IN THE SUPREME COURT OF FLORIDA

CYNTHIA L. STELTENKAMP
F/K/A CYNTHIA L. RUSSENBERGER,

Petitioner/Former Wife,

SUPREME COURT CASE NO. 85,743
1ST DCA CASE NO. 94-00084

and

RAY DEAN RUSSENBERGER,

Respondent/Former Husband.

_____/

PETITIONER'S JURISDICTIONAL BRIEF

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

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STATEMENT OF THE CASE AND FACTS

On February 22, 1994, Circuit Judge Nancy Gilliam entered an order granting Ray Russenberger's request to impose a restriction on relocation by his former wife, Cindy Steltenkamp. Mrs. Steltenkamp, the primary residential parent of the parties' five minor children and the children's historical primary caretaker, hoped to relocate with the children to Suffern, New York. Mrs. Steltenkamp presented the following reasons as motivation for her requested relocation: (i) she has remarried, (ii) her husband lives in Suffern, New York, (iii) her husband's employment as a research scientist is located in New York, and (iv) she had purchased housing in New York.

After the trial court entered the order prohibiting relocation, Mrs. Steltenkamp filed a timely notice of appeal with the district court of appeal, first district. The appellate court applied a competent substantial evidence standard of review and affirmed the trial court's decision. Russenberger v. Russenberger, 20 Fla. L. Weekly 985 (Fla. 1st DCA April 21, 1995). The first district indicated that it may have reached a different result as a trier of fact, but under an abuse of discretion standard, the court held that sufficient evidence existed to support the trial court's prohibition against relocation. A copy of the decision is attached hereto as Appendix Exhibit 1.

In Russenberger, the first district struggled to resolve the "internal contradictions" of Mize v. Mize, 621 So. 2d 417 (Fla. 1993). After resolving these "internal contradictions" to its

satisfaction, the first district acknowledged conflict with the fourth district case, Tremblay v. Tremblay, 638 So. 2d 1057 (Fla. 4th DCA 1994). In order to resolve this conflict between the districts and for several additional reasons subsequently set forth in this brief, Mrs. Steltenkamp filed a timely notice to invoke discretionary jurisdiction of this court.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court on the same question of law.

SUMMARY OF ARGUMENT

Without additional guidance from this court, the first district will continue to wrongfully deny relocation requests of primary residential parents. Unfortunately, the only decision from this court on this issue, Mize v. Mize, 621 So. 2d 417 (Fla. 1993), has been interpreted in varying ways by the district courts of appeal and has not provided the consistency in rulings as anticipated by this court. For example, in the case at hand, Mrs. Steltenkamp wants to relocate with the parties' children because of her remarriage and her husband's employment in Suffern, New York. Despite this well-intentioned reason and despite the fact that the trial court specifically found that she did not have a vindictive desire to interfere with visitation, Mrs. Steltenkamp's request was denied after the trial court reviewed the Hill six-factor test. As explained more fully herein, an analysis utilizing the Hill factors

will often result in a decision against removal. Accordingly, the Hill analysis conflicts with this court's general rule in favor of removal. In Russenberger, the first district gives lip-service to the Mize general rule, but then decides the case on the Hill factors. Other districts, however, have given lip-service to the Hill factors, and have decided the case on the Mize general rule.

Finally, it is imperative that Mrs. Steltenkamp be given the same opportunity to relocate with the children and with her new husband as other parents throughout the State of Florida. Mrs. Steltenkamp should not be penalized simply because she lives in the first district. Mrs. Steltenkamp respectfully requests that this court accept discretionary jurisdiction of the Russenberger decision in order to i) resolve the internal contradictions of Mize, ii) clarify the rule of law of Mize, and iii) resolve the conflicts between the districts in relocation cases. Additional case law is necessary to provide consistent guidance to all parents in the state of Florida.

ARGUMENT

I. ISSUE OF STATEWIDE IMPORTANCE.

A. Importance of Supreme Court Guidance in Family Law Matters.

Family law cases compile a very high percentage of all cases heard at the trial court level. For this reason, it is imperative that the supreme court provide guidance and direction in family law matters. In July of 1993, this court recognized the importance of providing guidance to the family law courts when a request is made by a primary residential parent to relocate with the parties'

children. The Mize decision, however, has created confusion for family lawyers and judges. Several courts and lawyers have found it extremely difficult to reconcile the Mize "general rule" with the six-factor relocation test also adopted by this court in Mize.

To explain, Mize provides that as a general rule, as long as the primary residential parent desires to move for a well-intentioned reason and founded belief that "relocation is best for the parent's - and it follows, the child's - well-being," and not from a vindictive desire, the change in residence should ordinarily be approved. As explained by the first district in Russenberger, adoption of this general rule from Judge Schwartz' concurring opinion in Hill v. Hill, 548 So. 2d 705, 707 (Fla. 3d DCA 1989), rev. denied, 560 So. 2d 233 (Fla. 1990), is an endorsement of the view that a relocation request "should presumptively be approved." Russenberger, 20 Fla. L. Weekly at 987. As a matter of fact, Justice Shaw acknowledged in his Mize concurrence that the majority opinion creates a "virtual per se rule favoring removal." Mize, 621 So. 2d at 422.

The conflict arises when this court directs the trial courts to next apply the Hill six-factor analysis: "when viewed as a whole, however, the combination of the six-factor test and the language from the Hill concurring opinion seems internally contradictory." Russenberger, 20 Fla. L. Weekly at 987-988. [1]

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[1]For further explanation of the internal contradictions see Jones v. Jones, 633 So. 2d 1096 (Fla. 5th DCA), rev. denied 639 So. 2d 978 (Fla. 1994), and Tremblay v. Tremblay, 638 So. 2d 1057 (Fla. 4th DCA 1994).

Briefly, the general rule presents a presumption in favor of removal and the Hill factors require an entirely different test which frequently will result in a conclusion supporting non-removal. As a matter of fact, in some states an analysis similar to the Hill test has been characterized as a presumption against removal. In Re Marriage of Eckert, 119 Ill. 2d 316, 518 N.E. 2d 1041 (Ill. 1988). This internal contradiction must be resolved in order to provide consistent guidance to the trial courts. If this court accepts jurisdiction in this matter, the Mize decision can be "fine-tuned" in order to provide well-reasoned guidance to trial courts and litigants throughout the state.

B. Fine-tuning of Relocation Problems in Other States and Relevance to Florida Litigation.

The six-factor approach to relocation dilemmas derives from the 1976 New Jersey Supreme Court decision, D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 365 A.2d 30 (1976). Since 1976, New Jersey relocation law has evolved and has been modified considerably. Briefly, New Jersey has fundamentally changed its analysis of the relocation issue by now stating that under current law the emphasis "should not be on whether the children or custodial parent will benefit from the move, but on whether the children will suffer from it." Holder v. Polanski, 111 N.J. 344, 544 A.2d 852 (1988). As one can see, the D'Onofrio test that was adopted verbatim in Mize, has been substantially modified by the New Jersey Supreme Court. Since Holder, custodial parents have been allowed to routinely

relocate for reasons such as better employment opportunities and remarriage.[2]

In summary, the New Jersey analysis has evolved from a conservative, multi-element analysis to a relaxed, flexible standard for justifying relocation. The Florida analysis, as established in Mize, however, focuses on the 1976 New Jersey multi-factor test that has now been rejected by New Jersey. The evolution of the New Jersey relocation analysis strongly suggests that this state should consider further growth and modification of the relocation standard.

II. Express and Direct Conflict.

The decision of the first district court of appeal in Russenberger expressly and directly conflicts with this court's decision in Mize v. Mize, 621 So. 2d 417 (Fla. 1993) and with the following district court of appeal decisions: Tremblay v. Tremblay, 638 So. 2d 1057 (Fla. 4th DCA 1994); Ciftci v. Munoz, 627 So. 2d 67 (Fla. 5th DCA 1993); Baez v. Baez, 627 So. 2d 1260 (Fla. 3rd DCA 1993); Zak v. Zak, 629 So. 2d 187 (Fla. 2nd 1993); Stockburger v. Stockburger, 633 So. 2d 1140 (Fla. 2d DCA 1994); Blakney v. Marks, 642 So. 2d 73 (Fla. 1st DCA 1994); and Mize v. Mize, 623 So. 2d 636 (Fla. 5th DCA 1993).

A. Conflict with Mize v. Mize, 621 So. 2d 417 (Fla. 1993).

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[2] See McMahon v. McMahon, 256 N.J. Super. 524, 607 A.2d 696 (1991); Harris v. Harris, 235 N.J. Super. 434, 563 A.2d 64 (1989); Murnane v. Murnane, 229 N.J. Super. 520, 552 A.2d 194 (1989); and Winer v. Winer, 241 N.J. Super. 510, 575 A.2d 518 (1990).

This court provides that as a general rule, relocation should be allowed if the primary residential parent desires to move for a well-intentioned reason and the move is not motivated by a vindictive desire to interfere with visitation rights.

In Mize, the mother desired to relocate to California in order that she could receive emotional and financial support from her father and seek higher paying employment. In Russenberger, the mother wishes to relocate to New York because (i) she has remarried, (ii) her husband lives in Suffern, New York, (iii) her husband is employed as a research scientist in New York and (iv) she has purchased housing in New York. In both cases, the trial court found that the move was not motivated by a vindictive desire to interfere with visitation rights. Despite these same controlling facts, different results were reached: Ms. Mize was allowed to relocate while Mrs. Steltenkamp was not. For this reason, the Russenberger decision expressly and directly conflicts with Mize. As explained in City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So. 2d 632 (Fla. 1976), conflict exists where a rule of law is applied to produce a different result in a case which involves substantially the same controlling facts as a prior case. Moreover, even though the general rule favoring relocation is mentioned in Russenberger, it is entirely overlooked in the ultimate decision.

B. Conflict with Tremblay.

Russenberger expressly and directly conflicts with the fourth district decision, Tremblay v. Tremblay, 638 So. 2d 1057 (Fla. 4th

DCA 1994). As stated by the first district in Russenberger, "we recognize that our reading of Mize may conflict with the reading given Mize by our colleagues of the fourth district." See Russenberger, 20 Fla. L. Weekly at 990.

Tremblay holds as follows: "[w]here the relocating parent is acting in good faith, permission to relocate should generally be granted; i.e. granting relocation becomes the proverbial rule, rather than the exception." Id. at 988. By stating that a conflict exists, the first district is acknowledging that it has chosen not to follow the Mize general rule favoring removal. As a matter of fact, the first district gives lip-service to the general rule, but then ignores it completely in the final decision by affirming the trial court's denial of the relocation request.[3]

C. Conflict exists where a rule of law is applied to produce a different result in a case which involves substantially the same controlling facts as a prior case. City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So. 2d 632, (Fla. 1976).

Mrs. Steltenkamp was not allowed to relocate to be with her husband. Ms. Mize, Ms. Tremblay, Ms. Ciftci, Ms. Baez, Ms. Zak, Ms. Stockburger, and Ms. Blakney were allowed to relocate. Despite substantially the same controlling facts, Mrs. Steltenkamp is not allowed to relocate. The chart on page 9 of this jurisdictional brief presents a thorough comparison of several similar cases from other districts.

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[3]See also Holman v. Holman, 638 So. 2d 941 (Fla. 1st DCA 1994); (mother requested permission to relocate to her hometown in Alabama to care for ailing mother, family support, and improved employment opportunities; no vindictive motive; trial court denied removal and first district affirmed).

	MIZE	TREMBLAY	CIFTCI	ZAK	STOCKBURGER	BLAKNEY	RUSSENBERGER
Primary Residential Parent	Mother	Mother	Mother	Mother	Mother	Mother	Mother
Shared Parental Responsibility	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Motive to defeat visitation	No	No	Implied No	Implied No	No	Implied No	No
Primary Residential Parent's Reason for move	Better job	Study nursing, improve her earning ability	Better paying job for Mother	Better job opportunity	Impending Marriage, better employment opportunity	Remarried; husband had higher paying job; purchased new home	Remarried; husband transferred; purchased new home
Move from Florida to _____?	CA	MA	Another county in FL	IL	NC	MN	NY
Reason considered "well-intentioned"	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Mize general rule followed (change of residence should ordinarily be approved)	Yes	Yes	Yes	Yes	Yes	Yes	NO
Parent allowed to move	Yes	Yes	Yes	Yes	Yes	Yes	NO

As the chart illustrates, substantially the same controlling facts are producing drastically different results. A review of the Russenberger decision by this court can correct this inequity.

CONCLUSION

The Russenberger decision expressly and directly conflicts with the Mize decision of this court and several decisions from other district courts of appeal. Mrs. Steltenkamp urges this court to exercise its discretionary jurisdiction to maintain uniformity for all families residing in Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this the 31st day of May, 1995, forwarded to T. Sol Johnson, 800 SE Caroline Street, Post Office Box 605, Milton, FL 32572 and to Crystal Collins Spencer, 30 S. Spring Street, Post Office Box 1271, Pensacola, FL 32596 by U.S. Mail.

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APPENDIX

1. Russenberger v. Russenberger, 20 Fla. L. Weekly 985 (Fla. 1st DCA April 21, 1995).

Appendix

Workers' compensation—Compensable accidents—Findings that claimant, while upset and angry over his termination, pushed hard on plate glass portion of door and thereby suffered injury required conclusion that claimant had willful intention to injure so as to be outside course and scope of employment—Order finding injury compensable reversed

391ST BOMB GROUP and CNA INSURANCE COMPANY, Appellants, v. STEVEN L. ROBBINS, Appellee. 1st District. Case No. 94-1007. Opinion filed April 21, 1995. An appeal from an order of the Judge of Compensation Claims. Steven Cullen, Judge. Counsel: Helene H. Morris of Miller, Kagan and Chait, P.A., West Palm Beach, Attorney for Appellants. Mark S. Edwards of the Law Offices of J. Robert Miertschin, Suite 465-S Presidential Circle, 4000 Hollywood Boulevard, Hollywood, Attorney for Appellants. Jerold Feuer of Miami, and Lawrence Langer of West Palm Beach, Attorneys for Appellee.

(PER CURIAM.) This appeal arises from an order of the Judge of Compensation Claims (hereinafter "JCC") finding claimant's injury to be compensable under Florida Workers' Compensation law. We reverse because we find that claimant's injury did not arise out of and in the course and scope of his employment.

On May 9, 1993, claimant Steven Robbins severely injured himself when he thrust his hand through the security window of an exit door. Immediately prior to the incident which caused his injuries, claimant was called into his supervisor's office and fired because of unsatisfactory work. Several witnesses testified that claimant then yelled some profanities, ripped open the office door, punched a wall, and headed for the rear exit door. As claimant exited, he pushed hard with an open hand on the security glass of the rear door, causing it to shatter. The window was approximately 18 inches square and comprised of wire mesh encased by layers of glass. Claimant suffered serious injuries to his left hand and forearm requiring extensive medical care, including several skin grafts.

Claimant filed a claim for temporary partial disability benefits and payment of all medical bills. The employer, 391st Bomb Group Restaurant, and its carrier, CNA Insurance, (hereinafter "E/C") controverted the claims, asserting, *inter alia*, that claimant's injuries were due to his own misconduct and not related to any work-related activity or accident. Following a hearing on the matter, the JCC found, *inter alia*, that claimant had broken the glass while upset and angry over his firing. However, the JCC also found that claimant had "no willful intention . . . to injure himself" and, therefore, was not precluded from compensation. This appeal followed.

Section 440.09(1), Florida Statutes (1993), states in part that "[c]ompensation shall be payable under this chapter in respect of disability or death of an employee if the disability or death results from an injury arising out of and in the course of employment." However, subsection (3) states that "[n]o compensation shall be payable if the injury was occasioned primarily by . . . the willful intention of the employee to injure or kill himself, herself or another." When read together, the substantive language of these subsections allows compensation benefits if disability or death results from an injury arising out of and in the course of employment, provided the injury was not willfully and intentionally inflicted. Where the injury is caused by the willful intent of the employee to injure himself or another, the injury cannot be said to have been arising out of and in the course and scope of employment. *Tucker Taxi, Inc. v. Schofield*, 107 So. 2d 188, 191 (Fla. 1st DCA 1958) (benefits denied where employee's death was occasioned primarily by his willful intention to injure his superior in a fight). In *Tucker Taxi*, 107 So. 2d at 191, we interpreted then current section 440.09(3), stating:

> It is generally held, apart from the express statutory defenses provided by our statute, that the aggressor in an admittedly work-connected fight cannot recover compensation. Our statute does little if anything more than to reiterate the rule of the case law to the effect that a subordinate employee engaged in aggression against his superior thereby performs no service and no duty for his employer, and the hazard that such subordinate employee may receive injury from his own acts of aggression against his superior are not a risk of his employment and, therefore, do not arise "out of" and "in the course of" his employment.

Pivotal in the denial of compensation in *Tucker Taxi* was the court's holding that the employee's deliberate acts of aggression were tantamount to a willful intent to injure apart from instinct or impulse. The term "intention" as used in the statute was defined as an act that is premeditated and deliberate. *Tucker Taxi*, 107 So. 2d at 191.

Here, the JCC found that claimant "pushed hard . . . on the plate glass of the rear door causing [it] to shatter" and that he was "upset" and "angry over his termination when he broke the glass." As in *Tucker Taxi*, we hold that these findings are tantamount to willful intention to injure so as to be outside the course and scope of his employment. We find little difference between an employee who is injured while attempting to injure a superior in a fight in which he was the aggressor and an employee who is injured by willfully striking an inanimate object of the employer in anger, an object which obviously presented a danger of injury.

Even were we to find that claimant's injuries resulted from an impulsive act, we would reject benefits under section 440.09, Florida Statutes. Although a distinction between willful acts and acts of instinct or impulse was mentioned in *Tucker Taxi*, we could find no Florida case expounding it. As such, we adopt the holding of *Relish v. Hobbs* in which the Louisiana Court of Appeal stated:

> "The test (of wilful intent to injure) should involve an inquiry into (1) the existence of some premeditation and malice . . . , coupled with (2) a reasonable expectation of bringing about real injury to himself or another." This clearly means that wilfulness, as distinguished from impulsiveness, is not the sole test. Every impulsive act is not condoned by the statute. Some acts, even though impulsive, are so serious and so likely to result in real injury, that they must be construed to show a wilful intent to injure.

Relish v. Hobbs, 188 So. 2d 479, 482 (quoting *Velotta v. Liberty Mutual Ins. Co.*, 241 La. 814, 132 So. 2d 51 (1961)). Here, we find that claimant's act, even if impulsive, was so serious and so likely to result in real injury that it must be construed to show willful intent.

We REVERSE. (BOOTH, JOANOS and MINER, JJ., CONCUR.)

* * *

Dissolution of marriage—Child custody—In post-dissolution proceeding pertaining to wife's proposed relocation to other state with parties' children, denial of husband's motion for psychological evaluations of the children affirmed where nothing in record warranted disturbing trial court's conclusion that psychological impact of the proposed move was not a matter in issue—Although hearing on request for examination under Rule of Civil Procedure 1.360 is not required, trial court did not commit reversible error by holding hearing on husband's renewed motion for examination—Where relocating parent is acting in good faith, trial court must permit relocation if the best interests of the children, as determined based upon analysis of factors discussed in *Hill v. Hill*, will be served at least as well in the proposed location as in the present location—If marital settlement agreement and final judgment do not restrict relocation, relocating parent has burden to establish that relocation is not for vindictive or improper motive and that new location would offer quality of life for the children at least equal to the quality of life in present location; parent opposing relocation then has burden to establish that relocation is not in children's best interests under the *Hill* factors—Trial court did not abuse its discretion in prohibiting wife's relocation of children—Order imposing standard visitation schedule affirmed even though such order imposed new specific burdens in absence of finding of substantial change of circumstances where issue was before the trial court by consent of the parties

CYNTHIA L. RUSSENBERGER, Appellant, v. RAY DEAN RUSSENBERGER, Appellee. 1st District. Case No. 94-804. Opinion filed April 21, 1995. An appeal and cross-appeal from the Circuit Court for Escambia County. Nancy Gilliam, Judge. Counsel: E. Jane Brehany of Myrick, Silber & Davis, P.A., Pensacola, for Appellant. Crystal Collins of Emmanuel, Sheppard & Condon, Pensacola; T. Sol Johnson of Johnson, Green & Locklin, P.A., Milton, for Appellee.

(VAN NORTWICK, J.) Cynthia L. Russenberger, now known

as Cynthia L. Steltenkamp, appeals an order granting her former husband's petition to enforce a final judgment of dissolution and prohibiting her removal of the five Russenberger children from Pensacola, Florida, without court approval. Ray Dean Russenberger challenges an order denying his motion for psychological evaluations of the five children. We affirm both orders.

BACKGROUND

The parties to this appeal were married in July 1976, and five children were born to that union. Mr. and Mrs. Russenberger separated in February 1991 and were divorced by a final judgment of dissolution entered in January 1993. This final judgment incorporated a marital settlement agreement between the parties, which provided among other things, that:

> It would be in the best interest of the children for the parties to have shared parental responsibility with the Wife designated as residential custodian subject to liberal and reasonable rights of visitation by the Husband to include every other weekend and such other times as the parties can agree.

The settlement agreement defined "shared parental responsibility" to mean:

> A court ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each so that major decisions affecting the welfare of the child will be determined jointly.

At the time of dissolution, both parties resided in the Pensacola area. Neither the settlement agreement nor the final judgment of dissolution required either party to remain in Pensacola or specifically prohibited relocation.

Almost immediately following the entry of the final judgment of dissolution, the parties began experiencing difficulties relating to visitation. On February 4, 1993, Mr. Russenberger filed a motion to enforce the final judgment, outlining problems he was experiencing with visitation, and asked the court to impose specific visitation. Then, on February 5, 1993, Mr. Russenberger was, for the first time, advised through counsel that his former wife intended to relocate to Suffern, New York, with the five Russenberger children. On February 22, 1993, Mrs. Steltenkamp, through counsel, further advised Mr. Russenberger that she "would like to work out a liberal and reasonable visitation schedule with [him] so there will be no problems after the household is established in Suffern, New York." 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. On April 5, 1993, the trial court temporarily enjoined Mrs. Steltenkamp from removing the children from Pensacola "to allow the children an opportunity to complete the school year and also allow the former husband an opportunity to explore and investigate the intended move. . . ."

Cynthia Russenberger married Mike Steltenkamp in May 1993. In September 1992, Mr. Steltenkamp, who had resided in Pensacola for several years and who has a Ph.D. in chemistry, had accepted a new position with his employer which required him to relocate to New York in January 1993. Prior to their marriage, Mrs. Steltenkamp and her new husband purchased a home in Suffern, New York with the apparent intent of relocating there with the five children.

During the relocation litigation, the parties continued to have difficulties concerning Mr. Russenberger's "liberal and reasonable" visitation with his children. In May 1993, Mr. Russenberger filed a motion for contempt, in which he again requested the court to establish specific visitation. In addition, the parties began negotiating visitation during the children's summer vacation, but were unable to reach an agreement. Specifically, the parties could not agree on the children traveling to Suffern, New York during the summer months. As a result, in May 1993, Mr. Russenberger also filed a motion seeking the court to determine visitation privileges during the summer vacation period. Mr. Russenberger contended that any travel by the children to New York would violate the temporary injunction that prohibited the removal of the children from the Pensacola, Florida area.

A hearing to determine whether Mrs. Steltenkamp could take the children to New York for summer vacation was set for June 9, 1993. From Friday, June 4, 1993, through Sunday, June 6, 1993, Mr. Russenberger exercised his normal weekend visitation with the children. During that visitation, the children did not indicate that they might be going to New York, and Mrs. Steltenkamp did not inform him of any plan to take the children to New York. However on Monday, June 7, 1993, Mr. Russenberger received a telephone call from Mrs. Steltenkamp 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. Mr. Russenberger immediately filed an emergency motion for contempt, alleging that his former wife had violated the temporary injunction. The motion was heard on June 9, 1993. Although the trial court declined to find Mrs. Steltenkamp in contempt, it ordered her to "return the children of the parties to Pensacola, Florida, within twenty-four (24) hours" and if she "failes (sic) to return the children then the former husband . . . is hereby permitted to go to the State of New York and assume temporary custody of the children for the purpose of returning them to Pensacola. . . ."

The parties' inability to work together to discuss and resolve custody, visitation and parenting issues is readily apparent from the record. Between the date of the entry of the final judgment of dissolution in January 1993 and the final hearing on the relocation issues in December 1993, eleven hearings and two status conferences were held in this case, and thirty-three pleadings, excluding appellate pleadings, were filed.

During the course of the proceedings below, Mr. Russenberger also requested that the lower court enter an order compelling psychological evaluations of the children. The lower court initially determined that it would be in the best interests of the children to designate Mr. Russenberger as the parent "responsible for the psychological care and concern of the minor children. . . ." This responsibility included the right to determine whether psychological examinations were warranted. By way of a writ of certiorari, occasioned by Mrs. Steltenkamp's petition, this court reversed the trial court's order, finding that it did not conform to the essential requirements of law and could have caused material injury. *Russenberger v. Russenberger*, 623 So. 2d 1244 (Fla. 1st DCA 1993).

Ray Russenberger appealed to the Supreme Court of Florida, citing conflict with *Gordon v. State*, 615 So. 2d 843 (Fla. 4th DCA 1993), and *Pariser v. Pariser*, 601 So. 2d 291 (Fla. 4th DCA 1992). Although the supreme court eventually found that no conflict was present, it did accept jurisdiction and approved this court's decision. *Russenberger v. Russenberger*, 639 So. 2d 963 (Fla. 1994).

While his appeal was pending before the supreme court, Mr. Russenberger renewed his motion for psychological evaluations. Thereafter, the lower court issued an order finding the mental condition of the children not to be a matter in issue and, therefore, the request for evaluations was denied. It is this order that Mr. Russenberger now challenges.

The trial court held a three-day evidentiary hearing in December 1993 on the issues relating to the relocation of the children to Suffern. Extensive evidence was offered by both sides concerning the proposed relocation, including the testimony of psychologists concerning the impact on the children of the proposed relocation and evidence demonstrating the relative merits of Suffern, New York and Pensacola, Florida as places of residence for the children. Also at issue was the closely-related question of which parent would enjoy residential custody and what visitation privileges would be exercised by the non-custodial parent.[1]

In a 13 page order, the lower court expressly considered the

supreme court's decision in *Mize v. Mize*, 621 So. 2d 417 (Fla. 1993), and, after discussing in detail the application to the facts of this case of each of the factors set forth in *Mize*, the lower court prohibited relocation. The lower court further ordered that the court's standard visitation schedule would be imposed on the parties because of the difficulties experienced regarding visitation. It is this order which Mrs. Steltenkamp now challenges.

THE DENIAL OF PSYCHOLOGICAL EVALUATION

As indicated above, the lower court considered the renewed motion for psychological evaluations after the entry of this court's opinion reversing the previous trial court order but before the entry of the supreme court's decision affirming our disposition. In other words, the lower court did not have the benefit of the supreme court's opinion on this matter. *Russenberger*, 639 So. 2d 963. Mr. Russenberger now suggests that the instant order fails to conform with the dictates of the supreme court's decision. We disagree.

Although there is no specific authority for the motion cited, Mr. Russenberger stated in his renewed motion for psychological evaluations that the psychological impact on the children of a move to Suffern was a matter directly in controversy. Such an assertion suggests that the former husband was seeking psychological evaluations on authority of Rule 1.360, Florida Rules of Civil Procedure.

The lower court determined, as a matter of fact, that the psychological impact of the proposed move was not a matter in issue, and we find no basis in the record to disturb this finding. As for the argument that the lower court erred by holding a hearing on the renewed motion, we find it to be without merit. While it is true that the supreme court determined that a hearing on a request under Rule 1.360 was not required, *Russenberger*, 639 So. 2d at 965, it certainly was not reversible error for the lower court in this case to inquire beyond its minimum threshold of authority.

RELOCATION OF THE MINOR CHILDREN

Since King Solomon was called upon to render the first reported child custody decision,[2] courts have struggled with the conflicting interests and emotions involved in custody disputes. In today's mobile society, courts are frequently faced with a circumstance in which the custodial parent, usually the mother, desires to relocate with the children to pursue an educational or career opportunity or to move with a new spouse. In these cases, the court not only must weigh the interests of the children, the primary interest to be considered, *Mize*, 621 So. 2d at 420, but also the interests of the custodial parent, who many times see a substantial advantage in relocation, *Hill v. Hill*, 548 So. 2d 705, 707 (Fla. 3d DCA 1989), *rev. denied*, 560 So. 2d 233 (Fla. 1990), and the interests of the noncustodial parent, who, as a result of a relocation, may effectively lose visitation rights and certainly may have greatly reduced contact with the children, *Mize*, 621 So. 2d at 425 (Shaw, J., concurring in result only). As our supreme court has noted, these conflicting interests give rise to issues that present "an impossible problem for the children, the parties, and the courts." *Mize*, 621 So. 2d at 420.

The *Mize* Decision

Our principal focus in reviewing the trial court's denial of the wife's request to relocate is the supreme court's decision in *Mize v. Mize*, *supra*. In *Mize*, the supreme court was called upon to review an order allowing a custodial parent and a seven year old child to move from Florida to California over the objection of the other parent, the natural father. The supreme court began its analysis by noting that Florida law presumes that both parents will participate in child-rearing after divorce. § 61.13(2)(b), Fla. Stat. The court acknowledged that courts both within and without Florida have grappled with the difficulty posed when the custodial parent seeks to remove a child from the area of the former marital home recognizing that "[t]here are an infinite number of situations that must be evaluated in light of the best interests of the families involved." 621 So. 2d at 419. While a bright line rule was found to be impractical, the supreme court nevertheless recognized the lack of consistency in decisions of the lower courts and a lack of guidance available to the lower courts and therefore adopted the approach established by the Third District Court of Appeal in *Hill v. Hill*, *supra*.

In *Hill*, the district court reversed an order denying a custodial parent's petition to relocate out-of-state.[3] Noting that a test of sorts had evolved from case law,[4] the court found that a petition for relocation should be considered using the following criteria:

> 1. Whether the move would be likely to improve the general quality of life 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, will be likely to comply with any substitute visitation arrangements.
>
> 4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the custodial parent.
>
> 5. Whether the cost of transportation is financially affordable by one or both of the parents.
>
> 6. Whether the move is in the best interests of the child.[5]

548 So. 2d at 706. Interestingly, the *Hill* court, in finding that the trial court erred, did not remand for consideration of the six factors but instead weighed these factors itself and found that relocation was erroneously denied.

Concurring in result, Judge Schwartz wrote separately in *Hill* to articulate his "own understanding of the underlying rule of law applicable to the present issue. . . ." *Id.* at 707. He concluded that:

> As I see it, it is simply that so long as the parent who has been granted the primary custody of the child desires to move for a well-intentioned reason and founded belief that the relocation is best for that parent's—and, it follows, the child's—well-being, rather than from a vindictive desire to interfere with the visitation rights of the other parent, the change in residence should ordinarily be approved.

Id. at 707-708 (footnotes omitted).

Judge Schwartz reasoned that this rule of law arises from the premise that since the best interests of the child "have already resulted in an award of custody to a particular parent . . ., it follows that the child should live wherever that residence may be rather than in what is by definition the less important location of the other parent." *Id.* at 708. In other words, ". . . the child should be placed with that parent whose custody has been deemed to forward his best interests even if that location does not happen to be Florida." *Id.* at n. 4.[6]

In *Mize*, the supreme court adopted the six factor analysis set forth in the *Hill* majority opinion. *Mize* began its discussion of *Hill*, however, by quoting the following passage from Judge Schwartz's *Hill* concurrence:

> [S]o long as the parent who has been granted the primary custody of the child desires to move for a well-intentioned reason and founded belief that the relocation is best for that parent's—and it follows, the child's—well-being, rather than from a vindictive desire to interfere with the visitation rights of the other parent, the change in residence should ordinarily be approved.

Mize, 621 So. 2d at 419, *quoting Hill*, 548 So. 2d at 707-8. By quoting this passage from the concurring opinion, *Mize* appears to be endorsing the view that a request to leave the jurisdiction should presumptively be approved. In fact, in his concurring opinion in *Mize*, Justice Shaw viewed the majority opinion as creating a "virtual per se rule favoring removal." 621 So. 2d at 422 (Shaw, J., concurring in result).

Yet, the *Mize* court does not expressly adopt a per se rule. Rather, the opinion expressly requires the courts of this state, when considering requests to relocate, to apply the *Hill* six-factor analysis to the facts of the case. When viewed as a whole,

however, the combination of the six-factor test and the language from the *Hill* concurring opinion seems internally contradictory.[7] In addition, since satisfaction of all six criteria seems difficult to achieve, how are the designated factors to be weighed? For example, if any factor is found wanting, does that mean that relocation must be denied?

Other courts have discussed this seeming internal conflict within *Mize*. In *Jones v. Jones*, 633 So. 2d 1096, 1098 n.2 (Fla. 5th DCA), *rev. denied*, 639 So. 2d 978 (Fla. 1994), the Fifth District, while reviewing an order prohibiting relocation, observed:

> In *Mize* the supreme court seems to have held that the six factors must be weighed in making the ultimate decision when there are circumstances which would justify a departure from the general rule that what is best for the relocating parent is best for the child. *It does not seem that a parent's well-being and a child's well-being necessarily go hand in hand, but quoting Judge Schwartz's Hill concurrence, the supreme court seems to have adopted this view.* We note that the first paragraph of the trial court's order constitutes a finding that [the interest's of the parent who seeks to relocate] and [the child's] well-being do not go hand in hand.

(Emphasis added).

Similarly, the court in *Tremblay v. Tremblay*, 638 So. 2d 1057 (Fla. 4th DCA 1994), suggested that the *Mize* court's adoption of the *Hill* factors and the quotation from Judge Schwartz's concurrence seemed to be a pairing of contrasting viewpoints; to wit:

> The adoption in *Mize* of the six factors to be considered in these cases did not significantly change the law in this district, since this court had previously utilized them. The adoption in *Mize* of what Judge Schwartz stated in his concurring opinion in *Hill*, however, does represent a significant change. It means that where the relocating parent is acting in good faith, permission to relocate should generally be granted; i.e., granting relocation becomes the proverbial rule, rather than the exception.

638 So. 2d at 1059 (citations omitted).

Despite the apparently conflicting references both to the *Hill* majority opinion and to Judge Schwartz's *Hill* concurrence, *Mize* does not strike us as creating a per se rule favoring relocation.[8] Reading *Mize* in its entirety to give meaning to the *Mize* court's adoption of both the *Hill* majority and concurring opinions, we believe *Mize* requires 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. Further, we believe that the presumption in favor of relocation expressed in *Mize* places a burden of proof on the parent opposing relocation. Accordingly, in relocation cases involving joint custody in which the marital settlement agreement and final judgment do not restrict relocation, we conclude that *Mize* requires the relocating parent first to establish that the relocation is not for a vindictive or improper motive and that the new location would offer a quality of life for the child at least equal to the child's quality of life in the present location. If 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. If the non-custodial parent cannot meet this burden, the relocating custodial parent should be permitted to move with the child.[9]

In addition, in considering the six *Hill* factors, the weighing of the factors should be undertaken by the trial court on a case-by-case basis, based on the particular facts of each case, with the primary concern being the best interests of the child or children. *Mize*, 621 So. 2d at 420. Circumstances such as the relationship between the parties and between each party and the children, the financial resources of the parties, the age of the children, the ability and willingness of the parties to assure adequate substitute visitation, and the family and community support systems and resources available to the children in each location will vary greatly from case to case. In addition, a factor that has a minor impact in one case may be the dominant factor in another. In our view, it is for the trier of fact to weigh and consider the facts of each case in the context of the six *Hill* factors.

The Trial Court's *Mize* Analysis.

In its order, the trial court below first correctly concluded:

> The *Mize v. Mize* decision is controlling in this matter and this Court must, in making the ultimate decision about relocation, consider and weigh the six factors set forth in *Hill v. Hill*, as adopted by the *Mize* decision. This Court's interpretation of the *Mize* decision is that the majority *Hill* decision was the ruling. This Court interprets *Mize* as meaning in weighing and balancing the criteria, if it is a close call, then the call must go in favor of relocation.

(Citations omitted).

The trial court then considered each *Hill* factor in detail.

General Quality of Life for Both Primary Residential Parent and Children. The trial court found that:

> [T]here is no question that the move would improve the general quality of life for Mrs. Steltenkamp. . . She would be reunited with her husband. She would be where she wants to be and she would be able to achieve what it is she wanted to achieve through the dissolution, and that is happiness, which is such an elusive and non-quantifiable quality but it is there.

Although the trial court concluded that the relocation would be "certainly a value to the blended family," the court expressly found that the quality of life of the children would not likely be improved by the relocation.

> The second aspect of this criteria though is whether it is likely to improve the general quality of life for the children. There are many advantages to Suffern, New York. The schools are good schools, there are many activities available, including the recreational aspects, track programs, the theater and the neighborhood. It is a good place. . . The issue is whether the move will improve the general quality of life for the children. The children are in a good situation right now. They are in good schools. They have been 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. The evidence does not support that the quality of life for the children will be improved. . . The court finds that this is not a factor that supports relocation for the children. It does for Mrs. Steltenkamp.

Motive for the Move. The trial court found that "[t]here has been no evidence here that [relocation] is for that express purpose [of defeating visitation]." The court expressed substantial concern, however, that the actions of Mrs. Steltenkamp in failing to inform Mr. Russenberger during the negotiation of the Marital Settlement Agreement that she could be moving when she knew the move was a possibility. The court concluded that Mrs. Steltenkamp kept the information from Mr. Russenberger to avoid the difficulty of having to litigate the relocation issue at the time the court was considering the dissolution and initial custody and visitation arrangements. As a result, the court concluded with respect to the second factor that "this Court does not find that the move was for the express purpose of defeating visitation, but the implication is that the impact would be that it would. Thus, I find this criterion somewhat neutral."

Compliance of Moving Parent with Substitute Visitation Arrangements. Based on the trial court's experience with and knowledge of the parties gained during the divorce, custody and relocation litigation, the court concluded that this factor weighed against allowing relocation. The court discussed in detail what it described as:

> [A] long-standing history of the inability of the parties to have a good relationship regarding the children and . . . a long-standing history of Mrs. Steltenkamp not encouraging the visitation,

following very much a precise schedule of visitation, but not allowing the small bits of flexibility that need to be there.

The court recited several examples of Mrs. Steltenkamp's ailure to communicate with Mr. Russenberger concerning the hildren after the date of the dissolution and her lack of encouragement of contact between the children and Mr. Russenberger. As a result, the court concluded:

> This court finds on the whole that it is highly questionable whether Mrs. Steltenkamp would be likely to comply with substitute visitation arrangements. It is not happening here in Pensacola. With Mr. Russenberger being out of town and not residing where Mrs. Steltenkamp resides, history dictates in this case that visitation would peter out.

Adequacy of Substitute Visitation. The trial court concluded that his factor also weighed heavily against allowing relocation, inding:

> [T]hat there is no adequate substitute visitation schedule which would promote a continuing meaningful relationship between the non-custodial parent, Mr. Russenberger, and the five minor children.

This conclusion was reached by the trial court after an analysis of arious circumstances, including the relationship between Mr. Russenberger and the five children and his involvement in their ctivities in Pensacola; the difficulty of the travel between Sufern and Pensacola on the weekends the children visited in Pensola; the limited length of time Mr. Russenberger would have vith each child under the proposed substitute visitation, given hat all five children would be visiting Pensacola at the same time eriod; the lack of a framework or home for visitation that would e conducive to effective visitation by Mr. Russenberger in New York; the fact that the financial and other burden of the proposed ubstitute visitation is "place[d] on Mr. Russenberger's shoulers when it is [Mrs. Steltenkamp's] decision to move", and the act that Mr. Russenberger would have a very limited opportuni y to play a role in the children's activities in New York.

Financial Affordability of Transportation. The trial court described the cost of transportation as an "easy" factor since "[t]he parties have stipulated that they can both afford it." As a result, the trial court concluded that "this factor favors relocation."

Best Interests of Children. The trial court recognized that "as the *Hill* majority opinion states, this is a generalized summary of the above five factors." Based on its analysis and balancing of the first five *Hill* factors, the trial court concluded that the move would not be in the best interests of the children. In reaching this conclusion, the trial court stated:

> This Court finds that it would not be in the children's best interest to allow the relocation. The evidence does not support relocation. The court finds that Mr. Russenberger has been active in the lives of all five children, at least since the parties' separation; he has consistently exercised alternate weekend visitation with all five children, plus one day each week with at least the younger children; he has participated in their extracurricular activities in a consistent fashion; the children's extracurricular activities have become a part of the children's weekend visitation schedule so that the children's separate lives are not disrupted by the visitation schedule; the visitation which now occurs between Mr. Russenberger and the children is beneficial. The visitation would not continue should the children move from the Pensacola area. It is in the best interest of all five children that Mr. Russenberger continue to play an active weekly role in their lives.

The Standard of Review.

The *Mize* court did not articulate the standard of review to use in cases such as the one before us. We are of the view that our role is to determine whether the lower court applied the correct law under *Mize* and whether the lower court abused its discretion, that is, whether there is a logical and reasonable resolution of the *Hill* factors, supported by competent and substantial evidence. *Dinkel v. Dinkel*, 322 So. 2d 22 (Fla. 1975) (in a child custody proceeding, the lower court's decision will be affirmed if the court's findings are supported by competent, substantial evidence; a custody decision made upon findings which are not supported by competent and substantial evidence constitutes an abuse of discretion); *see also*, *Jones v. Jones*, 633 So. 2d 1096 (Fla. 5th DCA 1994) (since trial court correctly applied the *Hill* test, the standard of appellate review is whether the trial court abused its discretion).

The trial court below expressly examined each of the *Hill* factors, and thereafter, concluded that moving the Russenberger children to New York would not be in the children's best interest. Although there was conflicting evidence with respect to virtually all of the issues before the trial court, and we may have reached a different result had we served as trier of fact, our review of the record establishes clearly that there is competent and substantial evidence to support the findings of the trial court and that the trial court correctly interpreted and reasonably applied the law. As a result, we find no basis to disturb the trial court's order. In affirming, we are particularly influenced by the fact that the trial judge has been involved with these parties and the children for some time, has presided over several evidentiary hearings in this case, and thus, is quite familiar with the competing facts and claims. Further, the lower court's order indicates the careful consideration given to the complex and difficult issues presented in this case.

> [W]ho but the wisest among us, except in the clearest of cases, could divine what may be in the best interests of the children? The master and trial judge have done the best they could and I do not believe we should interfere. In doing so we are simply substituting our opinion on an issue which the triers of fact, by reason of their first hand contact with the situation, are uniquely suited to resolve.

Costa v. Costa, 429 So. 2d 1249, 1255 (Fla. 4th DCA 1983) (Anstead, J. dissenting) (citation omitted).

IMPOSITION OF A STANDARD VISITATION SCHEDULE

As noted above, Mrs. Steltenkamp also challenges the lower court's decision to impose on the parties a standard visitation schedule. According to Mrs. Steltenkamp, the imposition of this standard visitation schedule was erroneous because it amounts to a modification of the final judgment of dissolution when there has not been a substantial change of circumstances shown to justify modification.

Principal among the cases cited by Mrs. Steltenkamp in support of this argument is *Buttermore v. Meyer*, 559 So. 2d 357 (Fla. 1st DCA 1990). In *Buttermore*, a former husband sought modification of a final judgment which granted residential custody of the minor children to the former wife subject to "reasonable visitation" to be exercised by the former husband. Modification was sought apparently because the parties had differing views as to what constituted reasonable visitation. Noting that the order on appeal was an order granting a motion for modification, this court referred to the well-established rule that modification may be granted only upon a showing that a substantial and material change in circumstances has occurred. *See*, for example, *Zediker v. Zediker*, 444 So. 2d 1034 (Fla. 1st DCA 1984).

The record in the instant case reflects that a motion for modification had been filed, but apparently, the lower court was not ruling upon this motion specifically when the standard visitation schedule was implemented. We are not inclined to reverse on this point however. We must concede that by imposing the standard visitation schedule, the lower court imposed specific burdens that were not previously present. Nevertheless, in view of the fact that both parties were seeking residential custody of the children, we find that the issue of visitation was, by consent of the parties, an issue before the court.

For the reasons expressed above, the order denying the request for psychological evaluations and the order prohibiting relocation and imposing a standard visitation schedule are

AFFIRMED. (KAHN and MICKLE, JJ., CONCUR.)

[1]Under the marital separation agreement, Mr. Russenberger was entitled to visitation "every other weekend and such other times as the parties can agree." During the relocation litigation, Mr. Russenberger requested an extended period of summer visitation and Mrs. Steltenkamp proposed a substitute visitation schedule that would govern visitation in the event the relocation was approved by the trial court. In the proposed schedule, Mr. Russenberger generally would have been entitled to visitation (i) every other weekend, with alternating visitation weekends being exercisable in Pensacola and within the state of New York; (ii) alternating Easter, Christmas, and Thanksgiving holidays; (iii) Father's Day weekend; (iv) every spring school break; and (v) five continuous weeks during the summer vacation period.

[2]"And the King said, 'Divide the living child in two, and give half to one, and half to the other' . . . And all Israel heard of the judgment which the King had judged; and . . . they saw that the wisdom of God was in him, to administer justice." 1 Kings 3:25, 28 (King James).

[3]In *Hill*, a mother who was given primary residential custody of a then six year old boy sought to leave Miami with the child and relocate to Alabama. It is significant that in *Hill*, neither parent was originally from Florida, and the family had only moved to this state in 1984, when the husband obtained a job in Miami and therefore moved the family from Alabama to South Florida. The child was born in Alabama, and all relatives—with the exception of the father who continued to work in Miami—lived either in Alabama, Georgia or Tennessee. 548 So. 2d at 706.

[4]The *Hill* court specifically cited the Florida cases of *Matilla v. Matilla*, 474 So. 2d 306 (Fla. 3d DCA 1985), *Costa v. Costa*, 429 So.2d 1249 (Fla. 4th DCA 1983), and *DeCamp v. Hein*, 541 So. 2d 708 (Fla. 3d DCA 1989), *rev. denied*, *Hein v. DeCamp*, 551 So. 2d 461 (Fla. 1989); and the landmark New Jersey case of *D'Onofrio v. D'Onofrio*, 144 N.J. Super 200, 365 A. 2d 27 (N.J. Super. Ct. Ch. 1976), *aff'd*, 144 N.J. Super 352, 365 A. 2d 716 (N.J. 1976). 548 So. 2d at 706. Although *Hill* and *Mize* derived their six factor test from the four factor test in *D'Onofrio*, and *D'Onofrio* continues to be followed by other jurisdictions in relocation cases, *see Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (Ark. Ct. App. 1994), the *D'Onofrio* holding has been substantially modified by the New Jersey Supreme Court. *Holder v. Polanski*, 111 N.J. 344, 544 A. 2d 852 (N.J. 1988); *see* D. Manz and J. Bennett, Jr., *Mize: Florida's Disenchanted Response to the Relocation Dilemma*, 68 Fla. B. J. 53, 55-57 (Dec. 1994).

[5]Both the *Hill* court and the *Mize* court viewed the sixth factor as a "generalized summary of the previous five." *Hill*, 548 So. 2d at 706; *Mize*, 621 So. 2d at 420.

[6]Notwithstanding this recognition of the premise that the interests of the relocating parent and child are uniform, commentators remain in substantial disagreement as to whether a child's best interests are necessarily satisfied when the best interests of the custodial parent are served. For example, *compare*, J. Horne, *The Brady Bunch and other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 Stan. L. Rev. 2073, 2110 (1993) ("Regardless of what a judge may think of a parent's reasons for moving, if the move improves the parent's situation—including his emotional situation—it may ultimately be in the child's 'best interests' regardless of the parent's motives.") with P. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. Fam. L. 625, 656 (1985-6) ("It is rarely in the child's best interest to change geographical locations subsequent to a divorce, regardless of the fact that the parent with whom the child is primarily residing may feel more self-satisfied after the move.")

[7]For example, a multiple-factor test, strikingly similar to the *Hill* factors, adopted by the Illinois Supreme Court in *In Re Marriage of Eckert*, 119 Ill.2d 316, 518 N.E.2d 1041, 1045-1046 (Ill. 1988), has been described as subscribing to a "presumption against the right to remove a minor child. . . ." Linngren, *The Feuding Fortins: South Dakota Adopts A Presumption in Favor of the Custodial Parent's Right to Remove a Minor Child from the Jurisdiction in Fortin v. Fortin*, 39 S.D.L.Rev. 661, 674 (1994). Given the *Mize* court's adoption of the language from Judge Schwartz's *Hill* concurrence in conjunction with the six-factor test, obviously *Mize* cannot be said to give rise to a presumption against relocation.

[8]We recognize that our reading of *Mize* may conflict with the reading given *Mize* by our colleagues of the Fourth District. *See*, *Tremblay v. Tremblay*, *supra*.

[9]In this ruling, we are guided by the approach taken by courts in other jurisdictions which, like *Mize*, have adopted a presumption in favor of the right to relocate. In those jurisdictions, if the relocating parent shows that the proposed move is not for an improper purpose, this presumption is deemed to impose a burden of proof on the non-relocating parent to establish that the move is inconsistent with the child's best interests. *See*, *e.g.*, *Auge v. Auge*, 334 N.W. 2d 393, 398-399 (Minn. 1983) (motion to permit relocation shall be granted, unless the party opposing the move establishes by a preponderance of evidence that the move is not in the best interests of child); *In re Marriage of Lower*, 269 N.W. 2d 822 (Iowa 1978) (burden of proof should be on party opposing relocation to show that the move is not in the best interests of the child).

* * *

Workers' compensation—Wage loss benefits—Error to award wage loss benefits for period where claimant did not file claim covering the period—Claimant was excused from conducting work search for certain period because record failed to prove that he had requisite knowledge of the statutory requirements—Fact that claimant performed work search did not establish that claimant had actual knowledge of statutory requirements for work search

MAC PAPERS, INC., and ASSOCIATED INDUSTRIES OF FLORIDA, Appellants, v. ARMANDO CRUZ, Appellee. 1st District. Case No. 92-1856. Opinion filed April 17, 1995. An appeal from an order of the Judge of Compensation Claims Henry H. Harnage. Counsel: Ivette E. Linares of Reinert, Perez & Goran, P.A., Coral Gables, for Appellants. Jay M. Levy, P.A. and De Cardenas & Freixas, Miami, for Appellee.

(PER CURIAM.) Employer and Carrier, Mac Papers, Inc. and Associated Industries of Florida (E/C), seek reversal of a workers' compensation order that awards Claimant, Armando Cruz, wage-loss benefits from June 28, 1991, through July 8, 1991, and from July 23, 1991, through August 19, 1991. We affirm in part, reverse in part, and remand.

The Judge of Compensation Claims (JCC) found that during the temporary partial disability period from June 28, 1991, through July 8, 1991, Claimant worked in a light-duty capacity and awarded wage-loss benefits subject to appropriate offset, if any.[1] He further found that on July 3, 1991, Employer offered Claimant a light-duty job. However, on July 8, 1991, when Claimant had returned to work for Employer, he suffered an exacerbation and returned to see his authorized physician, who took Claimant off work until July 23, 1991. Accordingly, Carrier paid temporary total disability from July 9 through July 22, 1991. Employer also sent Claimant a letter on July 24, 1991, advising him that a job was available within his restrictions. The letter, however, was sent to an incorrect address and Claimant did not receive the letter until August 19, 1991. Based on these facts, the JCC ruled that "[s]ince the Employer/Carrier did not definitely notify the Claimant (subsequent to the two week period of temporary total disability [7/9/91 - 7/22/91]) that any light duty job was still open, I find that the Claimant is entitled to wage loss benefits from the period of July 23, 1991 to August 19, 1991 when he was unarguably notified that a job was available."

The E/C, arguing for reversal of the award for the period June 28 through July 8, 1991, assert there is no evidence that Claimant actually was working in a light-duty capacity at this time and that Claimant did not file a wage-loss request or conduct a work search for this period. Claimant concedes that wage-loss benefits were improperly awarded for the period June 28, 1991, through July 3, 1991, because no claim was filed covering this period. As for the period July 4 through July 8, Claimant contends that he is entitled to benefits because he was relieved of the obligation to perform a good-faith search once he was offered a light-duty job on July 3 and that he was not able to report to work until July 8 because of the intervening July 4 holiday. We need not consider whether the offer of a job relieved Claimant of the obligation to perform a work search. We conclude that Claimant was excused from conducting a work search because the record failed to prove that he had the requisite knowledge of this statutory requirement, as discussed below. Accordingly, we affirm this award.

We likewise affirm the wage-loss benefits awarded for the period commencing July 23, 1991, through August 19, 1991. Although the record establishes that Cruz performed a work search, of sorts, after his treating physician took him off temporary total disability status on July 23, his search was confined to applying for positions as a truck driver, employment that he had performed before his industrial injury. The JCC found that in applying for these positions Claimant had applied for work that was beyond his capacity to perform due to limitations placed upon him by his physician. However, the JCC also found that the E/C failed to notify Cruz of the availability of a job within his restrictions until August 19, 1991, so the JCC excused the work-