OA 12-6-95

IN THE SUPREME COURT OF FLORIDA

CYNTHIA L. RUSSENBERGER, n/k/a CYNTHIA L. STELTENKAMP)

Petitioner,

vs.

RAY DEAN RUSSENBERGER,

Respondent.

CASE NO: 85,743
1ST DCA CASE NO: 95-00804

RESPONDENT'S AMENDED ANSWER BRIEF

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Respondent, Ray Dean Russenberger, accepts the statement of the case and facts as presented by the Petitioner, Cynthia Russenberger Steltenkamp, with the following exceptions and omissions. [1]

The parties were married to each other on July 31, 1976. Five children were born to this marriage: Rhett W. Russenberger, born February 8, 1977; Rachel A. Russenberger, born July 13, 1979; Lauren E. Russenberger, born May 29, 1987; Stephanie A. Russenberger and Sara Beth Russenberger, born June 14, 1988.

On January 5, 1993 the parties marriage was dissolved by final judgment. The final judgement incorporated the parties' marital settlement agreement. A copy of the final judgment is attached hereto as Exhibit "1". (A-1). The marital settlement agreement does contain the custody provision as outlined by Petitioner in her merits brief, however, the marital settlement agreement goes further and defines shared parental responsibility. The marital settlement agreement specifically states that shared parental responsibility "means a court ordered relationship in which both parents retain full parental

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[1]Petitioner alleges a number of facts in the argument section of her Merits Brief which are not presented in her Statement of Case and Facts. Therefore, Respondent will raise additional facts where appropriate in the body of his argument.

rights and responsibilities with respect to their children and in which both parents confer with each other so that major decisions affecting the welfare of the children will be determined jointly". A-1.

Contrary to Petitioner's assertion, the parties did not separate in August 1987. The parties moved to Pensacola in August 1987 as a result of Mr. Russenberger's sale of his business in Louisiana. As a condition of the sale of the business, Mr. Russenberger was required to assist in the transition to the new owner. R-1, p.98-99; R-7, p.13. During the transition, Mr. Russenberger commuted between Pensacola and Lafayette, Louisiana. He was in Pensacola every weekend and several days during the week. R-1, p.98-99. At the time the family moved to Pensacola, the parties had three children. The twins were born in Pensacola on June 14, 1988. R-7, p.13. *See* A-1.

In February 1991 the parties separated. Mr. Russenberger exercised visitation at a minimum of every other weekend and every Wednesday evening. He began experiencing problems with visitation as early as May 1991. R-6, p.752-753.

In addition to the minimum visitation as set out above, Mr. Russenberger actively participated (and continues to participate) in all of his children's lives. During the first year of separation, Mr. Russenberger would see his children every weekday. During this time, Mr. Russenberger drove to the marital residence in order to take his son to school. The

girls came from the house to the car and brought him coffee. R-1, p.26. Mr. Russenberger continued this routine until his son's friend obtained his driver's license and it was no longer "cool" to have dad take his son to school. R-1, p.27.

In addition to the regular weekly contact, Mr. Russenberger was (and still is) involved in the children's school activities, participated in evening functions, family functions, classroom productions and holiday programs held at the Creative Learning Center where the children attended pre-school and school. R-1, p.131-135; R-7, p.113. Mr. Russenberger routinely rearranges staff meetings at his office to accommodate his children's schedule, and on many occasions stops by the children's school to have lunch with them. R-1, p.36; R-7, p.113. In addition to the school functions, Mr. Russenberger participates in the children's extracurricular and community activities. R-1, p.61-66; R-2, p.296, 299, 300-304; R-3, p. 311. Thus, contrary to Petitioner's assertion, Mr. Russenberger has been and remains actively involved in all of his children's lives. In reviewing the deposition as cited by Petitioner, Mr. Russenberger does not acknowledge that he had little involvement in his children's lives. On the contrary, Mr. Russenberger testified that he supported his children and that he is always there for his children. D-15, p.20.

On December 22, 1992, the parties entered into the Marital Settlement Agreement. At the time they entered into the agreement, both parties continued to live in Pensacola. Prior

to the signing of the agreement, Mr. Russenberger continued to experience difficulties with visitation. On numerous occasions, Mrs. Steltenkamp denied Mr. Russenberger access to his children and used the children as a negotiating tool. Mrs. Steltenkamp told Mr. Russenberger if he would sign this marital settlement agreement he would get to see his children more. [2] R-1, p.27-31.

On January 5, 1993, the Final Judgment of Dissolution was entered. On February 4, 1993, Mr. Russenberger filed a Motion for Contempt and Enforcement of Final Judgment. In the Motion for Contempt and Enforcement of Final Judgment, Mr. Russenberger outlined problems he was experiencing with visitation and asked the trial court to impose specific visitation. The Motion for Contempt and Enforcement of Final Judgment is attached hereto as Exhibit "2". (A-2). On February 5, 1993, Mr. Russenberger was informed by Petitioner's attorney that she intended to relocate to the Suffern, New York area with the parties' minor children and Mr. Russenberger was asked to consider a modification of visitation. R-1, p.31. On February 22, 1993, Mrs. Stenltenkamp, through counsel, further advised Mr. Russenberger she would be moving to Suffern, New York, in about thirty days and asked him to provide a

[2] The marital settlement agreement did not contain a relocation restriction. At the time she signed the agreement, Mrs. Steltenkamp knew that she intended to relocate with the parties' minor children yet she hid this fact from Mr. Russenberger. R-7, p. 68; R-9, p. 32.

reasonable revised visitation schedule. *See* Petition to Enforce Final Judgment (with attachments) attached hereto as Exhibit "3". (A-3).

On February 25, 1993, Mr. Russenberger filed a Petition to Enforce the Final Judgment and a Motion for Temporary Injunction seeking to enjoin his former wife from relocating the children to Suffern, New York. *See* A-4. *See also* Motion for Temporary Injunction attached hereto as Exhibit "4". (A-4).

On April 5, 1993, the trial court entered an order temporarily enjoining Mrs. Steltenkamp from removing the children from Pensacola, giving the former husband an opportunity to explore and investigate the intended move. A copy of the court's Order on Temporary Injunction is attached hereto as Exhibit "5". (A-5).

In May 1993, Petitioner, Cynthia Russenberger, married Mike Steltenkamp. In September 1992, Mr. Steltenkamp, who had resided in Pensacola for a number of years accepted a transfer to Suffern, New York. The transfer to New York and acceptance of the position by Mr. Steltenkamp was a **voluntary** lateral move within his company. Mr. Steltenkamp did not receive a pay raise or a promotion. The small percentage increase in pay he did receive was to offset the increase in cost of living for the Nyack, New York area as compared to Pensacola, Florida. D-24, p. 6,17; D-11, p. 23-24.

The potential future of the relationship between Petitioner and Mr. Steltenkamp, including relocation of the

Petitioner with the children, was first discussed between them in the fall of 1992. D-13, p.8, 9; D-11, p. 49. Although the discussion concerning relocation occurred during the negotiations of the marital settlement agreement, Petitioner intentionally failed to disclose to Mr. Russenberger her intentions to move with the children to the New York area. R-9, p. 32; R-7, p. 68.

During the relocation litigation, the parties continued to have many difficulties concerning Mr. Russenberger's "liberal and reasonable visitation with his children." On March 16, 1993, Mr. Russenberger filed an Amended Motion for Contempt alleging numerous violations of the martial settlement agreement. A copy of the Amended Motion for Contempt is attached hereto as Exhibit "6". (A-6). On May 10, 1993 Mr. Russenberger filed another motion for contempt alleging additional visitation problems. The Second Amended Motion for Contempt is attached hereto as Exhibit "7". (A-7).

During the pendency of the relocation litigation, the parties began negotiating summer visitation, however, they were unable to reach an agreement. Specifically, the parties could not agree on the children traveling to Suffern, New York during the summer months. R-1, p.43; R-6, p. 759. On May 7, 1993, the Petitioner filed a Motion for Determination of Visitation/Vacation Privileges. A copy of the Motion for Determination of Visitation/Vacation Privileges is attached hereto as Exhibit "8". (A-8).

A hearing to determine whether Petitioner could take the children to New York for visitation/vacation purposes was set by Petitioner for Wednesday, June 9, 1993. A copy of the Notice of Hearing is attached hereto as Exhibit "9". (A-9). On Friday, June 4, 1993, through Sunday, June 6, 1993, Mr. Russenberger exercised his normal weekend visitation with the children. During that visitation, the children never indicated that they would be going to New York and Petitioner did not inform Mr. Russenberger of her plan to go to New York in violation of the temporary restraining order. R-1, p. 758, 759. On Monday, June 7, 1993, Mr. Russenberger received a phone call from the Petitioner indicating that she was in New York with the children and that he would not be able to exercise his week-day visitation for the next couple of weeks. R-1, p.758, 859. Mr. Russenberger immediately filed an Emergency Motion for Contempt alleging that Petitioner had violated the temporary restraining order. A copy of the court's order and the transcript of the judge's ruling are attached hereto as Exhibit "10" and "11" respectively. (A-10) (A-11).

The parties' inability to work together to discuss and resolve custody, visitation and parenting issues is readily apparent from the record. Between the time of filing Mr. Russenberger's Petition for Enforcement of Final Judgment and the final hearing on the relocation issue in December 1993, approximately eleven hearings and two status conferences were

held in the matter and thirty three pleadings, excluding appellate pleadings, were filed. See Index to Record on Appeal attached hereto as Exhibit "12". (A-12). *See also* Russenberger v. Russenberger, 654 So.2d 207, 210 (Fla. 1st DCA 1995).

In December 1993, the trial court held a three-day evidentiary hearing on the issues relating to the relocation of the children to Suffern, New York. Extensive evidence was offered by both sides on the proposed relocation, including the testimony of four psychologists and one psychiatrist concerning the impact on the children of the proposed relocation.

In a thirteen page well-reasoned order, the trial court expressly considered this Court's decision in Mize v. Mize, 621 So.2d 417 (Fla. 1993). After discussing in detail the application of the facts of this case with each factor as set forth in Mize, the trial court prohibited relocation. The trial court's decision is attached hereto as Exhibit "13". (A-13).

Following the trial court's decision, the Petitioner sought review of the trial court's order. The First District Court of Appeal, in affirming the trial court's decision, held that when a relocating parent is acting in good faith, a trial court must permit relocation if the best interests of the children, as determined by an analysis of the applicable facts using the Hill factors, would be served at least as well in the proposed location as in the present location. Russenberger, 654 So.2d at 214.

The First District Court found that the "record establishes clearly that there is competent and substantial evidence to support the findings of the trial court and the trial court correctly interpreted and reasonably applied the law." Russenberger, 654 So.2d at 217. Petitioner filed this appeal citing conflict between the first district's decision in Russenberger and the fourth district's decision in Tremblay v. Tremblay, 638 So.2d. 1057 (Fla. 4th DCA 1994).

Mr. Russenberger will follow the same format in identifying the record as outlined by the Petitioner in her merit's brief, with the following addition:

R-30: August 17, 1993, Hearing transcript (continuation of August 5, 1993 hearing).

SUMMARY OF ARGUMENT

Prior to this Court's decision of Mize v. Mize, 621 So.2d 417 (1993), lower courts grappled with the difficult issue of determining when a custodial parent should be allowed to remove a child from the geographical area. Recognizing that there is no bright-line rule, the supreme court decision in Mize directs determination of this issue on a case by case basis by evaluating and weighing factors as enunciated in Hill v.Hill, 548 So.2d 705 (Fla. 3rd DCA 1989).

Following this court's decision in Mize, the first district court in Russenberger v. Russenberger, 654 So.2d 207 (Fla. 1st DCA 1995) interpreted Mize as creating a presumption in favor of relocation. The Russenberger court did not

interpret Mize as creating a *per se* rule favoring relocation. A finding that Mize creates a *per se* rule would be in conflict with our state's strong public policy assuring that children will have frequent and continuing contact with both parents after separation and following dissolution of marriage and well founded psychological data.

In recognizing that Mize creates a presumption in favor or relocation, the Russenberger court interpreted Mize as placing a burden of proof on the parent opposing relocation when there is no relocation restriction contained in the marital settlement agreement or final judgment. The Russenberger court interpreted Mize as requiring the relocating parent to establish that the proposed relocation is not for a vindictive or improper motive and the new location would offer a quality of life for the children that is at least equal to the children's quality of life in the present location. After such a showing is made, the burden is then shifted to the non-custodial parent to establish that the proposed relocation is not in the children's best interests utilizing the Hill factors. The Mize decision as interpreted by the first district in Russenberger gives the Florida courts the needed guidance and will result in consistent holdings. The Petitioner has failed to articulate convincing reasons to abrogate the Mize decision. The new test that the Petitioner proposes fails to acknowledge that Florida is a Shared Parental Responsibility state in which our legislature has declared its

clear intent. All decisions relating to custody and visitation for children shall be made in accordance with the best interests of the children. If a new test is deemed necessary in relocation matters, then this court should adopt the test as proposed by Justice Shaw in his concurring opinion in Mize.

Regardless of the test utilized, the denial of relocation in this case should be upheld. The trial court in Russenberger carefully weighed all of the evidence as required by this court in Mize. There is competent and substantial evidence to support the trial court's findings that the evidence did not support the relocation of the parties' minor children. The trial court's factual findings are shielded from attack and are presumed valid. The Petitioner has failed to meet her burden and has not clearly demonstrated that the trial court abused its discretion. The trial court's decision must stand.

ARGUMENT

ISSUE: PART I: WHAT IS THE PROPER STANDARD TO BE APPLIED BY TRIAL COURTS WHEN A CUSTODIAL PARENT REQUESTS PERMISSION TO RELOCATE WITH THE MINOR CHILDREN?
PART II: WHETHER THE TRIAL COURT ERRED BY FAILING TO GRANT MRS. STELTENKAMP'S RELOCATION REQUEST.

I. EVOLUTION OF RELOCATION LAW (FLORIDA AND OTHER LEADING STATES).

A. D'ONOFRIO V. D'ONOFRIO, 144 N. J. Super. 200, 365 A.2d 27 (1976). LEADING RELOCATION CASE.

The landmark case of D'Onofrio v. D'Onofrio, 144 N. J. Super. 200, 365 A.2d 27 (1976) is the case most cited by courts in determining what test should be used to resolve relocation dilemmas. Petitioner's merits brief adequately lays out the

D'Onofrio test.

The facts in the D'Onofrio case are not similar to the facts in the Russenberger case. In D'Onofrio, the former wife took care of the children on a twenty-four hour basis and her income barely met the family's needs. Not only was she receiving minimal financial support from her former husband but she was also receiving very little assistance in the burden of raising the children. Additionally, the New Jersey Court found that she had genuinely attempted to maintain herself and the children in New Jersey but was unable to do so. Her move to South Carolina afforded her better employment, a more desirable place to live, and a large supportive family group including parents, siblings, cousins, aunts, uncles, nieces and nephews. Id. at 31-32. In weighing the non-custodial parent's rights, the court found that the former husband had played only a minimal role with the children, had never exercised overnight visitation with the children, and had seen them only one day a week in the home of his parents where he frequently left them during his visitation. Id. at 32.

B. ADOPTION OF D'ONOFRIO IN FLORIDA

In 1989, the Fourth District Court of Appeal addressed the issue of relocation in Decamp v. Hein, 541 So.2d 708 (Fla. 4th DCA 1989). Mr. Russenberger agrees with the Petitioner's assertion that Decamp adopted the D'Onofrio test but added two more requirements in accord with Costa v. Costa, 429 So.2d 1249 (Fla. 4th DCA 1983). These factors, which are commonly

referred to as the Hill factors, were adopted by this Court in Mize v. Mize, 621 So.2d 417 (Fla. 1993). See Hill v. Hill, 548 So.2d 705 (Fla. 3rd DCA 1989).

Admittedly, prior to this Court's pronouncement in Mize, the courts of Florida applied different standards as it related to relocation of residential parents. However, Mize now provides Florida courts with the appropriate framework within which to make proper decisions in relocation cases.

C. FLORIDA FIRST SUPREME COURT RELOCATION DECISION: MIZE V. MIZE, 621 So.2d 417 (Fla. 1993)

Mr. Russenberger does not agree with Petitioner's assertion that this Court's decision in Mize v. Mize, 621 So.2d 417 (Fla. 1993) has provided courts with limited and confusing guidance on the issue of relocation. Contrary to the Petitioner's assertion, the decision did not adopt *in toto* Judge Schwartz's concurring opinion in Hill v Hill, 548 So. 2d. 705 (Fla. 3rd DCA 1989). Mize, 621 So.2d at 419. In the Mize decision, this Court acknowledges that there is no way to fashion a bright-line rule for determining when a move that will geographically separate a child from one of his or her parents is permissible. Id. This Court in recognizing that a determination must be made on a case by case basis, adopted the approach taken by the majority in the Hill decision. Id. at 419, 420.

Following this Court's pronouncement in Mize, several district courts have struggled with its analysis. *See*

Russenberger, 654 So.2d. 207; Tremblay v. Tremblay, 638 So.2d. 1057 (Fla. 4th DCA 1994). Both Tremblay and Russenberger interpret Mize to mean that where a relocating parent is acting in good faith, permission to relocate should generally be granted. Where the two courts differ is that the fourth district court in the Tremblay case may interpret Mize as creating a *per se*[3] rule favoring relocation. The Russenberger court does not interpret Mize as creating a *per se* rule favoring relocation. Russenberger, 654 So. 2d at 214. The first district court in Russenberger interpreted Mize to require that

> where a relocating parent is acting in good faith, a trial court must permit relocation if the best interests of the children, as determined based upon an analysis of the applicable facts using the Hill factors, will be served at least as well in the proposed location as in the present location.

Id.

Further, the court recognized that the presumption in favor of relocation expressed in Mize places a burden of proof on the parent opposing relocation. Accordingly, the first district held that in relocation cases involving joint custody in which the marital settlement agreement and final judgment contain no relocation restriction, Mize requires the relocating parent to establish: 1) the relocation is not for a vindictive or improper motive; and, 2) the new location would offer a

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[3]Per se is defined in Black's Law Dictionary as meaning "by itself; simply as such; in its own nature without reference to its relation.... ". H. C. Black, Black's Law Dictionary, 1028 (Sp. 5th Ed. 1979).

quality of life for the child at least equal to the child's quality of life in the present location. Id. The first district found that "[i]f such a showing is made by the relocating parent, the burden is then shifted to the non-custodial parent to establish by a preponderance of the evidence that the proposed relocation of a child is not in the child's best interests under the Hill factors." Id. If the non-custodial parent is unable to meet this burden, relocation should be permitted. Id. The Russenberger court held that the primary concern of the trial court must be the best interest of the child or children. Id. at 215 *citing* Mize, 621 So.2d at 420.

The interpretation that Mize does not create a *per se* rule is supported by the Mize concurring opinion of Chief Justice Barkett. Chief Justice Barkett emphasized that the Mize majority incorporates all relevant factors, including those outlined by Judge Nesbit in Hill. Id. at 420-421.

Moreover, Chief Justice Barkett recognized that there is strong public policy in Florida that the best interests of the children are served by frequent and continuing contact with **both** parents. Section 61.13(2)(b), Florida Statutes (1989). (Emphasis added).

In 1982, the Florida Legislature adopted the Shared Parental Responsibility Act[4] which is codified in chapter 61,

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[4]Ch. 82-96, Laws of Fla.

Florida Statutes and provides in part:

> The court shall determine all matters relating to custody of each minor child of the parties in accordance with the best interest of the child.... It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities of child rearing . . . .

§ 61.13(2)(b)1.,Fla. Stat. (1989). See *also* Senate Staff Analysis and Economic Impact Statement, Chapter 82-96, January 19, 1982.

Florida's public policy favoring frequent and continuing contact with both parents is well founded and consistent with widely recognized social and psychological data. Mize v. Mize, 621 So.2d at 423. In addition to the numerous studies cited by Justice Shaw in his concurring opinion, recent studies confirm that frequent interaction with both parents is crucial to a child's healthy psychological adjustment following a divorce. J. Montgomery, *Long distance visitation, Access in Family Law Cases; Some Creative Approaches*, 5 Amer. J. Family L., 2 (Spring 1991).

Considerable research has focused on identifying factors that ameliorate or buffer the negative effects of divorce on children. One such factor identified is the maintenance of a frequent and supportive relationship with the non-custodial parent. Numerous studies have documented the benefit to children's well being of frequent, meaningful contact with their non-custodial parent. When children are denied frequent

and continuing access to their non-custodial parent the children suffer a profound sense of loss. Experience suggests that **policy** and intervention efforts to increase children's contact with their non-custodial parent after divorce should be a priority. S. Brogger, S. Wolchick, I. Sandler, B. Fogas and D. Szetina, *Frequency of Visitation by Divorce Fathers: Differences in Reports by Fathers and Mothers*, 61 Amer. J. of Orthopsychiat. 448, 453 (July 1991)

Clearly, Florida does have a strong public policy for encouraging frequent and continuing contact with the non-custodial parent. §61.13(2)(b), Fla. Stat. Where the language is clear, the legislature must be understood to mean what it has plainly expressed and the courts have only the simple and obvious duty to enforce the law according to its terms. VanPelt v. Hilliard, 78 So. 698, 694 (Fla. 1918). *See also* Clark v. Kreidt, 199 So. 333, 336 (Fla. 1940) (The language of a statute may be so plain as to fix the legislative intent and leave no room for interpretation or construction); Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987) (where a statute is unambiguous, it must be given its plain and obvious meaning). The first district's interpretation of Russenberger is consistent with our legislative mandate and this Court should not adopt a *per se* rule favoring relocation.

Petitioner's argument which in essence adopts *in toto* Judge Schwartz's concurring opinion in Hill ignores this state's public policy and legislative mandate. Contrary to her

assertion, it does not appear that this Court adopted in Mize Judge Schwartz's entire Hill concurrence. Mize, 621 So.2d at 419. Rather, this Court announced that in making the ultimate decision, trial courts must consider and weigh the following factors: 1. Whether the move would be likely to improve the general quality for both the primary residential spouse and the children; 2. Whether the motive for seeking the move is for the express purpose of defeating visitation; 3. Whether the custodial parent, once out of the jurisdiction, would be likely to comply with any substitute visitation arrangements; 4. Whether the substitute visitation would be adequate to foster a continuing and meaningful relationship between the child or children and the non-custodial parent; 5. Whether the costs and transportation are financially affordable by one or both of the parents; and, 6. Whether the move is in the best interests of the child. (This sixth requirement is a generalized summary of the previous five). Mize, 621 So.2d at 420 *citing* Hill, 548 So.2d at 706. (Footnote omitted).

The argument raised by Petitioner that application of these six factors will quite likely result in decisions denying removal requests is unfounded. In examining the post-Mize appellate decisions, all of which utilize this six factor test, the custodial parent and children have been allowed to relocate in the majority of cases.

The following District Courts of Appeal decisions allowed relocation:

1. Biaz v. Biaz, 627 So.2d 1260 (Fla. 3rd DCA 1993) (Third district court held that the former wife proved the Mize/Hill factors and allowed the wife to relocate to El Salvador);

2. Card v. Card, 20 Fla. L. Weekly D1945 (Fla. 5th DCA August 25, 1995)(Fifth district court examined all the Mize/Hill factors and found that the evidence favored relocation and Wife's request to relocate was granted);

3. Cifci v. Munoz, 627 So.2d 67 (5th DCA 1993) (Trial court's determination was consistent with Mize. The fifth district court upheld the permitted relocation);

4. Stockburger v. Stockburger, 633 So.2d 1140 (Fla. 2d DCA 1994) (The Fifth district court in applying the Mize/Hill multi-factor test concluded that relocation should be allowed);

5. Zak v. Zak, 629 So.2d 187 (Fla. 2d DCA 1993) (The second district court after weighing the Mize/Hill factors allowed the relocation);

6. Tremblay v. Tremblay, 638 So.2d 1057 (Fla. 4th DCA 1994) (Fourth district court remanded the case to the trial court to make a determination concerning relocation under Mize. The trial court, after weighing all the Hill factors as articulated in Mize, entered an order dated February 2, 1995 allowing for the relocation);

7. Mize v. Mize, 623 So.2d 636 (Fla. 5th DCA 1993) (On remand from this Court's decision, the fifth district court granted the former wife's petition to relocate).

There are two cases in which the information on the trial court's decision could not be confirmed but appear to allow relocation. These cases are: 1. Battistella v. Dodge, 627 So.2d 619 (Fla. 3rd DCA 1993) (It appears that the third district court *per curiam* affirmed the trial court's allowance of a relocation pursuant to the Mize decision); and, 2. O'Kane v. O'Kane, 20 Fla. L. Weekly D2170 (Fla. 3rd DCA September 20, 1995) (It appears from the style of the case that the third district court affirmed the trial court's granting of relocation).

There have been only three cases in which the appellate courts have upheld a trial court's denial of relocation:

1. Eldridge v. Schroeder, 633 So.2d 39 (Fla. 4th DCA 1994) (Trial court's denial of mother's request to return to her home state was denied. The fourth district court *per curiam* affirmed the trial court's decision);

2. Jones v. Jones, 624 So.2d 263 (Fla. 1993), *on remand*, 633 So.2d 1096 (Fla. 5th DCA 1994), *rev. den.*, 639 So.2d 978 (Fla.1994) (On remand by the supreme court to be considered in light of Mize, the fifth district court upheld the denial by the trial court of the former wife to relocate);

3. Russenberger v. Russenberger, 654 So.2d 207 (Fla. 1st DCA 1995) (First district court upheld trial court's denial of relocation by the former wife).

Therefore, a review of the post-Mize decisions does not support Petitioner's assertion that the application of the six

factors will likely result in a decision denying removal.

In reviewing Petitioner's merits brief, it appears she is arguing the abrogation of the Hill factors. To support her position, she compares each of the six factors to Judge Schwartz's concurrence in Hill and argues that this Court disregard factors numbered 1,3,4,5 and 6 as outlined in Mize v. Mize, 621 So.2d at 420. This argument defies legal logic and totally ignores that in matters of this type the best interest of the child is clearly the prime consideration. Id. The Department of Health and Rehabilitative Services v. Prevett, 617 So.2d 305 (Fla. 1993). Petitioner's argument that the non-custodial parent does not have the same or equal rights as the custodial parent is in direct conflict with this state's public policy and legislative mandate. She continues to ignore the mountains of psychological data [5] which support that the child's relationship with a non-custodial parent is of equal importance to the child's well being and separate from the relationship from the custodial parent. P. M. Hess, *Promoting Access to Access with Divorcing Parents*, Social Case Work: Journal Contemporary Social Work, 594, 600 (Dec. 1986). Pursuant to section 61.13, Fla. Stat., it is presumed that both parents of a dissolution will thereafter share jointly in deciding important issues and assuming major responsibilities of child rearing. Mize v. Mize, 621 So.2d at 422.

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[5]See Mize v.Mize, 621 So.2d at 423.

The Petitioner's argument suggests that this Court did not intend for courts to make a case by case determination utilizing the factors as articulated by Hill. Rather, she argues that this Court intended only for the trial courts to look at factor number two: whether the motive for seeking the move is for the express purpose of defeating visitation. Even Judge Schwartz in his Hill concurrence acknowledges that cases must be determined on a case by case basis; looking at the specifics of each case including making a determination as to whether the trauma of moving from the youngster's familiar surroundings-including other members of the family, friends, school and the like-outweighs that involved in separating from the custodian. Hill, 548 So.2d at 708. (Citation omitted).

D. CHANGES IN NEW JERSEY. HOLDER V. POLANSKI, 544 A.2d 852 (1988).

While it is true that New Jersey courts have modified their relocation tests, this revision occurred long before this Court's decision in Mize. *See* Cooper v. Cooper, 99 N.J. 42, 491 A.2d 606 (1984); Holder v. Polanski, 111 N.J. 344, 544 A.2d 852 (1988). Therefore, if it was this Court's intention to adopt the Holder relocation standard, it would have done so. Petitioner's argument that Mize has created a state of confusion ignores the first district court's well-reasoned analysis of Mize in Russenberger.

II. PROPOSED RELOCATION STANDARD

The current test utilized by New Jersey courts in

resolving the relocation issue is the test of Cooper as modified by Holder. Id. In New Jersey, if a non-custodial parent objects to the removal of a child from the jurisdiction, the removing parent must demonstrate to the court "cause" to support the relocation of the child.

Pursuant to Holder, trial courts must inquire as follows:

1. Does the custodial parent have a sincere, good faith reason for moving from this jurisdiction? If so,
2. Will the move be inimical to the best interest of the children?
3. Will the move adversely effect the visitation rights of the non-custodial parent?
   (a) If the move substantially changes the visitation schedule, will the move have prospective advantages for the custodial parent and the children?
   (b) Will the children suffer from the move?
   (c) Is the custodial parent acting in good faith and not to frustrate the non-custodial parent's visitation rights?
   (d) Can a reasonable visitation schedule be maintained for the non-custodial parent?

McMahon v. McMahon, 256 N.J. Super. 524, 607 A.2d 696, 698 (1991); Holder v. Polanski, 544 A.2d at 855, 856.

This test as articulated by Holder does not focus on whether the children's quality of life will be compromised and suffer as a result of the move. Rather, the focus of the inquiry is on "the best interest of the children and on the preservation of their relationship with the non-custodial parent." Holder, 544 A.2d at 856. Moreover, the Holder court stated that this test should not focus on the benefits that will accrue to the custodial parent. Id. However, the Holder standard does not relieve the custodial parent from showing that the proposed move will improve the quality of life for the

custodial parent and the child. Holder, 544 A.2d at 855. Specifically, Holder requires the custodial parent to put forth a sincere, good faith reason for the relocation. In determining if the reason is sincere or in good faith, the court will look at quality of life issues. For example, in Holder, the custodial parent alleged that she desired to move in order to live near her family who could provide her with emotional and financial support; she had an offer of employment and intentions to enroll in the university. These motives go the very heart of quality of life.

In the Petitioner's merits brief, she alleges five advantages to this test.

The first advantage that she cites is that in the majority of the cases, it will allow for a custodial parent the same freedom to relocate for better opportunity as the non-custodial parent. This, however, is no different from what this Court is already doing. Pursuant to Mize, where the parties' martial settlement agreement contains no relocation restriction, there is a presumption in favor of removal. The result of such a presumption is that in the vast majority of post-Mize cases relocation has been permitted. Therefore, the benefit as argued by Petitioner does not exist.

Second, Petitioner's allegation that the Holder test eliminates the requirement that the custodial parent prove that the move will improve the quality of life for the parent and child is contrary to the Holder test. As previously argued,

the courts must look to this very issue in determining what is a sincere good faith reason. This Petitioner's argument entirely ignores the primary focus in any relocation case: the best interests of the children. The New Jersey courts do not equate the best interest of the child with the best interest of the custodial parent. Cooper v. Cooper, 491 A.2d at 612. Moreover, the psychological data does not support the premise that if the custodial parent is happier in his or her environment, the child's best interests will be served when frequent interactions with the non-custodial parent is sacrificed. Id.

Further, Petitioner's assertion that quality of life cannot be proven disregards the very facts presented in New Jersey and Post-Mize Florida cases. Winer v. Winer, 241 N.J. Super. 510, 575 A.2d 518 (1990) (Former wife desired to move to Atlanta to be closer to her family and friends who would help provide her and the children emotional and financial support.); Zwernemann v. Kenny, 236 N.J. 37, 563 A.2d 1158 (1988), *affirmed*, 563 A.2d 1139 (1989) (Former wife alleged that she should be allowed to remove the children to Florida due to increased economic opportunities, better climate, and a desire to be closer to her mother).

The third benefit listed by Petitioner is embodied in factors 1 and 2 of the Mize/Hill factors. Specifically, pursuant to the dictates of Mize, trial courts must determine if the reasons set forth for the relocation will result in an

improved quality of life for both the custodial parent and the child. In addition, the trial court must consider the motive for seeking the move. Either of these factors or a combination of both can result in defeating a move unless a custodial parent has a sincere, good faith reason for the move.

The fourth enumerated benefit as alleged by the Petitioner is not an accurate statement of the Holder test. Holder creates no presumption that if the custodial parent is acting in good faith, the best interests of the children would be promoted. On the contrary, in considering whether the move will be adverse to the best interest of the child, courts must look to determine if the visitation rights of the non-custodial parent will be adversely effected. Holder, 544 A.2d at 856. In cases where the non-custodial parent has exercised his or her visitation rights, maintenance of a reasonable visitation schedule by the non-custodial parent remains a critical concern.

Finally, the fifth alleged benefit as outlined by Petitioner is that this test will eliminate significant costs and results in shorter trials. This is an argument which has no basis in fact. There is nothing in the New Jersey case law and nothing in the Petitioner's brief which would support this blanket statement. As stated by the Holder court, once it is shown that a proposed move will require changes in the visitation schedule, proof concerning the prospective advantages of the move, of the motives of the parties, and the

development of a reasonable visitation schedule remain important. Holder, 544 A.2d at 857. (Citations omitted). This is the very type of evidence a trial court must examine for a Mize analysis.

Further, it is not illogical to assume that if this Court develops an approach which presumes that the best interests of the children necessarily go hand in hand with the best interests of the custodial parent, the trial courts will be faced with many more custody battles. Since so many rights will flow from the custodial designation, both parents will fight over the designation.

It is important to note that Petitioner urges the adoption of the Holder test; however, there is nothing to indicate that New Jersey has an act similar to Florida's Shared Parental Responsibility Act. In fact, review of the New Jersey case law indicates that it is unusual for parties to enter into a marital settlement agreement wherein they both share legal custody, which requires them to cooperate in making major decisions affecting the health, education and welfare of the children. See McMahon v. McMahon, 607 A.2d at 701.

III. APPLICATION OF NEW TEST TO RUSSENBERGER.

In utilizing the Holder test as proposed by Petitioner, this Court would reach the same decision as the trial court and the First District Court of Appeal. Review of her argument reveals that Petitioner introduces a presumption which is not present in the Holder test. Specifically, she begins her

analysis with a presumption that the children's best interest will be served by living in any location with the custodial parent. No such presumption exists. In support of her position, she indicates that Mr. Russenberber admitted this fact when he executed the marital settlement agreement designating Petitioner as the residential parent. On the contrary, the record is clear that had Mr. Russenberger known of Petitioner's intent not to abide by her visitation promises and of her intent to relocate with the parties' minor children, he would never have signed the marital settlement agreement. See A-13, p.4.

PART I: Has Mrs. Steltenkamp presented a sincere, good faith reason for moving from Florida?
ANSWER: No.

Petitioner alleges that the only reason she wishes to relocate to Suffern, New York, is to be reunited with her new husband. Findings listed under part one ignore the trial court's findings which were affirmed by the First District Court of Appeal in Russenberger, 654 So.2d at 217. The record clearly demonstrates that Mr. Steltenkamp took a voluntary lateral move within his company. D-24, p.6, 17; D-11, p.23-24; R-4, p.473.[6] Moreover, there is evidence in the record to suggest that the Petitioner desired to move from the Pensacola, Florida area in order to punish Mr. Russenberger for having

[6]The reason to relocate to Suffern, New York no longer exists. The parties have sold the home they purchased during the pendency of this litigation and Mr. Steltenkamp now maintains an office at his employer's Pensacola facility.

left her. R-1, p.41. In her deposition, Petitioner testified that she felt that Mr. Russenberger chose to give up his rights to the children when he "left" her. D-13, p.49. See *also* Testimony of Kristy Johnfore, R-4, p.572-574; R-7, p.72. This very situation is one which occurs all too often. As the New Jersey court noted in D'Onofrio, "a separated wife is not likely to provide reasonable visitation privileges voluntarily. The children may well be used as weapons to inflict punishment upon the other parent for real or imagined wrongs." D'Onofrio 365 A.2d at 32. (Citations omitted).

PART II: Will the move negatively impact upon the best interest of the children? In short, will the children suffer from the move?

ANSWER: Yes.

The analysis proposed by the Petitioner again completely ignores the trial court's extensive findings of fact. The first district court found that although there was conflicting evidence with respect to virtually all the issues before the trial court, the record clearly establishes that there is competent and substantial evidence to support the findings of the trial court. Russenberger, 654 So.2d at 217. (Emphasis added).

To support her argument, the Petitioner makes conclusory allegations which are not supported by the record. To allege that there would be no negative impact on the children contradicts the trial court's findings as well as the evidence presented at trial. Numerous experts testified at trial.

Specifically, Dr. Ronald Yarborough, a child psychologist, testified that the quality of life for the children would significantly deteriorate if the relocation was allowed. Dr. Yarborough testified that there would be a significant loss for the children if Mr. Russenberger was no longer actively participating in their lives, and there would be significant long-term consequences if the move was allowed. *See also* Testimony of Dr. R. Scott Benson, Board Certified Child Psychiatrist and Pediatrician; D-20, p.10; Testimony of Dr. Tina Beissinger; D-17, p.18, 19, 22; Testimony of Dr. James Larson; D-19, p. 30.

PART III: Will the move adversely affect the visitation rights of the non-custodial parent?
ANSWER: Yes.

The Petitioner's analysis under this section again disregards the extensive findings of fact and extensive testimony by the numerous child experts. A detailed discussion of this issue and supporting record cites are found at p. 43-47 of this brief.

The New Jersey case of McMahon v. McMahon, 607 A.2d 696, which utilizes the Holder analysis, is strikingly similar to the Russenberger case. In the McMahon case, the former wife was granted residential custody of the parties' minor children. The parties entered into a marital settlement agreement in which they shared responsibility for making major decisions affecting the health, education, and welfare of their children. The former wife remarried and sought permission to relocate to

Montana. In making its determination the New Jersey court analyzed the facts pursuant to Holder. Id. at 698, 699. The court found that the first prong of the Holder test was satisfied and moved to the third prong dealing with visitation. The trial court found that the non-custodial father had maintained frequent and regular contact with his children, had lunch with them at school at various times, and had participated in their school functions. In McMahon, the trial court further noted that the children received emotional support from extended family in New Jersey. Following an extensive analysis of the Holder test, the court denied the former wife's motion to relocate with the children to Montana.

It is clear that under the facts of the Russenberger case even if this Court adopted the test as propounded by the Petitioner, the results would be the same. Relocation would be denied.

If this Court finds the Mize test is now outdated or inappropriate, Mr. Russenberger would urge this Court to adopt the proposed standard for removal propounded by Justice Shaw in his Mize concurring opinion. See Mize 621 So.2d at 421-425. Justice Shaw 's proposed standard is consistent with Florida's strong public policy and legislative mandate of Chapter 61, Florida Statutes.

IV. REVIEW OF RUSSENBERGER DECISION UTILIZING THE MIZE SIX-FACTOR TEST.

In this section of Petitioner's merits brief, the

Petitioner reargues her case and asks this Court to reweigh the evidence and find in her favor. This is essentially the same argument that Petitioner raised in her Amended Initial Brief to the First District Court of Appeal. The first district, in Russenberger, found that the record clearly establishes that there is competent and substantial evidence to support the findings of the trial court. In rejecting the Petitioner's argument, the first district emphasized that it was particularly influenced by the fact that the trial judge had been involved with these parties and the children for some time, had presided over several evidentiary hearings in this case, and thus was quite familiar with the competing facts and claims. Russenberger, 654 So.2d 207, 217.

It is well established law that the trial court's order arrives on appeal with a presumption of correctness, and absent a showing of abuse of discretion, the appellate court must not reevaluate the facts. Spradley v. Spradley, 335 So.2d 822 (Fla. 1976). As expressed by this Court in Spradley, the trial court has the unique opportunity to "observe the demeanor and personalities of the parties and the witnesses and to feel forces, powers and influences that simply cannot be discerned by merely reading the record . . . ." Id. at 823 *citing* Grant v. Corbett, 95 So.2d 25, 28 (Fla. 1957).

The trial court's findings of fact are shielded from attack and are presumed valid. The burden is on the Petitioner to demonstrate error by clearly showing that the trial court

abused its discretion. In re Gregory v. Gregory, 313 So.2d 635 (Fla. 1975); Herzog v. Herzog, 346 So.2d 56 (Fla. 1977); Marsh v. Marsh, 419 So.2d 629 (Fla. 1982). The Petitioner has again failed to clearly demonstrate that the trial court abused its discretion. A review of the record clearly shows that there was competent evidence to sustain the trial court's findings.

Factor 1: Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children.

The trial court found that the quality of life for the children would not be improved by a move to Suffern, New York. The trial court found that the children are in a good situation now: "They are in good schools. They are in a good neighborhood. They are doing well. They are involved in many activities and have a good support group here. They are well adjusted and they are happy now." A-13, p.3. Clearly, the record supports this finding. The three younger children are currently enrolled at Creative Learning Center, a school which has been recognized for its excellence. R-7,p.107; R-4,p.522. The school is a top notch facility with a state wide reputation for excellence. R-4,p.522, 533. The students at Creative Learning Center consistently score in the top ten percent in the country. R-7,p.107. The school offers numerous programs and extracurricular activities. *See*, brochure, handbook and final report from Creative Learning Center, Exhibits 7, 8 and 9, introduced into evidence at hearing held on August 5, 1993. *See also*, Testimony of James Dale Vinson. R-7,p.103,120.

According to Mary Lee Porter, an instructor at the school, the Russenberger children have flourished in the environment at Creative Learning Center. R-4,5,p.522,524.

The parties' teenage daughter, Rachel, attends Washington High School. The record supports the finding that Washington High School is also a good school. In fact, Washington High School has been recognized as one of the top five outstanding high schools in the State of Florida since 1987. This designation is bestowed upon the high school by the Commissioner of Education, State of Florida. D-22,p.20,21. Washington High School has a graduation rate between ninety-eight and ninety-nine percent. D-22,p.9. During trial of this matter, the evidence showed that approximately sixty graduating seniors were recognized as Florida Academic Scholars. D-22,p.16. The facility is a modern structure with a broad range of courses offered and a number of facilities available to the students. *See generally*, Deposition of Eugene Pettis, D-22 and the attached exhibits. The school has an excellent drama department that puts on a variety of plays and productions. D-22,p.12. *See also*, Testimony of Andrew Witt, D-25,p.19; Deposition of Petitioner, D-14,p.50.

At final hearing, Petitioner's expert, Dr. Tina Beissinger testified that Rachel, the parties' daughter, is a bright, articulate, well rounded child. She is active in both her school and community. D-17,p.18,19,22.

At the time of the final hearing on the relocation issue,

Rhett, the parties' teenage son, attended Pensacola Catholic High School. This school, which offers a variety of programs and athletics, was awarded the prestigious United States Department of Education Blue Ribbon Award. D-23, p.13. Ninety-nine percent of the students graduate, and the graduating seniors earned more than 2.8 million dollars in merit based scholarships. D-23,p.25.

Further, Dr. Barbara French, the children's pediatrician, testified on behalf of Petitioner that the children are happy, healthy, good children. R-4,p.528,541.

According to Petitioner's expert, Dr. James Larson, the social life of children is quite important to them in their development period. D-19,p.30. Dr. Larson admitted that if a child is active in school and/or community or has lots of friends, they are not going to want to pick up and go on the weekend. (D-19,p.30). The record shows that the children are able to maintain healthy lives in Pensacola and to engage in effective visitation with Mr. Russenberger. If they were in New York, this aspect of their life would change dramatically, and the quality of their life would diminish. According to Dr. R. Scott Benson, a board certified child psychiatrist and pediatrician, it would be impossible to balance the Petitioner's proposed visitation schedule and the children's activities. D-20,p.10.

The record supports the finding that the children have a good support group in Pensacola. Besides their many friends,

the children have numerous family and extended family that participate in their lives. In addition to their father, their support group includes their grandmother, Dorothy (Mr. Russenberger's mother), their aunt and uncle, Kristy and Dale Johnfore, godparents Julia and Mitch Dantin, Valerie Russenberger (Mr. Russenberger's Wife, f/k/a Valerie Plommer) and Miss Ann (Valerie's mother). The record clearly demonstrates that all of these people are active in the daily lives of the children. R-1,p.46,47,48; R-3,p.324,327. *See* Testimony of Valerie Plommer, (n/k/a Valerie Russenberger) R-2-3,p.291-365; Testimony of Julia Dantin, R-3,p.366-388.

According to Dr. Ronald Yarbrough, a child psychologist who testified in this matter, the quality of life of the children would significantly deteriorate if all of these people were no longer able to maintain an active role in the children's lives. R-2,p.217.

Additionally, Dr. Yarbrough testified that it would be a major loss to these children if Mr. Russenberger no longer actively participated in the children's lives. R-2,p.218. Specifically, significant consequences in the long term will occur if there is not meaningful contact between the children and Mr. Russenberger. Such consequences include sexual acting out. R-2,p.220; R-7, p.133. According to Dr. Tina Beissinger, a psychologist called by Petitioner, in the situation of children of divorce, it is important for a child to be able to build and maintain a relationship with both parents. D-7,p.35.

This simply could not be accomplished if a move to New York is permitted. R-2,p.218,219,226,240.

Emphasis is placed on the blended family by the Petitioner. However, Dr. Yarbrough testified that biological parents are the most central aspect of developmental issues for a child's well being, not the primary custodial family and/or post dissolution blended family. R-2,p.250-251. Finally, in light of all the evidence that suggests the children are happy, well adjusted children, it cannot be logically argued that Petitioner's happiness and best interest and the children's happiness and best interest go hand in hand.

The record clearly supports the trial court's findings that the quality of life of the children will not be improved by a move to Suffern, New York.

Factor 2: Whether the motive for seeking the removal is for the express purpose of defeating visitation.

Again, Petitioner merely reargues her case, asks this Court to reevaluate the facts and reach a different conclusion.

The trial court found that this factor was somewhat neutral. The trial court stated that although the move was not for the express purpose of defeating visitation, the impact of the move would defeat visitation. A-13. This finding is similar to the finding of the trial court in Jones v. Jones, 633 So. 2d 1096 (Fla. 5th DCA 1994). In the Jones case, the trial court's refusal to allow the relocation of the custodial parent was upheld. The third district court held that the

trial court applied the correct test, a reasoned analysis of Hill, and affirmed the trial court's decision. Id at 1099.

In the present case, the trial court found that Petitioner intentionally failed to inform Mr. Russenberger of her plans to move to Suffern, New York. This is clearly supported by the record. As previously stated, Petitioner admitted on numerous occasions that she kept this information from Mr. Russenberger. Throughout the course of the litigation, Petitioner gave various reasons for keeping this information from Mr. Russenberger including: 1) she did not want to start a problem R-9, p.32; 2) she figured why "rock the boat" R-7, p.68; and, 3) it was her personal life and her decision to make. R-7, p.68. The evidence is uncontroverted that at the time of the signing of the marital settlement, Mr. Russenberger had no knowledge of Petitioner's intent to relocate. R-7, p.68; R-9, p.32.

The marital settlement agreement specifically states that "both parties will confer with each other so that major decisions affecting the welfare of the children will be determined jointly." A-1. Petitioner admitted in her deposition taken on May 6, 1993, that she considered a major decision in the children's lives to be something like a move or the changing of schools. D-13,p.26. Yet she failed to discuss both of these matters with Mr. Russenberger.

The trial court's finding that a move to New York would defeat visitation is further supported by the testimony of Dr.

Yarbrough and Dr. Benson.

According to Dr. Benson, the distance and time constraints would significantly impact visitation. Essentially, Mr. Russenberger would only be exercising visitation one day on his weekend. The children would arrive late Friday. On Sunday, they would be consumed with getting packed and ready to return to New York. D-20.,p.7. According to Dr. Yarbrough, the children will be tired, and this will take away from the quality of the visit. R-2,p.233. Obviously, Mr. Russenberger would no longer enjoy the weekday visitation nor be able to respond in a spontaneous way to immediate activities of the children. There would be no participation in the extracurricular activities. According to Dr. Benson, the result is a negative impact on their relationship. D-20,p.10.

Factor 3: Whether the custodial parent, once out of the jurisdiction will be likely to comply with any substitute visitation arrangements.

The trial court, after carefully considering and weighing the evidence, found that the evidence on the whole indicates that it is highly questionable whether Petitioner would be likely to comply with substitute visitation arrangements. The court found that visitation was not occurring in Pensacola. The court felt that since Mr. Russenberger would not reside where Petitioner resides, history dictated that visitation would peter out. A-13.

In support of its finding, the trial court considered numerous factors. The first relevant factor that the court

considered was the parties' long-standing inability to have a good relationship regarding the children. Contrary to Petitioner's assertion, there is evidence in the record that indicates problems with visitation date back to May 1991. R-6,p.752,753. The record clearly shows that since February 1991, Mr. Russenberger has asked numerous times for additional visitation but has been denied. *See* R-1,p.26, 27, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 76; R-3, p. 347; R-9,p. 20; R-2,p. 235. In her deposition taken on May 6, 1993, Petitioner admitted that Mr. Russenberger had asked for additional visitation but she had denied his requests. D-13, p.32; R-5, p.676. Petitioner testified that sometimes Mr. Russenberger would ask her once or twice a week, other times three or four times per week. D-13,p.32. Moreover, in her trial testimony, Petitioner testified that throughout 1993 Mr. Russenberger asked for additional visitation on a frequent basis and was denied. R-6,p. 676. The trial court noted that there had been a long standing history of the Petitioner discouraging visitation. Petitioner has used visitation as a discipline tool with one of the children. D-13,p.40. On other occasions Petitioner she would use the children as weapons and deny Mr. Russenberger his visitation. R-1, p.29. Petitioner has even used the children as negotiation tools: Petitioner told Mr. Russenberger that if he did not move one-half the money from the sale of the business into her name, he would never see his children again. R-1, p.28; Petitioner told Mr. Russenberger

that if he would sign the marital settlement agreement he would get to see his children more. R-1, p.29. Petitioner has even occasionally forgotten about visitation although the parties have been following the same schedule for years. R-7,p. 15, 30.

The trial court found that Petitioner has not encouraged the relationship between the children and Mr. Russenberger. To support its position, the trial court found that there had been irregular encouragement of the children to recognize significant days. Sometimes birthdays are remembered, sometimes not. Mr. Russenberger testified that he did not receive a phone call or a card on his birthday from his children. R-6,p. 753; R-3, 729. Further, Petitioner admitted that the children did not give Mr. Russenberger a Father's Day card. R-5, p.711. On the other hand, Mr. Steltenkamp received a Father's Day card, and received something for Easter. The children are also encouraged to send Mr. Steltenkamp photographs and drawings in the mail. R-4,p. 503.

The trial court found that Petitioner had not encouraged the younger children to telephone their father. At trial, Petitioner admitted that she has not thought much about the children's telephone calls to Mr. Russenberger and that she has not encouraged the children to call him. R-5,p.710. Petitioner admitted that the children have only called their father <u>twice</u> since the parties separated in February, 1991. R-5,p.708. However, Mr. Steltenkamp talks to the younger children every day. R-4, p.502.

Mr. Russenberger has asked to spend individual time with the children on numerous occasions; however, Petitioner continues to refuse his requests. R-1,p.27,36. Petitioner has admitted that the children must go together as a group and that she discourages individual visitation. D-13,p.62,63. Additionally, not only has Petitioner denied Mr. Russenberger additional time, she has failed to offer him the right to babysit the children when she has been out of town. She has left the children with others. According to Petitioner, she never felt the need to call him. R-5,p.726,727.

The record also clearly demonstrates that the Petitioner has failed to contact Mr. Russenberger about events in the children's lives. Petitioner admits that the only major decision in which she has consulted with Mr. Russenberger has been that of Summer 1993 vacation. D-13,p.24. She further admits that the two older children have seen a psychologist, but she is unaware if their father knows. D-13,p.29. Obviously, Petitioner is of the position that when Mr. Russenberger divorced her, he gave up rights to the children. She has been heard to say this on numerous occasions, at times in front of the children. D-13,p.49. *See* Testimony of Kristy Johnfore, R-4, p.572, 573. *See also* R-7,p. 72; R-1,p.41.

The trial court found that the proposed move to Suffern New York, was announced by attorneys and not by the Petitioner. The Petitioner testified that she did not feel that what she

did with her life was a concern to Mr. Russenberger. R-7,p.68.[7]

The trial court expressed concern over the Petitioner's failure to call Mr. Russenberger concerning their son's recent encounter with the law. This again demonstrates Petitioner does not feel she must share matters relating to the children with Mr. Russenberger. She states that she does not want these things thrown back in her face, that she merely wants to keep the peace. This, however, denies Mr. Russenberger the opportunity to effectively share in parental responsibility. His role as a father becomes neutralized. According to Dr. Yarbrough, when children are having problems, both parents need to be aware. In order to have meaningful shared parental responsibility, both parents need to have the same information, and they need to have reasonable access to the children. R-7,p.131.

The evidence is overwhelming that based on the totality of circumstances, substitute visitation is not likely to occur.

Factor 4: Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or the children and the non-custodial parent.

The trial court reviewed all of the evidence presented and held that the proposed substitute visitation was not an

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[7] Petitioner attempts to allege now as she did at trial that domestic violence occurred during the parties' marriage and following separation. The trial court found that both parties argued loudly and that evidence was conflicting. The court found that domestic violence was not a major factor in this case. A-13, p.11.

adequate substitute visitation schedule. This is supported by the evidence in the record. The trial court found that Mr. Russenberger is actively involved in the lives of his children. This is found throughout the record.

During the first year of separation of the parties, Mr. Russenberger saw the children every morning. R-1, p. 26, 27. From the onset of the parties' separation, he exercised visitation at a minimum of every other weekend and every Wednesday. R-1, p. 25; D-13, p. 22. The trial court seriously considered that the parties have five children.

According to James Dale Vinson, head master/principal of Creative Learning Center, Mr. Russenberger has participated in evening functions, family functions, productions and holiday programs held at the school. R-7, p. 113. Further, Mr. Vinson testified that Mr. Russenberger has on various occasions visited with his children for lunch at the school. R-7, p. 113. Mr. Russenberger has rearranged staff meetings to accommodate his children's schedule. R-1, p. 23. He has gone to track meets, including the state championships, to watch Rhett compete. R-1, p. 61; R-2, p. 299. At the trial, the evidence demonstrated that Rhett stops by to visit his father frequently and they share an interest in fishing, skiing, and boating, scuba diving and running. R-1, p. 61-63; R-2, p. 296, 299, 300. Mr. Russenberger and Rachel share an interest in theater and music. Mr. Russenberger often plays the piano for Rachel's auditions and frequently records tapes for her. R-1,

63-64; R-2, p. 302, 304; R-3, p. 311. Mr. Russenberger attends all of Rachel's performances and has played the piano for her. R-1,p.64. Rachel is involved in the Pensacola Little Theater, and Mr. Russenberger is president of the Board of Trustees for the Little Theater. Whenever Rachel is working on an audition, both Mr. Russenberger and Valerie, Mr. Russenberger's wife, work with her. R-1,p.66. Clearly, Mr. Russenberger is involved in his children's lives.

In examining the proposed substitute visitation schedule the court expressed concern that the children would be tired following the lengthy plane trip. Dr. Yarborough and Dr. Benson both noted concern and expressed doubt that the children would be able to engage in any kind of meaningful relationship following the lengthy trip. R-2, p. 236, 243; D-20, p. 7. Due to the sheer distance and time constraints as proposed by the substitute visitation, Dr. Benson testified that Mr. Russenberger would not be able to respond in a spontaneous way to immediate activities of his children such as afternoon activities including track meetings, cross country races, school dress rehearsals, school plays. By eliminating these spontaneous and regular activities, Dr. Benson testified that the nature of visitation is severely limited. Moreover, he noted that this proposed visitation represented a substantial change from the previous visitation schedule that had been in effect between the parties. D-20, p. 8, 9.

The trial court's concern about the lack of framework if

Mr. Russenberger was required to go to New York to visit is also supported by the record. According to Dr. Yarborough, if Mr. Russenberger New York visits occur once a month, he will be a virtual sore thumb. This atmosphere provides no potential for him to interject himself into the children's community, and the quality of Mr. Russenberger's visit will be significantly impacted. R-2, p. 237, 239. Dr. Benson testified that if Mr. Russenberger came to New York to some type of temporary quarters where the children would exercise visitation, there would be no substance to that type visitation. D-20, p. 8.

The trial court's finding that the children's activities would inevitably interfere with visitation is consistent with the evidence as presented by Dr. Yarborough, Dr. Benson, and Dr. Larson. *See* D-20, p. 10, R-2, p. 226, 230. Petitioner's expert, Dr. Larson, testified that if the children were active in extracurricular activities or friendships, they would resist the weekend visitation as proposed in the substitute visitation schedule. Dr. Larson noted that the children will view Mr. Russenberger as the one forcing the visitation and in their eyes he will become an ogre. D-19, p. 30, 32. This is consistent with Dr. Yarbrough's view. R-2, p.227.

Further, according to Dr. Yarborough, due to the distance and lack of weekly access to their biological father, Mr. Steltenkamp would become the real father in the children's minds, even if they maintained the proposed visitation schedule. R-2, p. 219. Dr. Yarborough testified that Mr.

Russenberger would be excluded from the parenting process of decision making. In order to have a meaningful shared parental responsibility both parents need to have the same type of information. They need to have reasonable access to the children. R-7, p. 131. Finally, Dr. Benson testified that the proposed visitation schedule is a very poor substitute for what the children have had in the past. D-20, p. 11. The trial court found that Mr. Russenberger actively participates in the children's lives and noted that the spontaneous time he spends with them is really critical to their well-being. This is supported by the testimony of Dr. Benson. He found by limiting this type of contact, the whole aspect of visitation is effectively limited. D-20,p.8. *See also* William F. Hodges, Intervention for Children of Divorce: Custody, Access, and Psychotherapy, 596 (1986) (Spontaneous contact can be of enormous benefit to the child who interprets this as an indication of affection and enjoyment).

Factor 5: Whether the transportation is financially affordable by one of the parties.

This factor was not in dispute. The parties stipulated that they can afford the cost of transportation. Under the proposed visitation schedule the burden of the cost of the transportation of the five children and Mr. Russenberger is placed on Mr. Russenberger. R-9, p. 28.

Factor 6: Whether the move is in the best interest of the children.

The Petitioner argues that the primary residential

parent's family must be viewed as the family that is central and most important to the child's best interest. This is contrary to the evidence in the record. Dr. Yarborough testified that research is unequivocal that it is in the best interest of the children to have both biological parents active in the rearing of their children. R-2, p. 212, 213. Children do better if they have access to both parents. R-2, p. 214. Further, Dr. Yarborough testified that biological parents are the most central aspect of the developmental issues for a child's well being, not the primary custodial family and/or post-dissolution blended family. R-2, p. 250 - 251.

Upon comprehensive review of the entire record, the trial court did not abuse its discretion in finding that it is not in the best interest of the children to relocate to the New York area. The relationship between Mr. Russenberger would deteriorate significantly if the children were allowed to relocate. Dr. Yarborough testified that he reviewed Rachel's psychological records. He is of the opinion that her relationship with her father has progressed in positive terms. R-2, p. 224. However, according to Dr. Yarborough, if the children were allowed to relocate to New York, the problem that exists between Rachel and her father would only be magnified. R-2, p.226. In reviewing the totality of the circumstances the trial court found that in weighing the relocation factors and the evidence, it is not in the best interest of the children to allow relocation to New York. There is ample evidence in the

record to support this conclusion. Specifically, Dr. Yarborough testified that given the facts of this case he did not believe that it was in the best interest of the children to move to Suffern, New York. R-2, p. 216.

V. REVIEW OF RUSSENBERGER V. RUSSENBERGER, 654 So.2d. 207 (Fla. 1st DCA 1995).

Mr. Russenberger agrees with the Petitioner's analysis of the first district court's holding in Russenberger, however, Mr. Russenberger disagrees with the assertion that the first district court failed to apply it's own analysis to the facts in the case.

As previously argued, it is clear that Petitioner was angry with Mr. Russenberger over the divorce. She improperly used the children as weapons and as tools in negotiation. Further, she has dictated visitation according to her whim and has refused to abide by the shared parenting responsibility provision of the marital settlement agreement. If she is able to put some geographical distance between herself and Mr. Russenberger, she will truly then be able to do as she pleases with her life and the children. The acceptance of a voluntary, lateral move by residential custodian's spouse should not be perceived by this Court as a good faith reason to allow relocation. This Court's analysis should end here. However, in the event that this Court finds that the Petitioner's reason for relocation leads this Court to believe that the Petitioner is acting in good faith, then the determination must be made as

to the best interest of the children, based upon an analysis of the Hill factors. A review of the evidence clearly demonstrates that a move to Suffern, New York, is not in the children's best interests. The quality of life will not be equal to the quality of life the children now experience. See A-13. To state that no evidence supports this finding overlooks all the expert testimony and the extensive evidence in this matter. To assert that since Petitioner is the custodial parent, she has the sole to choice to move to New York and take the children with her nullifies the concept of shared parental responsibility and the Mize mandates of this Court.

CONCLUSION

The relocation test recently articulated by this Court in Mize is not outdated. Mize provides trial courts with guidance in dealing with these most difficult cases and allows consistency throughout the districts.

The first district court's decision in Russenberger correctly interprets this Court's decision in Mize and should therefore be affirmed. If this Court finds it necessary to abandon the test as enunciated in Mize, then Mr. Russenberger urges this Court to adopt the proposed standard as propounded by Justice Shaw in his Mize concurring opinion. This test, as opposed to the one proposed by the Petitioner, is consistent with Florida's strong public policy. Regardless of which test is applied, relocation should be denied in this case.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondent's Answer Brief has been furnished to E. Jane Brehany, Myrick, Silber & Davis, 625 North 9th Avenue, Pensacola, Florida, by Hand Delivery ~~U. S. Mail~~, on this October 26, 1995.

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APPENDIX

1. Final Judgment of Dissolution of Marriage dated 1/5/93

2. Motion for Contempt And Or Enforcement of Final Judgment of Dissolution of Marriage dated 2/4/93

3. Petition to Enforce Final Judgment (with attachments) dated 2/25/93

4. Motion for Temporary Injunction dated 2/25/93

5. Order Upon Petitioner/Former Husband's Motion for Temporary Injunction dated 4/5/93

6. Amended Motion for Contempt and Enforcement of Final Judgment of Dissolution of Marriage dated 3/16/93

7. Second Amended Motion for Contempt and Enforcement of Final Judgment dated 5/10/93

8. Motion for Determination of Visitation/Vacation Privileges dated 5/7/93

9. Notice of Hearing dated 5/13/93 on Former Husband's Motion to Compel Discovery

10. Order on Motion for Clarification of Summer Visitation dated 6/9/93

11. Excerpt of Hearing held on June 9, 1993

12. Index to Record on Appeal

13. Trial Court's Order dated 2/22/94 on Former Husband's Petition to Enforce Final Judgment