OA 12-6-95 017

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

FILED
SID J. WHITE
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PETITIONER'S MERITS BRIEF

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

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STATEMENT OF THE CASE AND FACTS

Cindy Steltenkamp and Ray Russenberger were married on July 31, 1976 in New Orleans, Louisiana. R - 4 : 449. They have five children. The oldest child has reached the age of majority. The other children are now 16, 8, and 7.

The parties' marriage was dissolved on January 5, 1993 by a Final Judgment of Dissolution of Marriage. The Final Judgment incorporated the parties' marital settlement agreement dated December 22, 1992. A copy of the final judgment is attached hereto as Exhibit "1". (A - 1). The marital settlement agreement provided as follows:

> IV. Custody:
>
> The Husband and Wife agree 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 did not contain a restriction prohibiting relocation.

The parties were separated for an extended period of time prior to execution of the settlement agreement. In August of 1987, Mrs. Steltenkamp and the children moved to Pensacola from Lafayette, Louisiana. R - 5: 591. Mr. Russenberger remained in Lafayette for eighteen months. R - 5: 591 - 592. After Mr.

Russenberger moved to Pensacola, the parties experienced marital difficulties and separated two or three times. Their final separation occurred in February of 1991. R - 5: 593 - 594. The parties were able to work out visitation during the separation periods. The first visitation problems voiced by Mr. Russenberger occurred when Mrs. Steltenkamp announced her decision to relocate.

During the marriage and during the separation, Mrs. Steltenkamp was primarily responsible for the day to day activities of all five children. Mr. Russenberger acknowledged that he had little involvement in the children's lives. D - 15: 20. The trial court's order denying Mrs. Steltenkamp's request to relocate provides that Mr. Russenberger became active in the lives of all five children after the parties' separation. The court found that Mr. Russenberger consistently exercised alternating weekend visitation with all five children, plus one day each week with at least the three younger children. A copy of this Order is attached hereto as Exhibit "2". (A - 2).

Mrs. Steltenkamp married Mike Steltenkamp on May 29, 1993. Mike Steltenkamp holds a Ph.D. in chemistry from Georgia Tech and is a scientist employed by Champion. R - 4: 430 - 431. Until January of 1993, Dr. Steltenkamp was based out of the Champion Pensacola office. In September of 1992, Dr. Steltenkamp accepted a transfer to New York as department leader responsible for

corporate research in the area of product development. R - 4: 434, 438. The Champion corporate offices are located in Stanford, Connecticut and the corporate research department is located in West Nyack, New York. R - 4: 433.

Dr. Steltenkamp and Cindy Russenberger purchased a home in Suffern, New York prior to their marriage. Dr. Steltenkamp moved into the home and Mrs. Steltenkamp and the children continued to live in Pensacola, Florida.

Both Mrs. Steltenkamp and Mr. Russenberger are well off financially. Mr. Russenberger's personal financial statement dated June 30, 1993 indicates a gross annual income of $554,500. See Exhibit 23 of Respondent/Former Wife's Trial Exhibits. Mrs. Steltenkamp, with the payment of interest, child support, and lump sum alimony payments has a gross monthly income of $21,908.00. See Exhibit 21 of Respondent/Former Wife's Trial Exhibits.

After deciding to marry, Mrs. Steltenkamp, through her attorney, informed her former husband that she intended to move to Suffern, New York with the children. In response, on April 5, 1993, Mr. Russenberger obtained a temporary injunction prohibiting the move. At the time of the temporary injunction hearing, Dr. Steltenkamp and Cindy Russenberger had not closed the sale of the Suffern home. In the temporary injunction order, the trial court indicated that Ms. Russenberger could proceed with the purchase of

the home. The final hearing consisted of three days of testimony. In addition, eighteen depositions were introduced into evidence. After hearing the testimony, the trial court granted Mr. Russenberger's request to modify the Final Judgment by imposing a restriction on relocation and enjoined Mrs. Steltenkamp from removing the children from the Pensacola area without court approval.

A timely appeal to the first district court of appeal followed. The district court opinion reviews the trial court decision in light of Mize v. Mize, 621 So. 2d 417 (Fla. 1993). The first district pointed out that Mize relies upon both the Hill majority opinion and Judge Schwartz's Hill concurrence. By quoting Judge Schwartz's Hill concurrence, the first district concluded that Mize "appears to be endorsing the view that a request to leave the jurisdiction should presumptively be approved." Id. at 419. Next, the first district acknowledged that Mize also requires a review of the Hill six factor test. At that point, the first district stated that "when viewed as a whole, however, the combination of the six factor test and the language from the Hill concurring opinion seems internally contradictory." Id. at 213. After acknowledging these contradictions, the first district determined that Mize does not create a per se rule in favor of removal and determined that a trial court must permit relocation if

a review of the Hill factors shows that relocation will be in the best interests of the children. Next, finding that the trial court did not abuse its discretion and that the Hill factors supported the trial court's decision, the appellate court affirmed the trial court's decision denying Mrs. Steltenkamp's request to leave the jurisdiction. This appeal timely followed.

References to the record will be identified as follows:

R - 1: Volume I, Final Hearing, December 13, 1993.
R - 2: Volume II, Final Hearing, December 13, 1993.
R - 3: Volume III, Final Hearing, December 14, 1993.
R - 4: Volume IV, Final Hearing, December 14, 1993.
R - 5: Volume V, Final Hearing, December 15, 1993.
R - 6: Volume VI, Final Hearing, December 15, 1993.
R - 7: August 5, 1993 hearing.
R - 8: July 13, 1993 hearing on Motion for Determination of Summer Visitation.
R - 9: March 17, 1993 hearing on Motion for Temporary Injunction.
R - 10: August 27, 1993 judge's ruling.
D - 11: Deposition of Mike Steltenkamp, March 31, 1993.
D - 12: Deposition of Mike Steltenkamp, July 16, 1993.
D - 13: Deposition of Cynthia L. Russenberger, May 6, 1993.
D - 14: Deposition of Cynthia L. Steltenkamp, August 3, 1993.
D - 15: Deposition of Ray Dean Russenberger, November 10, 1993.
D - 16: Deposition of Ray Dean Russenberger, July 7, 1993.
D - 17: Deposition of Tina Bessinger, Ph.D., July 27, 1993.
D - 18: Deposition of Michael DeMaria, Ph.D., November 23, 1993.
D - 19: Deposition of James Larson, Ph.D., August 16, 1993.
D - 20: Deposition of R. Scott Benson, M.D., August 17, 1993.
D - 21: Deposition of James Blasie, July 29, 1993.
D - 22: Deposition of Eugene Pettis, August 3, 1993.
D - 23: Deposition of Sister Kierstin Martin, August 2, 1993.
D - 24: Deposition of Marleen Feigenbaum, June 25, 1993.
D - 25: Deposition of Andrew Witt, August 17, 1993.
D - 26: Deposition of Joseph Biddy, July 29, 1993.

D - 27: Deposition of Guy Guccione, July 29, 1993.
D - 28: Deposition of Margot Bohlin, June 24, 1993.
R - 29: December 17, 1993, judge's ruling.

SUMMARY OF ARGUMENT

Mrs. Steltenkamp proposes a new relocation standard that will result in uniformity and guidance throughout the state. Mrs. Steltenkamp's proposal acknowledges the Mize presumption in favor of removal. With this presumption in mind, the trial court should review certain issues to fully evaluate the relocation request. First, the court should determine whether the custodial parent has a sincere, good faith reason for moving from the jurisdiction. If the custodial parent cannot show a sincere, good faith reason for the requested relocation, the analysis should stop and the parent's removal request should be denied. If, however, the custodial parent is able to illustrate a sincere, good faith reason for the move, the court should next consider whether the move will negatively impact upon the best interests of the children. The burden should be placed on the noncustodial parent to show a negative impact. Next, the court should consider whether the move will adversely affect the visitation rights of the noncustodial parent. This portion of the analysis should focus upon whether the children will suffer from the move, as opposed to whether visitation will simply be changed. It should be presumed that changes in visitation will be necessary in the majority of cases.

When this test is applied to the facts of Russenberger, the evidence overwhelmingly supports a finding that Mrs. Steltenkamp should be permitted to move to New York to be reunited with her husband.

If the new test is not adopted, and this court continues to utilize the Hill six factor test, the evidence also supports a finding in favor of relocation. The trial court decision denying the relocation request is in error. A move to Suffern, New York will allow Mrs. Steltenkamp to be reunited with her husband. It will allow Dr. and Mrs. Steltenkamp to establish a blended family environment. As long as the parties are willing to work together, a positive meaningful relationship can be fostered and maintained between Mr. Russenberger and the children. Mrs. Steltenkamp has indicated her willingness to encourage a positive relationship between Mr. Russenberger and the children, and under these circumstances, she should be permitted to move to Suffern, New York. The evidence overwhelmingly supports a conclusion that the motivation for the request is based upon a well-intentioned belief that relocation is best for Mrs. Steltenkamp. The evidence also overwhelmingly shows that the move is not motivated by a vindictive desire to interfere with the visitation rights of Mr. Russenberger.

In short, whether the new test proposed by Mrs. Steltenkamp is applied, or the old test is utilized, the first district should be

instructed to reevaluate its opinion affirming the trial court decision. This reevaluation will result in a reversal of the trial court decision denying Mrs. Steltenkamp's request for relocation.

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, 365 A.2d 27 (1976). LEADING RELOCATION CASE.

The New Jersey district court opinion, D'Onofrio v. D'Onofrio, 365 A.2d 27 (1976) is the case most often cited nationwide for its relocation analysis. The D'Onofrio court held that the custodial parent must demonstrate that a "real advantage" will result from the relocation with the children. Id. at 30. In order to determine "real advantage", the court directed the trial courts to consider the following:

1. Likely capacity for improving the general quality of life for both the custodial parent and the children.

2. Evaluation of motives to determine whether the removal request is inspired primarily by a desire to defeat visitation.

3. Whether the custodial parent is likely to comply with

substitute visitation.

4. The noncustodial parent's motives in resisting the removal with attention to financial considerations.

5. Whether there will be a realistic opportunity for visitation to preserve and foster the parental relationship with the noncustodial parent.

Id. at 30.

Under D'Onofrio, if the custodial parent could meet the "real advantage" test, the court noted that the move should not be prohibited simply because of the failure to maintain weekly visitation. Id. at 30. In support of this position, the court argued that longer uninterrupted visits requiring exclusive parental contact may serve the noncustodial relationship better than the typical weekly visitation which involves little responsibility. Id. at 30. The court also pointed out that since the noncustodial parent is free to leave the jurisdiction to seek better opportunities at any time, the custodial parent should be given the same opportunity.

> The custodial parent, who bears the essential burden and responsibility for the children, is clearly entitled to the same option to seek a better life for herself and the children, particularly where the exercise of that option appears to be truly advantageous to their interests and provided that the parental interest can continue to be accommodated, even if by a different visitation arrangement than theretofore.

Id. at 30.

After applying this test, Mrs. D'Onofrio was allowed to relocate from New Jersey to South Carolina.

B. ADOPTION OF D'ONOFRIO IN FLORIDA.

In 1985, Florida's third district court of appeal endorsed the D'Onofrio analysis. Matilla v. Matilla, 474 So. 2d 306 (Fla. 3rd DCA 1985). Prior to the Matilla decision, Judge Anstead relied upon D'Onofrio and several other cases from Michigan, New York, Massachusetts, and North Dakota in his Costa v. Costa, 429 So. 2d 1249 (Fla. 4th DCA 1983) dissent. [1]

As Judge Anstead explained:

> The gist of the holdings in these cases is that the court should utilize other means, such as increased summer visitation or a shift in the financial burden of visitation, to deal with the problem and reserve the power to bar moves for the extreme case.

Id. at 1254.

Florida law further evolved in 1989 in DeCamp v. Hein, 541 So. 2d 708 (Fla. 4th DCA 1989). In DeCamp, the fourth district adopted the D'Onofrio test, and added two requirements. The two new requirements included a consideration of i) the costs of transportation, and ii) the best interests of the children. Later

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[1] D'Onofrio v. D'Onofrio, 144 N.J.Super. 200, 365 A.2d 27 (1976) aff'd, 144 N.J.Super. 352, 365 A.2d 716 (1976); Henry v. Henry, 119 Mich.App. 319, 326 N.W.2d 497 (Mich.App. 1983); Martinez v. Konczewski, 85 A.D.2d 717, 445 N.Y.S.2d 844 (1981); Hale v. Hale, 429 N.E.2d 340 (Mass.App.1981); Burich v. Burich, 314 N.W.2d 82 (N.D.1981).

that same year, the third district adopted the Matilla-DeCamp analysis and set the framework that this court adopted in Mize v. Mize, 621 So. 2d 417 (Fla. 1993). See Hill v. Hill 548 So. 2d 705 (Fla. 3rd DCA 1989).

Prior to the Mize Supreme Court decision, several Florida district courts addressed the relocation issue. Relocation law was confused and unclear. The confusion was addressed by Judge Anstead in Ferguson v. Baisley, 593 So. 2d 319 (Fla. 4th DCA 1992). Judge Anstead noted that relocation was a legal issue of great public importance requiring resolution by the state supreme court. He stressed that uniformity and clear guidelines were needed to assist the courts in relocation cases. The Ferguson dissent also is important inasmuch as it summarizes the key factors of Judge Schwartz's Hill concurring opinion. Judge Anstead explained that Judge Schwartz's Hill concurrence establishes the proper groundwork for the consideration of a relocation request. This groundwork includes the following:

1. The relocation should ordinarily be approved if it is supported by a well-intentioned reason and not for a vindictive desire.

2. Children should live wherever the residence of the primary residential parent is located rather than by definition the less important location of the other parent.

3. To favor the home of the visitor (noncustodial parent) over the custodial parent is wholly misguided. This is particularly unjustified if the noncustodial parent is financially able to visit.

4. Since it is the child's welfare that is the concern, it make more sense to require the noncustodial parent to move.

Id. at 320.

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

Shortly after Judge Anstead raised the relocation issue as an issue of great public importance, the supreme court issued its first opinion on this issue. Mize v. Mize, 621 So. 2d 417 (Fla. 1993). Mize successfully eliminated the line of district court decisions that found a presumption against removal. Unfortunately, however, Mize has provided limited and confusing guidance to the district and trial courts. The decision itself is inconsistent inasmuch as it appears to adopt the Hill six factor test while also adopting Judge Schwartz's Hill special concurrence. Judge Schwartz's special concurrence argues that the home of the residential parent, whether or not in Florida, is the most appropriate home for the children. The home of the primary residential parent will best serve the children's interest. He states:

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 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 419.

This conclusion acknowledges that after a divorce two new family units are created. In one of those family units a parent has been designated as a primary residential parent and the other parent has been designated as the secondary residential parent. When considering the best interests of the children, the primary physical family relationship must be viewed as the family central and most important to the child's best interests. The primary physical family supplies the day to day routine for the child and the day to day emotional interaction for the child. These everyday ordinary contacts will form the child's character, psychological health, and value system. The family of the noncustodial parent will continue to be important to the child, however, the nature of that relationship will necessarily be different in that it is less intense and not as formative or influential as the home of the primary parent.

In short, Judge Schwartz's concurring opinion, as adopted by this court in Mize, provides a framework that will generally result in approval of a custodial parent's relocation request. In

general, as long as the decision is for a well-intentioned reason and not simply to interfere with visitation, the request should be approved. This presumption acknowledges that the primary residential parent has already been designated as the parent best equipped to serve the children's best interests.

The difficulty with Mize arises when the court then adopts the Hill majority decision requiring a review of six factors. Application of these six relocation factors will quite likely result in a decision denying a removal request, whereas the general rule presented by Judge Schwartz provides that the move should be allowed in most all cases. Furthermore, the trial courts and the district courts of appeal are indecisive as to how much weight to place upon each of the six factors and whether all six factors must be in favor of removal before the parent should be allowed to move.

First, it would be helpful to review each of the six factors. The first factor requires an analysis of whether the move will improve the quality of life for both the primary residential parent and the children. This factor directly conflicts with Judge Schwartz's concurrence. Judge Schwartz's concurrence simply provides that as long as the primary parent desires to move for a well-intentioned reason indicating that relocation is best for that parent's well-being, and not for a vindictive desire, it should be approved. Judge Schwartz's statement and his concurring opinion do

not require an analysis of whether the move would be "likely to improve the general quality of life" for the residential parent and the child. Furthermore, this factor has been interpreted by some courts, including the trial court in the Russenberger case, to require an analysis of whether the move will improve the quality of life of both the primary residential parent and the children. Judge Schwartz's statement on the other hand, provides that the child's well-being will naturally coincide with the parent's well-being. Also, requiring a showing that the move will improve the quality of life for the children is absurd and senseless in the framework of a family law matter. Evidence as to "quality of life" often results in lengthy trials dealing with intangible issues. How can it really be determined whether the "quality of life" will improve? In response to this factor, litigants provide endless evidence comparing school districts, crime statistics, cultural opportunities, etc. In this case alone, eight depositions, some even in New York, were actually taken on this issue. This money could be spent much more productively. In this light, it must be acknowledged that the quality of the child's life should not be determined by a comparison of cities. The physical locale is not important. Quality of the home environment must be evaluated based upon the parenting strengths of the custodial parent. Either by agreement or by a prior court decision, it has already been

determined that the primary residential parent can provide a better quality of life for the child. Since every custody decision requires a determination of which parent will best serve the child's interests, the child's quality of life will be maintained if that parent maintains custody.

Factor number two requires an analysis of "whether the motive for seeking the move is for the express purpose of defeating visitation." Both the concurring opinion and the factors require a review of this issue.

The third factor is "whether the custodial parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements." This factor is not mentioned in Judge Schwartz's concurring opinion. In fact, this factor should not be a consideration since visitation can be enforced uniformly throughout the country. If a custodial parent does not comply with the visitation requirements, the noncustodial parent can enforce the final judgment in any state. Furthermore, Florida will retain jurisdiction to enforce its own judgment as well.

The next factor requires a consideration of "whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the noncustodial parent." Once again, Judge Schwartz makes it extremely clear that the children should live wherever the

residence of the primary residential parent is located rather "than by definition the less important location of the other parent." Also, D'Onofrio, upon which Hill and Mize were based, noted that longer visits in which the noncustodial parent has more responsibility, may actually be more beneficial than short frequent visits.

Next, the Court is required to consider "whether the cost of transportation is financially affordable by one or both of the parents." Judge Schwartz did not require a finding on this issue. This factor can typically be addressed, even if the parents are not financially well off, by reducing the child support to assist with the costs of transportation.

The six factor test places the rights of the secondary residential parent on par with the primary residential parent and will quite likely result in a decision denying a removal request. Even though it is an admirable goal to give the noncustodial parent equal consideration, this test ignores the fact that the primary residential parent has the majority of the responsibility for the children. Clearly, the rights of the secondary parent should be considered. But, it must be acknowledged that in every single divorce the rights of the secondary parent will be altered. Relocation will simply require an additional adjustment in those rights. A relocation request should not be denied because it will

affect visitation rights. Unfortunately, the six factor test provides a trial court, as illustrated in Russenberger, with the framework to deny relocation by simply finding that the quality of life will not be improved and that visitation will be inadequate. Russenberger, and all the other decisions denying removal, fly in the face of this court's initial stated preference in favor of removal by the custodial parent.

In short, the contact between a parent and a child will never be the same after a divorce. Considering that we live in an extremely transient society, it is unrealistic to suggest that a custodial parent must stay in the same locale as the noncustodial parent simply because visitation will be further altered by a move. For these reasons, the relocation test as articulated in Mize, fails to provide adequate and consistent guidance to the trial courts.

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

The review of Mize in the section above, explains the two competing forces within the decision. To summarize, first, the decision supports a virtual per se rule in favor of removal by quoting Judge Schwartz's concurring opinion in Hill. Next, however, by utilizing the Hill majority, the court requires a different test that promotes decisions in favor of non-removal. In light of this confusion, Mrs. Steltenkamp suggests that this court

adopt a new relocation test for use in the State of Florida.

In fact, since D'Onofrio, New Jersey has substantially revised its relocation test. Holder v. Polanski, 544 A.2d 852 (1988). The fundamental change in New Jersey's analysis is that the emphasis is not now on "whether the children or custodial parent will benefit from the move, but on whether the children will suffer from it." Id. at 857. It is without question that the D'Onofrio analysis, which was adopted by this court in Mize, has been substantially modified by the New Jersey Supreme Court. The New Jersey courts no longer focus on whether the move will improve the quality of life for the primary residential parent. The test properly focuses on whether the children's quality of life will be compromised and suffer as a result of the move. The primary residential parent is no longer required to show a real advantage to the move, or that the children's quality of life will improve.

Mrs. Steltenkamp suggests that this approach is much more reasonable and workable in the relocation arena. It also appears that Mize intended to adopt a less restrictive standard generally favoring removal.

II. PROPOSED RELOCATION STANDARD.

The groundwork provided by this court in Mize sets the stage for Mrs. Steltenkamp's proposed relocation standard. Specifically, Mize provides a general rule in favor of removal. After reviewing

decisions from several states, including the changes in New Jersey law, Mrs. Steltenkamp presents the following suggestion for future review of a custodial parent's relocation request. First, the court should determine whether the custodial parent has a sincere, good faith reason for moving from the jurisdiction. If the custodial parent cannot show a sincere, good faith reason for leaving, the analysis should stop and the parent's removal request should be denied. If, however, the custodial parent is able to illustrate a sincere, good faith reason for the move, the court should next consider whether the move will negatively impact upon the best interests of the children. Obviously, the burden will be on the noncustodial parent to show a negative impact. Negative impact will not concern visitation rights. By framing the issue in this manner, the custodial parent will be relieved of the burden to prove that the move will improve the quality of life for the custodial parent and the child. In return, it will affirm that the quality of life chosen in the original custody decision will be maintained for the child. As explained previously, the quality of life consideration is unnecessary since it was previously determined, whether by court order or agreement, that the child's quality of life will be best served by residing with the custodial parent. Facts proving negative impact will vary and will depend on the circumstances of each case.

Next, the court should consider whether the move will adversely affect the visitation rights of the noncustodial parent. As explained previously, the divorce has already changed the parent-child contact. Furthermore, it must be acknowledged that most relocations will require a modification of the prior visitation arrangements. For these reasons, the court should review the situation to see whether the move will adversely impact the visitation. The analysis should focus upon whether the children will suffer from the move, as opposed to whether the visitation will simply be changed. It will be presumed that changes in the visitation will be necessary in the majority of the cases. Simply eliminating weekly contact or every other week contact should not provide a significant reason to deny a relocation request. Also, when making the final consideration, it will be reasonable for the court to evaluate the financial circumstances of the parties when considering the impact upon visitation.

The following benefits will result from use of the above test:

1. In the majority of the cases it will allow the custodial parent the same freedom to relocate for better opportunity as the noncustodial parent. Since the custodial parent was previously determined to be the parent best equipped to serve the interests of the children, this decision best promotes the further interests and

well-being of the children.

2. This test eliminates the former requirement that the custodial parent prove that the move will improve the quality of life for that parent and the child. As mentioned previously, this requirement is extremely costly, time consuming, and close to impossible to prove. How can a parent prove that life in Chicago will actually be better than life in Tallahassee? Once again, one must assume that the child's best interests will be served by living with the custodial parent. If the custodial parent is happier in their environment, the child's best interests will be served.

3. Moves will not be allowed unless the parent has a sincere, good faith reason for the move. Only then, will relocation be allowed.

4. An analysis of whether the children will suffer from the move is a more realistic approach. If the custodial parent is acting in good faith, the children's best interests should be promoted. In the event, however, a noncustodial parent is able to show that the children will actually suffer from the move, it should be irrelevant that the custodial parent has a sincere, good faith reason to move. When it is proven that the children will suffer as a result of the requested move, the request should be denied.

5. The test will eliminate significant costs and time in the trial court's review of a relocation request. This elimination will save parent's money that could better be spent on the children. This analysis also will save the court system money by resulting in shorter trials.

III. APPLICATION OF NEW TEST TO RUSSENBERGER.

Utilizing the new test presented above, Mrs. Steltenkamp's relocation request should be approved. First, her request should acknowledge the presumption that the children's best interests will be served by living with Mrs. Steltenkamp. Mr. Russenberger acknowledged this fact when he executed the settlement agreement designating his former wife as the primary residential parent. With this presumption in mind, the following questions should be asked.

PART I: Has Mrs. Steltenkamp presented a sincere, good faith reason for moving from Florida?

ANSWER: Yes.

Mrs. Steltenkamp wishes to relocate to Suffern, New York in order to be reunited with her new husband. Since Dr. Steltenkamp is employed in New York and his employment requires that he continue to reside in New York, her request must be considered a good faith, sincere request. No evidence suggests that Mrs. Steltenkamp's desire to relocate is motivated by any other purpose.

She is motivated solely by a decision to form a blended family with her husband. Since Mrs. Steltenkamp easily passes the first hurdle of the relocation test, the burden then transfers to Mr. Russenberger with regard to the second portion of the test.

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

ANSWER: No.

Mr. Russenberger has not proven that the children will suffer from the move. In fact, the evidence shows that the children will thrive and prosper from the move. Even though it is unnecessary for Mrs. Steltenkamp to prove that the children's quality of life will improve, the evidence overwhelmingly supports such a fact. Mrs. Steltenkamp and the children will be reunited with Dr. Steltenkamp in a blended family environment. Dr. Steltenkamp will be able to provide constant and daily guidance. Furthermore, Mrs. Steltenkamp will be happier, which will strengthen her mental health and will in turn strengthen her relationship with the children. Mr. Russenberger did not present evidence that the move will negatively impact upon the best interests of the children.

PART III: Will the move adversely affect the visitation rights of the noncustodial parent?

ANSWER: No.

The relocation in this case will have little effect on Mr. Russenberger's visitation rights. First, the substitute schedule provides that he should have at least one long weekend per month with the children in the State of Florida. Second, Mr. Russenberger is permitted visitation with the children in the State of New York on alternating weekends. Considering Mr. Russenberger's substantial financial situation, including monthly income over $46,000, he can reasonably afford visitation in the State of New York. If he desires, Mr. Russenberger could even purchase an apartment or home in the State of New York for visitation with the children. In addition to the visits twice a month allowed in the substitute visitation schedule, Mr. Russenberger is also permitted extensive summer and holiday visitation. In short, Mr. Russenberger's visitation will not be adversely affected. In fact, his visitation will not be affected at all. Mr. Russenberger's income should permit him to visit with the children as much as he chooses. Under these circumstances, relocation should be allowed.

As one can see, the new test proposed by Mrs. Steltenkamp is much more simple and focuses on the important issues. It still continues to consider the best interests of the children and the visitation rights of the nonresidential parent. The benefit of the new test is that it is more realistic and acknowledges the fact

that the children's best interest will be served with the custodial parent.

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

In section II herein, Mrs. Steltenkamp presented a new relocation test which she believes will provide more uniformity across the state and will better serve the interests of children. However, Mrs. Steltenkamp acknowledges that this court may issue an opinion confirming the use of the six factors set forth in the Mize decision. For this reason, this portion of her brief will address those six factors and illustrate the trial court's error in its conclusions with regard to those six factors. This review also will illustrate the district court error in affirming the trial court's decision denying relocation.

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

A review of the testimony shows that the evidence supports only one finding, i.e., relocation will improve the general quality of life of both Mrs. Steltenkamp and the parties' minor children. Mrs. Steltenkamp married Mike Steltenkamp in May of 1993. She described her relationship with Dr. Steltenkamp as a "wonderful, very loving, very fulfilling relationship." R - 5: 628. She testified that Dr. Steltenkamp was "attentive and very kind." "He loves my children, which was an absolute necessity." R - 5: - 628.

Dr. Steltenkamp joined Champion in 1979 as a senior scientist and was transferred to Champion's West Nyack facility in New York in January of 1993. His former position in Pensacola is no longer available to him. R - 4: 444. The New York relocation positively impacted upon Dr. Steltenkamp's career with Champion. Marlene Feigenbaum, department head of the Human Resources Function of Champion, testified that Dr. Steltenkamp's performance with the company was exceptional. D - 24: 12. She further indicated that the new position was "certainly a part of a succession plan and a career growth" that would enhance Dr. Steltenkamp's upward mobility in the company. Finally, she indicated that the move was a <u>significant</u> career move for Dr. Steltenkamp. D - 24: 14.

Both Mrs. Steltenkamp and Dr. Steltenkamp expressed a desire to live together in New York as a blended family. Mrs. Steltenkamp explained that the move would enable her to raise the children in a model environment of two loving parents and would give her the support of another human being to help her with the children on a day to day basis. R - 5: 667. Several psychologists testified with regard to these issues. Dr. Larson discussed the concept of a blended family. He explained that a "blended family" is used to describe the dissolution of a nuclear family and the remarriage of the divorced spouses. It is no longer a nuclear family in the sense that the parents are not the biological parents. He

indicated that the blended family can have a positive impact upon the children and explained that remarriage gives a person much needed emotional support.

Dr. Scott Benson, a psychiatrist that testified on behalf of Mr. Russenberger, stated that if the custodial parent is happy that this situation will create a base for happiness and contentment for the children residing with that custodial parent. D - 20: 28. Dr. Tina Beissinger testified that the emotional health of the custodial parent is almost invariably reflected in the child's well-being. D - 17: 76. Finally, Dr. Michael DeMaria testified that it is well recognized in psychology that if the custodial parent is happy and well adjusted that the happiness and adjustment will flow to the children. He also stated that it could be crucial to the development of young children that they have a happy well adjusted mother who is happy in her environment. D - 18: 44.

During the home selection process, the Steltenkamps number one priority was the quality of the school district. D - 28: 14. Other important concerns included recreational offerings, low crime rate, and a "sense of neighborhood."

In addition to her desire to reside with her husband, Mrs. Steltenkamp believed that a move to New York might alleviate some of the tension between herself and her former husband. She explained that the opportunities for stress and upset would be

significantly reduced. R - 5: 667. The history between the parties included incidents of domestic violence. Mrs. Steltenkamp testified that Mr. Russenberger had a very bad temper and had been physically abusive on past occasions. R - 7: 19 - 20. Several years ago, Mr. Russenberger threatened to kill his wife in front of the children. On other occasions, he had shoved her, kicked her, dragged her across the room, and choked her. R - 7: 20, 21, 22 - 23. It is reasonable to assume that the distance may alleviate some of the tension.

Numerous opportunities will be available to the children in New York. It was never Mrs. Steltenkamp's intention to suggest that Pensacola, Florida and the surrounding area does not have a great deal to offer to the children. It was her intention, however, to show that the opportunities in New York are endless and that the children's quality of life will be enhanced by the cultural, environmental and educational opportunities available.

Suffern High School encompasses sixty acres of land and is located in an attractive residential area. The physical education plant has an additional gym, an indoor swimming pool, an outdoor facility that includes an all weather track, several baseball fields, and a football field. D - 27: 7 - 8. The high school also has a planetarium, a 35,000 volume library, an IBM and Apple computer network, a gifted program, a music program, dramatic

performances, and several successful athletic teams. D - 27: 8, 14, 18, 19, 21, 22. Over ninety-nine percent of the students graduate from high school and approximately ninety percent go on to college. D - 27: 30.

In summary, the evidence can only lead to one conclusion: a move to Suffern, New York will significantly improve the quality of life for Cindy Steltenkamp and the Russenberger children.

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

The trial court found that the move was not requested for the express purpose of defeating visitation. The trial court next stated that the "implication is that the impact would be that it would" defeat visitation and that visitation would "peter out". The court concluded that this criterion is "somewhat neutral". The trial court's conclusion that visitation will "peter out" is not based upon the testimony presented. First, Mrs. Steltenkamp was asked about this issue at trial.

> Q: Is any component of the move in any manner designed to deny Ray visitation privileges with his children?
>
> A: Absolutely not. It's unfortunate that would be any kind of consideration. I don't feel like it has to be that way.
>
> R - 5: 659.
>
> ** ** **
>
> A: No. It has - - is not aimed at him in

> any way, shape, or form. And that's why we worked on this visitation to make it abundantly clear how we think it could work. Because I really do believe that it could work well and possibly even better because blocks of time - - and he'll still have them and see them as often as he wants to.
>
> R - 7: 50.

In addition, Mr. Russenberger also testified that he did not believe there was any vindictive or mean motive on the part of his former wife with regard to her request to move the children to Suffern, New York. D - 16: 45 - 48.

Despite these facts, the trial court reasoned that since Mrs. Steltenkamp did not inform Mr. Russenberger that she would be moving at the time the marital separation agreement was negotiated, that somehow this fact suggests an improper motive on the part of Mrs. Steltenkamp. The marital settlement agreement was signed in December of 1992. Cindy and Mike Steltenkamp were not married until May of 1993. At the time of the parties' dissolution, the parties had been living apart for several years and had been dating other individuals for several years. Mr. Russenberger was aware that his former wife had a serious relationship with Dr. Steltenkamp. Furthermore, it is important to note that Mr. Russenberger was informed of the proposed move by Mrs. Steltenkamp's attorney. Because of the previous problems with domestic violence, Mrs. Steltenkamp chose a safe method to deliver

this information.

In summary, Mrs. Steltenkamp's decision was not motivated by a desire to defeat visitation.

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

After a lengthy discussion, the trial court found that it was highly questionable whether Mrs. Steltenkamp would be likely to comply with substitute visitation arrangements. The trial court found that history dictates that the visitation would "peter out." The trial court listed several reasons in support of this decision. Each of those reasons will be analyzed below.

A. Trial court: There is a longstanding history of the inability of the parties to have a good relationship regarding the children.

This statement is unsupported by the evidence. Mrs. Steltenkamp was asked at trial about the visitation prior to the relocation litigation. She responded:

> Well, we had an easy, natural relationship with dealing with those things. If Ray had a conflict or if I did, it absolutely never was a problem with one or the other of us not being willing to change a schedule to accommodate the other person's needs.
>
> R - 5: 603.

In fact, Mr. Russenberger never filed a Motion for Contempt or alleged any problems with visitation during the two year period before Ms. Steltenkamp announced her decision to relocate. R - 7:

17. Only after the relocation litigation began, did Mr. Russenberger begin to raise problems about visitation.

B. Trial Court: Mrs. Steltenkamp has not allowed flexibility in the visitation schedule.

This conclusion is not supported by the testimony of either party. First, Mr. Russenberger testified in July of 1993 on these issues. He explained that i) he would be permitted a makeup weekend if one was missed ii) that his wife allowed another day during the week if one was missed and iii) that he took the older two children at different times alone. R - 8: 21 - 22. Mr. Russenberger also indicated that he had the children with him for extra days or long weekends when his former wife was out of town. R - 8: 21. Mrs. Steltenkamp confirmed that she and Mr. Russenberger always worked together with regard to visitation and scheduling conflicts. R - 7: 16.

At the final hearing, however, Mr. Russenberger testified about numerous visitation problems in the recent months. One can only assume that these "problems" suddenly arose because of the pending litigation.

In short, other than Mr. Russenberger's unsubstantiated allegations during the litigation period, no evidence supports the judge's finding that Mrs. Steltenkamp did not allow flexibility in the visitation schedule. The evidence supports exactly the opposite conclusion. R - 5: 603.

C. Trial Court: The wife has not encouraged the relationship between the father and the children.

i) There has been irregular encouragement of the children to recognize significant days.

ii) Mrs. Steltenkamp has not encouraged the children to telephone their father, whereas Dr. Steltenkamp talks to the younger children everyday.

iii) There has been no separate visits with the children.

The evidence does not support these conclusions. As Mrs. Steltenkamp explained, after the parties' separation, she instructed the children to call Mr. Russenberger on his birthday and on numerous other occasions. D - 5: 606 and 610. Mrs. Steltenkamp testified that she felt it was important for the children to share their achievements with their father. R - 5: 610. She also indicated that she thought it was important for Mr. Russenberger to know that the children thought of him on special occasions R - 5: 608. Mrs. Steltenkamp also encourages the two older children to involve their father in their athletic and musical achievements. D - 13: 52 - 53. D - 13: 55 - 56.

Mrs. Steltenkamp stated that she would prefer for the children to visit their father in a group. Despite this preference, visitation has been exercised with one or more children on several occasions. Even Mr. Russenberger stated that there has been many times over the years when he would pick up Rhett or Rachel and take them to dinner. Furthermore, the older two children rarely visited

with their father on Wednesday evenings since they were engaged in school activities on Wednesdays. On these days, Mr. Russenberger would visit with just the three younger children.

Mrs. Steltenkamp's desire for the children to go for visitation as a unit is motivated by her desire to protect the children. She felt that if Mr. Russenberger was in a violent or angry mood that the children would be safer together. The oldest daughter explained that her father's behavior would make the younger girls become frightened and that they would come to her for comfort.

The trial judge also placed some weight on the fact that Dr. Steltenkamp speaks to the younger children every day. Mr. Russenberger also may call if he wishes to speak with the children.

In short, considering the history of the parties and Mr. Russenberger's lack of involvement with the children over the years, Mrs. Steltenkamp has made a concerted and admirable effort to encourage contact between the children and their father.

D. Trial Court: Mrs. Steltenkamp has not contacted Mr. Russenberger about things that are happening in the children's lives. She did not inform Mr. Russenberger about the oldest child's recent run in with the law.

The trial judge made several unrealistic expectations with regard to how these parties should interact with each other. Specifically, it is unrealistic to expect parents to communicate better after a divorce than during the time they were married.

Mrs. Steltenkamp was the parent responsible for care of the children during the marriage, whether that meant providing discipline, caring for their medical needs, or just supervision of day-to-day activities. Mrs. Steltenkamp explained that if a decision was discussed between the two of them before the divorce, she would continue to discuss those type of decisions after the divorce. D - 13: 24. Mrs. Steltenkamp made all decisions regarding the children during the marriage and she continued to make the majority of the decisions after the parties separated. That relationship continued to work up until the time of the relocation litigation. D - 13: 27 - 28. Mr. Russenberger did not dispute his wife's testimony. He testified "maybe I wasn't the greatest father when they were growing up, the big ones were growing up because I was very, very busy at the time, but I'm not near as busy now." D - 15: 20.

History has to speak for the relationship between the parties. It is extremely common during custody and relocation litigation for one parent to become more involved with the children even though that parent was not previously involved. For that reason, the courts must determine who has acted as the primary caretaker for the children over the years. The evidence in this case illustrates that Mrs. Steltenkamp has been the primary or only caretaker for the children and that Mr. Russenberger was the breadwinner for the

family. Only when Mr. Russenberger senses that he will lose control over his former wife, does he decide to become more involved with the children. R - 5: 616.

E. Trial Court: Mrs. Steltenkamp did not tell her husband about the planned relocation.

Mrs. Steltenkamp did tell her husband about the planned relocation. She informed him through her attorney since she feared violence. It is understandable that she did not wish to face Mr. Russenberger face to face because of the long history of anger and violence. Furthermore, the settlement agreement contained no restriction against relocation. The letter to Mr. Russenberger's attorney concerning relocation stated that Mrs. Steltenkamp intended to relocate in approximately a month and requested a proposed substitute visitation schedule. This is a reasonable means of communication under the circumstances.

F. Trial Court: The court noted that the exchange of children for visitation at McDonalds, was not healthy for the children.

It is difficult to determine how this fact can be used to support a finding that Mrs. Steltenkamp would not allow substitute visitation. The parties agreed to visitation exchange at McDonalds in light of the domestic violence injunction. The public exchange insures that an altercation will not arise.

G. Trial Court: The wife moved the children's furniture and toys to Suffern, New York.

Mrs. Steltenkamp testified that she moved some of the children's toys and furniture to New York, but allowed the children to keep the toys and furniture that they wanted to keep in Pensacola, Florida. Since Champion paid for the move, it was reasonable for her to go ahead and ship some of the children's items to New York. D - 13: 88. A - 2.

As shown herein, all of the trial court's findings used to support a decision that visitation will "peter out" are unsupported by the evidence. Furthermore, Mrs. Steltenkamp indicated her willingness to make the substitute visitation work. She read numerous books about relocation and custody in divorce. R - 5: 631 - 635. In addition, visitation has continued on a regular schedule despite Mr. Russenberger's anger and violence. The fact that visitation has continued, coupled with Mrs. Steltenkamp's sincere desire to learn everything she can about coping with children in divorce and long distance parenting, indicates that she will comply with substitute visitation arrangements.

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.

Under the parties' original agreement, Mr. Russenberger is entitled to every other weekend visitation and such other times as the parties agree. The agreement did not provide for any extended visitation. The parties had been separated for several years at

the time the dissolution was granted and had worked out a visitation schedule during the separation. For the first time, during this litigation, Mr. Russenberger requested an extended period of summer visitation. Prior to this litigation, he had never requested visitation for more than a week and the parties had worked into a comfortable situation with regard to visitation.

The substitute visitation schedule proposed by Mrs. Steltenkamp provides extensive contact with the children. The contact includes longer, extended periods of time and provides for at least one long weekend each month in Pensacola, several days at Easter, several weeks in the summer, and extended times during the Christmas vacation. The schedule also provides for visitation in New York. A copy of the proposed schedule is attached hereto as Exhibit "3". (A - 3).

The substitute visitation schedule was developed after a great deal of effort and time. The schedule was adopted from the standard visitation schedule and changes were made by Dr. Tina Bessinger in order to make it more appropriate for long distance visitation. D - 17: 58 - 75. Dr. Benson, although opposed to relocation, indicated that the visitation schedule covered all bases and that there was some flexibility and some effort to make the time frame of the visitation reasonable. D - 20: 20. Dr. DeMaria also testified that he had worked in several cases where he

had formulated reasonable visitation schedules when parties lived in different locations. D - 18: 45 - 46.

Mr. Russenberger has argued that he wants to be able to "pop in" on the children at social events or other events. He argues that this would only be an opportunity available to him if he lived in the same city. First, this has not been the behavior pattern that has been established over the years. Only when Mrs. Steltenkamp expressed a desire to relocate to be with her new husband did Mr. Russenberger decide to become somewhat involved in the children's activities. Furthermore, the oldest son has reached the age of majority and Mr. Russenberger has a very poor relationship with the oldest daughter.

In this case, because of the significant resources of the parties, it is quite reasonable to assume that Mr. Russenberger could purchase a home in New York, spend time in New York, and "pop in" on the children.

The trial court made several findings in support of this issue as well. Once again, these findings are unsupported by the evidence. Before addressing her findings, the trial judge found that Mr. Russenberger had not had a meaningful relationship with his children in the early years of the parties' marriage. The judge found that Mr. Russenberger had increased contact since the parties' separation.

The trial court made the following findings:

Trial Court: The court found that there was corroboration of Mr. Russenberger being involved in the children's lives since he returned to Pensacola every weekend the parties were separated when he was in Louisiana.

If Mr. Russenberger was interested in spending time with his family, why did he go ahead and move them to Pensacola instead of keeping his family in Louisiana with him until the business closed? Obviously, during this time and during the remainder of the parties marriage, Mrs. Steltenkamp was responsible for the care of the children.

Trial Court: Mr. Russenberger agreed to provide for the children's college education which today is fairly unusual.

Mr. Russenberger is a multi-millionaire. It will not be at all difficult for him to provide for the children's college educations. Furthermore, Mrs. Steltenkamp insisted upon payment as part of the settlement negotiations. R - 5: 621.

Trial Court: Mrs. Steltenkamp did not tell Mr. Russenberger that she was thinking of relocating because she believed he would be angry. The court asked what is the underlying message that the court received since he would be angry.

The court does not answer this question, but the evidence suggests that the underlying message was that Mrs. Steltenkamp feared her husband and feared that he might harm her. Furthermore, Mrs. Steltenkamp did tell her former husband that she would be relocating, she simply chose to do it through her attorney.

Trial Court: The fact that the children will be tired because

of the plane trips concerns the court.

The plane trip will take place once a month, approximately four hours each way. Travel on a plane over this period of time should not tire a child. The children will have time to do their homework, time to read a book, or time to engage in other activities. Mrs. Steltenkamp and her husband plan to travel with the children during the weekend visitation as long as it is necessary.

Trial Court: Substitute visitation will begin about 3:00 p.m. on Friday and end at 6:00 p.m. on Sunday. The fact that the parties have five children concerns the court.

This conclusion is incorrect. Mrs. Steltenkamp testified that a long weekend is available almost every single month pursuant to the school calendar. The children would visit with their father during the long weekend. Accordingly, the children would either leave for Pensacola on a Thursday afternoon and return on Sunday or leave on Friday afternoon and return on Monday. This allows for longer weekend visitation with Mr. Russenberger. The schedule also allows for numerous extended visits.

The fact that the parties have five children should have no relevance to this issue. In fact, the oldest child is now 18 and the second oldest child is now 16. Mr. Russenberger can set aside individual time for each child during the extended visitation.

Trial Court: If Mr. Russenberger goes to New York for visitation there is no framework for the visits. He has no home.

Mr. Russenberger owns a $753,000 boat, in addition to the house on the water. If he wishes, he could clearly purchase an apartment or home in Suffern, New York where he could set up a residence for visitation with the children. His financial affidavit indicates monthly income exceeding $46,000. He and the children could establish a suitable visitation framework in New York. Since Mr. Russenberger owns his own company and claims that he has more free time now, he should also be able to spend additional time in New York in order to attend the children's special functions and other activities.

Trial Court: The proposed substitute visitation schedule indicates that Mr. Russenberger would pay the entire cost of the visitation.

If the trial court found that this proposal was unreasonable, the trial court could certainly order the parties to split the transportation costs or order Mrs. Steltenkamp to pay 100% of the transportation costs. The proposed visitation should not be objected outright just because Mrs. Steltenkamp requested that Mr. Russenberger pay 100% of the transportation costs. Furthermore, Mr. Russenberger's income is extensive. He can clearly afford to pay the transportation costs without difficulty.

Trial Court: The children's activities would inevitably interfere.

The substitute visitation schedule allows for flexibility in that additional time will be added in the summer if the children

cannot participate on a particular weekend.

Mrs. Steltenkamp is well aware that the children are involved in activities and indicated that she will make the visitation a priority in her life and in the children's lives. Since Mrs. Steltenkamp has already obtained a school schedule and knows when the extended weekends occur, she will be able to plan far in advance for the children to have no activities scheduled on the one weekend a month when they would be traveling to Pensacola to visit with their father. Since Mr. Russenberger will be exercising one weekend a month of the visitation in New York, he will be able to participate in the children's activities during that weekend. Furthermore, the children will be with Mr. Russenberger for an extended period of time in the summer and can engage in numerous activities with him during that time.

Trial Court: Dr. Steltenkamp would assume a much greater role in the children's lives.

This is inevitable in every divorce when a spouse remarries. In this case it is extremely fortunate that Mrs. Steltenkamp has married a very warm, loving, and considerate man who gets along extremely well with the children. R - 4: 450 - 453. Dr. Steltenkamp has slowly encouraged the relationship with the children and has fostered that relationship by calling them every evening while they are apart. As discussed previously, it is extremely beneficial for Mrs. Steltenkamp to live with her spouse

and to gain support from her spouse. This type of relationship will only benefit the children and should not be denied to her. It is unreasonable to make Mrs. Steltenkamp and the parties' children hostages in Pensacola after she has remarried a gentleman who lives in Suffern, New York.

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

This factor is not in dispute. Both parties can afford the cost of transportation.

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

In terms of best interests of the children, the primary residential parent's family must be viewed as the family central and the most important to the child's best interest. Mrs. Steltenkamp genuinely believes that the quality of her life and the children's lives will be enhanced as soon as she is reunited with her husband in Suffern, New York. It is critical to the well-being of this marriage to allow Mrs. Steltenkamp, upon whom the principal responsibility of child rearing falls, the liberty and autonomy to make this decision for the future of the children.

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

In Russenberger, the first district determined that Mize does not create a per se rule favoring relocation. The first district noted that this decision "may conflict with the reading given Mize

by the fourth district. In Tremblay v. Tremblay, 638 So. 2d 1057 (Fla. 4th DCA 1994) the fourth district recognized that the adoption of Judge Schwartz's concurring opinion represented a significant change in the law of the fourth district. The fourth district stated:

> 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." (Emphasis Added).
>
> Id. at 1059.

If the Mize test is maintained, at a minimum, this court should answer the question as to whether a presumption in favor of removal exists.

In Russenberger, prior to reviewing the trial court's analysis of the six factors, the first district presented a new proposal for review of relocation requests. The first district stated that it was guided by the approach taken in other jurisdictions which have adopted a presumption in favor of the right to relocate. The court cited Auge v. Auge, 334 N.W. 2d 393 (Minn. 1983) for the proposition that a petition to permit relocation should be granted unless the party opposing the move establishes by a preponderance of the evidence that the move is not in the best interests of the child. The court also cited an Iowa case for the proposition that the burden of proof should be on the party opposing relocation to show that the move is not in the best interests of the child. In

Re Marriage of Lower, 269 N.W.2d 822 (Iowa 1978). Utilizing these cases, and after analyzing the Mize opinion, the first district presented the following relocation test. If it is determined that a relocating parent is acting in good faith, the trial court must permit relocation if the best interests of the children are served by relocation. Determination of best interests requires an analysis of the Hill factors. The first district stated that the presumption in favor of relocation expressed in Mize places the burden of proof on the parent opposing relocation. Therefore, in cases involving joint custody in which the marital settlement agreement does not restrict relocation, Mize requires the relocating parent 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 this showing is made by the relocating parent, the burden is then shifted to the noncustodial parent to establish by a preponderance of the evidence that the proposed relocation is not in the child's best interests. If the noncustodial parent cannot meet this burden, the relocating custodial parent should be permitted to move.

Russenberger presents the above test, however, it does not apply the test to the Russenberger evidence. In fact, the first district simply reviewed the trial court's findings as to each of

the Hill factors and then determined that the decision should be affirmed based upon an abuse of discretion standard. If, however, the first district applied this analysis to the facts of this case, it would have been forced to reverse the trial court's decision denying the relocation request. Under the test, Mrs. Steltenkamp is first required to show that relocation is not for a vindictive or improper motive. Mrs. Steltenkamp's request was motivated by a desire to be reunited with her husband. No evidence supported a finding that the request was motivated by any other motive than to form a blended family with her new husband. Next, the test requires a showing 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. The evidence clearly shows that the quality of life will "at least be equal." As explained in the prior section, numerous opportunities will be available to the Russenberger children in New York. In addition, since Mrs. Steltenkamp will be in a happier environment, the children's happiness should improve as well. Next, since Mrs. Steltenkamp has established the sincerity of her motives and that the quality of life will at least equal the present quality of life, the burden shifts to Mr. Russenberger to establish by a preponderance of the evidence that the proposed relocation is not in the children's best interests. The evidence simply does not support a finding that the

move is not in the children's best interests. The substitute visitation schedule will allow Mr. Russenberger more or at least the same weekly visitation, together with longer uninterrupted blocks of time during the summer and holidays. The financial strength of Mr. Russenberger will allow him to either purchase housing or visit the children in New York on a regular basis. It has already been determined that Mrs. Steltenkamp is the better parent to serve the best interests of the children. Since she has chosen to move to New York to be reunited with her husband, the children should be allowed to move. No evidence supports a finding that the children's interests will not be served by moving. In short, if the district court had applied its own analysis to this case, it would have concluded that Mrs. Steltenkamp should be allowed to move. Instead, the decision ignores the proposed test and simply parrots the trial court's finding on each of the Hill factors. As shown in the prior section, the trial court's findings were not supported by the evidence. For this reason, the district court decision affirming the trial court's decision denying the move, must be reversed.

CONCLUSION

The relocation test articulated by this court in Mize should be replaced with an updated analysis. The analysis proposed by Mrs. Steltenkamp acknowledges that the best interests of the

children will continue to be served by residing with the primary residential parent. Mrs. Steltenkamp proposes an adoption of the new standard to provide uniformity and guidance to trial courts throughout the state. The first district should be instructed to reevaluate its prior opinion in light of the new standard. This reevaluation will result in a reversal of the trial court's decision denying Mrs. Steltenkamp's request for relocation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this the 22nd day of September, 1995, forwarded to T. Sol Johnson, 800 SE Caroline Street, Post Office Box 605, Milton, Fl 32572 and to Crystal Collins Spencer, 30 Spring Street, Post Office Box 1271, Pensacola, FL 32596 by U.S. Mail.

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APPENDIX

1. Final Judgment of Dissolution of Marriage
2. Post Judgment Order on Appeal dated February 22, 1994
3. Proposed Visitation Schedule