OA 5-6-94

IN THE SUPREME COURT OF FLORIDA

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 REPLY BRIEF

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

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I.

REPLY TO ISSUE AS RESTATED BY THE RESPONDENT

Petitioner, Mr. Russenberger, disagrees with the issue as phrased by Respondent, Mrs. Russenberger Steltenkamp. Clearly, if the First District Court of Appeal's decision in the instant case, Russenberger v. Russenberger, 623 So. 2d 1244 (Fla. 1st DCA 1993), is allowed to stand, it would require a trial court to strictly comply with Rule 1.360, Florida Rules of Civil Procedure, in proceedings brought pursuant to Chapter 61, Florida Statues, before a psychological evaluation could be ordered. Following the language used in Rule 1.360, Florida Rules of Civil Procedure the First District Court held in Russenberger in that proceedings involving custody of children, conclusory allegations alone do not put the child's mental health "in controversy" or demonstrate "good cause" for ordering a psychological examination of the child. Russenberger v. Russenberger, 623 So. 2d 1244, 1245. The First District Court recognized that this holding is in conflict with its sister court's decision of Gordon v. Smith, 615 So. 2d 843 (Fla. 4th DCA 1993).

In Gordon v. Smith, the Fourth District Court of Appeal recognized that Chapter 61, Florida Statutes, gives the trial court independent express statutory authority to order psychological evaluations in child custody proceedings. The Gordon court did not require a showing of "in controversy" and "good cause". Rather, the court stated that section 61.13, Florida Statutes, supplies the

relevancy and section 61.20, Florida Statues, furnishes the specific tool. Gordon v. Smith, 615 So. 2d at 845.

Section 61.20 provides in pertinent part:

> (1) In any action where the custody of a minor child is in 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 therefrom provided to the court by the parties or when the court determines that the investigation and study have been done are insufficient.

The Gordon court pointed out that subsection (2) of section 61.20 provides that the social investigation and study referenced in subsection (1) shall be conducted by, among other persons, a psychologist licensed pursuant to Chapter 490. The court concluded that a trial court faced with conflicting custody claims between parents has the discretion to order a psychological evaluation. Gordon v. Smith, 615 So. 2d at 845, 846.

Further, the Fourth District Court of Appeal recognized in Gordon that parents in custody proceedings can and do engage in reprehensible behavior which would merit psychological evaluation of the child. In Gordon, the wife accused the husband of sexual abuse of their child, and the husband alleged that the wife concocted these charges to achieve sole custody. The Russenberger case is similar. The former wife, Mrs. Russenberger Steltenkamp, filed an ex parte domestic violence restraining order (attached hereto as Exhibit 10) in which she wrongfully accused Mr. Russenberger of abuse towards three of the five minor children. Mrs.Russenberger Steltenkamp then referred to this ex parte

injunction in the hearing for temporary injunction (See transcript Motion for Temporary Injunction held on March 17, 1993, attached hereto as Exhibit 11). See, Appendix, Exhibit 11 at p. 28. Moreover, Mrs. Russenberger Steltenkamp denied nearly all of the verified allegations of Mr. Russenberger's Petition to Enforce Final Judgement. See Answer to Petition to Enforce Final Judgment attached hereto as Exhibit 12.

In her answer to the Petition for Modification of Final Judgment of Dissolution (attached hereto as Exhibit 13), Mrs. Russenberger Steltenkamp again alleged that Mr. Russenberger had in the past abused the children and accused him of continuing this course of conduct. Appendix, Exhibit 13, allegation 5.(k).

This Court in Kern v. Kern, 333 So. 2d 17 (Fla. 1976), recognized the necessity of vesting the trial court with wide discretion in matters involving children. Id. at 19. Upholding the constitutionality of the earlier version of Section 61.20, this court further recognized the need to modify certain traditional trial proceedings as they relate to resolving issues in child custody proceedings. This court held that

> [b]y providing the trial court with potentially valuable information compiled by professional social workers, the instant statute constitutes a legislative cognition of the suitability of modified proceedings in this special area.

Kern v. Kern, 333 So. 2d at 20.

Mrs. Russenberger Steltenkamp argues that without the protection of Rule 1.360, children could be subjected to compulsory mental examination without any safeguard or concern for their

privacy and well-being. However, this argument ignores the limitations and protection found within Section 61.20. Subsection (1) explicitly provides that the court may only order the evaluation when such has not been done or when the court determines that the investigation and study that have been done are insufficient.

The reality is that if, in child custody proceedings, the court is unable to order an evaluation unless there has been strict compliance with Rule 1.360, Florida Rules of Civil Procedure, the court will no longer have invaluable information from skilled professionals to aid in making this most important decision. Because as this Court noted in Kern v. Kern, the overriding concern for the court in custody litigation between parents is the child's welfare. 333 So. 2d at 19. This information is necessary to make the soundest possible decision. The legislature recognized the need to modify the traditional rules as a "means of furthering the trial court's search for just and humane results in this sensitive area." Kern v. Kern, 333 So. 2d at 21. By upholding the constitutionality of Section 61.20, this Court has implicitly rejected the need for strict compliance with Rule 1.360 in child custody matters. Therefore, Gordon v. Smith is in accord with this Court's previous ruling of Kern v. Kern.

Respondent argues, without any supporting case law, that a social investigation is not the same as a psychological examination. This issue was addressed in Gordon v. Smith. In Gordon v. Smith the court observed that Section 61.20 subsection

(2) provides that the "social investigation and study", if ordered by the court, shall be conducted by one of a class of listed professionals. Specifically, the court can order the investigation be performed by a psychologist licensed pursuant to Chapter 490 or a mental health counselor licensed pursuant to Chapter 491. Subsection (1) of Section 61.20 allows the professional conducting the study to delve into all pertinent details relating to the child and each parent. The Gordon court rightly interpreted this portion of the statute to be an express authorization of psychological evaluations in custody proceedings. Gordon v. Smith, 615 So. 2d at 845.

Mrs. Russenberger Steltenkamp further argues that Section 61.13 and implicitly Section 61.20 must be read to harmonize with Rule 1.360, Florida Rules of Civil Procedure. Mr. Russenberger disagrees.

In Kern v. Kern, this Court in upholding the constitutionality of section 61.20, recognized that section 61.20 conflicted with the technical rules of evidence. 333 So. 2d 17. However, due to the special nature of child custody matters such modifications of traditional trial proceedings are permissible. This Court noted with approval the observations of the late Judge Kenneth Keating of the New York Court of Appeals:

> The burden of a Judge when he acts as parens patriae is perhaps the most demanding which he must confront in the course of his judicial duties. Upon his wisdom, insight and fairness rests the future happiness of his wards. The procedures of the custody proceeding must, therefore, be molded to serve its primary purpose and limit the modifications of the

> traditional requirements of the adversary system must be made, if necessary. 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, 299 N.Y.S. 2d 842, 843-844 (N.Y. 1969).

Kern v. Kern, 333 So. 2d at 19.

Mrs. Russenberger Steltenkamp further argues that Rule 1.360 creates a substantive right of privacy. Under this argument, the Rule and the Statute simply cannot be harmonized. Since Section 61.13 and 61.20 are substantive in nature, the statute controls. State v. Garcia, 229 So. 2d 236 (Fla. 1969). See also, Kern v. Kern, 333 So. 2d 17.

Finally, Mrs. Russenberger Steltenkamp argues that the cost of a psychological evaluation could often pose an unnecessary burden on the parties in a custody case. However, Section 61.16, Florida Statutes, provides that after consideration of the financial resources of parties, the court may order a party to pay to the other party the reasonable amount of costs incurred to maintain or defend any proceeding under this Chapter, including enforcement and modification proceedings. Section 61.20(2) also provides that if a certification of indigence is filed, the court may request that the Department Health and Rehabilitative Services conduct the investigation and study. Of course, this matter is entirely irrelevant in the present case. Mr. Russenberger, in his Motion for Psychological Evaluations, agreed to pay costs associated with the evaluations.

A. REPLY TO SUMMARY OF DOMESTIC RELATIONS CASE LAW INVOLVING COMPULSORY PSYCHOLOGICAL EXAMINATION

I. First District Court of Appeal

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

The case involved a juvenile dependency matter brought pursuant to Chapter 39, Florida Statutes (1987). The State, in its re-adjudication hearing, sought a psychological evaluation of the dependent child's mother. The Court's ruling was controlled by section 39.407(13), Florida Statutes which provided in pertinent part:

> At any time after the filing of a petition for dependency, when the mental or physical condition...of a parent...requesting custody of a child is in controversy, the court may order the person to submit to a physical or mental examination by a qualified professional. The order may be made only upon good cause shown and pursuant to notice and procedures as set forth by the Florida Rules of Juvenile Procedure.
> Id. at 1158.

Section 39.407(13) is irrelevant because the case at bar does not involve a dependency determination. Therefore, In the Interest of S.N. v. State of Florida Department of Health and Rehabilitation Services in not applicable to this case.

2. In the Interest of T.M.W., 553 So. 2d 260 (Fla. 1st DCA 1989).

Although he does not agree with the case, Mr. Russenberger cannot argue with Mrs. Russenberger Steltenkamp's analysis of this case. It should be noted that the holding in this case requires

strict compliance with Rule 1.360, Florida Rules of Civil Procedure before the trial court can order a psychological evaluation of a party in a custody matter.

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

It is this court's ruling which is the subject of the appeal and is discussed at length in both Mr. Russenberger's Initial brief and Reply brief.

II. Second District Court of Appeal

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

Although Mr. Russenberger does not agree with the holding of the case he cannot argue with the general analysis as put forth by Mrs. Russenberger Steltenkamp.

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

This case involves two issues. First, the wife sought the husband's psychological records. The Court held that mere allegations that a parent is mentally unstable are not sufficient to place that parent's mental health at issue and overcome the [statutory] psychotherapist - patient privilege. Id. at 1201. (citation omitted). Second, psychological examinations should only be ordered, according to the court, upon a showing of good cause by evidence that the parent has been unable to meet the special needs of the child. Id. (citation omitted).

Contrary to Mrs. Russenberger Steltenkamp's assertions, the court did not hold that good cause could not be shown by allegations in the pleadings.

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

This case does not hold that allegations alone are insufficient to show good cause for compulsory mental examination of parties. In fact, the court stated that the pleadings filed in the matter contained no allegations that the examination of the mother was needed. The Second District Court of Appeal granted the mother's Petition for Writ of Certiorari "without prejudice to the husband to file appropriate pleadings placing the mental health of the parties in controversy." Id. (emphasis added).

III Third District Court of Appeal

1. Paul v. Paul, 366 So.2d 853 (Fla. 3rd DCA 1979).

This case, as indicated by Mrs. Russenberger Steltenkamp, did not involve issues concerning custody of children. Moreover, the court in this case did not make a determination whether the "in controversy" and "good cause" requirement can be met by pleadings. The court held merely that the husband's mental and/or physical condition had not been raised in any prior pleadings and that the wife's unverified and unsupported motion alleging that her husband was a person of unstable neurological background was insufficient to show good cause or bring the husband's mental condition in controversy.

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

In this case the trial court had before it a motion for increased child support filed by the wife. In response to the wife's motion for increased child support, the father moved the court for entry of an order requiring the children to undergo psychological evaluations and counseling. The trial court appointed a psychologist and ordered the minor children to undergo psychiatric counseling and evaluation. The Third District Court of Appeal in reviewing the decision of the trial court searched the record to determine the trial court's basis for in entering such an order. In reviewing the record the court noted only that the mother, in response to a question by the court as to whether the children come back upset after they visit with the father, indicated that they were upset "sometimes". Further, there was an indication by the father that he wanted the children to grow up with an appreciation of the value of money, and, thus, he desired the psychological examinations. The Third District Court of Appeal held that the requirement of good cause is not simply met by showing that the children were sometimes upset when they returned from visitation with their father or by the father's desire to give his children a sense of value about money.

IV. FOURTH DISTRICT COURT OF APPEAL

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

This case did not involve custody of children nor did it involve a request by the wife for any alimony. The husband had moved for compulsory psychological examination pursuant to Rule 1.360 and alleged that the wife drank, abused drugs, and was

susceptible to undue influence. In a previous hearing the wife had been determined to be competent. The court stated that because of the limited relief sought, the mental condition of the wife was not in controversy and that the wife's emotional health had no bearing on the issue of the marriage being irretrievably broken.

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

In a modification proceeding, the trial court had denied the husband's request to have the wife's mental condition evaluated. The husband alleged as grounds that the wife had been hospitalized fifteen years prior to the bringing of the motion. The Fourth District Court of Appeal in reviewing the record determined that the trial court did not abuse its discretion in denying the husband's request for psychological evaluation. The Fourth District Court of Appeal noted that the record supported the trial court's finding and termed the previous hospitalization of the wife as ancient history.

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

Mr. Russenberger agrees with the analysis set forth by Mrs. Russenberger Steltenkamp.

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

Mr. Russenberger agrees with the analysis set forth by Mrs. Russenberger Steltenkamp in this portion of her brief only. (See pages 11-13 Respondent's Answer Brief).

IV. FIFTH DISTRICT COURT OF APPEAL

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

The Fifth District Court of Appeal reviewed the trial court's order requiring the parties to undergo psychological evaluations. In reviewing the trial court's order, the Fifth District Court found that the pleadings contained no allegation that either party was unfit to have custody or that either had any kind of mental or physical illness or condition which would adversely effect his or her ability to be the custodial parent. The court held that "although the mental and physical condition of the parents is a factor the court should consider in resolving the issue of custody, it is not in controversy until raised by one of the parties in his or her pleadings, or by a proper motion." Id. at 1211. (citations omitted)(emphasis added).

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

This case is similar to In the Interest of S.N. v. State of Florida, Dept. of Health and Rehabilitative Service, 529 So.2d 1156, in that is also involves a psychological evaluation as part a of juvenile dependency action brought pursuant to Chapter 39, Florida Statutes.

As indicated previously, the requirements of Chapter 39, Florida Statutes, and the Florida Rules of Juvenile Procedure are different than the requirements in actions brought pursuant to Chapter 61, Florida Statutes. The Fruh case is simply not relevant to the issues at hand.

VII. UNITED STATES SUPREME COURT

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

The United States Supreme Court in Schlagenhauf specifically found that an evidentiary hearing is not required for psychological examinations to be ordered. 379 U.S. at 119, 85 S. Ct. at 243. The Court found that affidavits and other usual methods short of a hearing are sufficient to demonstrate the "in controversy" and the "good cause" standards. Id. at 118, 119.

II.

REPLY TO RESPONDENT'S ANSWER BRIEF TO PETITIONER'S INITIAL BRIEF

The Petitioner, Mr. Russenberger, will not reargue the issues raised in his Initial Brief. However, one area must be addressed which has ben continually raised by Mrs. Russenberger Steltenkamp in her Answer Brief.

In her Answer Brief, Mrs. Russenberger Steltenkamp argues that the trial court relied upon only unverified, conclusory allegations contained within the Motion for Psychological Evaluations and that only one hearing had occurred prior to the filing for the Motion for Psychological Evaluations. This is incorrect.

As previously stated, Mrs. Russenberger Steltenkamp had filed an ex parte domestic violence petition against Mr. Russenberger only weeks prior to his filing of the Petition to Enforce Final Judgment. See Petitioner/Former Husband's Initial Brief, Appendix, Exhibit 3; Appendix, Exhibit 10. Further, Mrs. Russenberger Steltenkamp referenced this ex parte domestic violence restraining order during her testimony at the hearing on the Petitioner/Former

Husband's Motion for Temporary Restraining Order. This motion was heard prior to the hearing for the Motion for Psychological Evaluations. Appendix, Exhibit 11, at p. 28. Moreover, the trial court had before it the Petitioner/Former Husband's Verified Petition to Enforce Final Judgment and Respondent/Former Wife's Answer to the Petition to Enforce Final Judgment. See Petitioner/Former Husband's Initial Brief, Appendix, Exhibit 3 and Appendix, Exhibit 12. Finally, the trial court was aware that a Petition for Modification of Custody was being filed by the Petitioner/Former Husband. In fact, the Petition for Modification of Custody was filed within days of the hearing. See, Petitioner/ Former Husband's Initial Brief, Appendix, Exhibit 4. The trial court had sufficient information, not merely conclusory allegations, for the psychological examinations.

This Court has long recognized the need to afford the trial court's wide discretion in child custody matters. Kern v. Kern, 333 So. 2d 17. The trial court exercised its discretion pursuant to statutory authority and its decision should be reinstated by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Reply 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 19th day of April, 1994, by U.S. Mail.

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APPENDIX