband. Therefore, the record provided sufficient information for the trial judge's reasonable belief that a psychological evaluation of the children in this case was warranted. Thus, no evidentiary hearing was necessary.

CONCLUSION

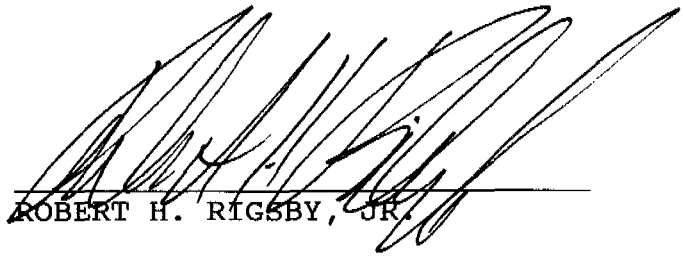
This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument.



ROBERT H. RIGSBY, JR.  
Fla. Bar No. 981389  
BEGGS & LANE  
P. O. Box 12950  
Pensacola, Florida 32576-2950  
(904) 432-2451  
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing jurisdictional brief has been furnished to E. Jane Brehany, John C. Myrick and R. Brook Davis, of Myrick, Silber & Davis, 625 North Ninth Avenue, Pensacola, Florida, 32501, by hand delivery this 25th day of October, 1993.



ROBERT H. RIGSBY, JR.

APPENDIX

1. Final Judgment of Dissolution of Marriage
2. Petitioner/Former Husband's Motion to Compel Examination of Persons
3. Transcript of Hearing on Motion to Compel
4. Order Upon Petitioner/Former Husband's Motion to Compel Examinations of Persons
5. Opinion of First District Court of Appeal