IN THE SUPREME COURT OF FLORIDA

CYNTHIA L. RUSSENBERGER,)
n/k/a CYNTHIA L. STELTENKAMP,)
)
Petitioner,)
vs.) CASE NO: 85,743
) 1st DCA CASE NO: 95-00804
RAY DEAN RUSSENBERGER,)
)
Respondent.)
_____/

REPLY BRIEF OF PETITIONER

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

E. JANE BREHANY, ESQUIRE
MYRICK, DAVIS & BREHANY
625 North Ninth Avenue
Pensacola, FL 32501
(904) 433-0084
Florida Bar No.: 715042
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

A. SHARED PARENTAL RESPONSIBILITY.

Shared parental responsibility and involvement by the secondary residential parent provide the framework for Mr. Russenberger's argument. Mrs. Steltenkamp fully acknowledges that Mr. Russenberger, and all secondary residential parents, should remain involved in their children's lives. It is not Mrs. Steltenkamp's intent to interfere with the relationship between Mr. Russenberger and his children.

The relocation test proposed by Mrs. Steltenkamp is consistent with the concept of shared parental responsibility. First, the relocation standard proposed by Mrs. Steltenkamp acknowledges that one parent has been designated as the children's primary residential parent. This designation is made either by agreement or court order upon a finding that the designated parent can best serve the interests of the children. Therefore, subsequent relocation requests should be considered favorably when the custodial parent presents a sincere, good faith reason for leaving the jurisdiction. The test proposed by Mrs. Steltenkamp further acknowledges the rights of the non-custodial parent by requiring evidence regarding whether the move will adversely affect visitation. If relocation will adversely affect visitation, the request must be denied.

Mr. Russenberger's argument that relocation should be prohibited because it will deny the non-custodial parent everyday contact with the children takes shared parental responsibility to the extreme. Parents can maintain a shared parental relationship despite physical proximity. Mr. Russenberger's argument ignores certain basic principles of American life. First, it fails to recognize that the American population is extremely transient. Individuals routinely relocate.[1]

---

[1]In fact, during their marriage, the Russenbergers lived in the following cities: New Orleans, Baton Rouge, Marksville, Houston, San Antonio, Kiln, Thibodeux, Lafayette, and Pensacola. R - 7, 11 - 13.

Second, the argument fails to recognize that the primary residential parent is faced with most of the child rearing responsibilities. The non-custodial parent must acknowledge the primary role of the custodial parent by allowing the custodial parent the right to decide what he or she believes will best serve the interests of the children.[2] This includes relocation for a good faith reason.

In short, compromises must be made. Here, Mr. Russenberger must be willing to forego everyday contact with the children in exchange for longer periods of uninterrupted contact. Mrs. Steltenkamp must be willing to support Mr. Russenberger's relationship with the children by promoting these longer periods of uninterrupted visitation and a positive relationship between the children and their father. When the parents work together, a shared parental relationship can be maintained regardless of physical proximity.

B. MIZE, HILL, AND APPELLATE STANDARD OF REVIEW.

Mr. Russenberger argues that Mrs. Steltenkamp simply reargued her case on appeal. This statement is incorrect. Mrs. Steltenkamp's initial brief presents a review of the trial court's findings in order to illustrate the judge's predisposition against removal. The trial judge ignored and overlooked the evidence in order to reach her decision denying the relocation request. Mrs. Steltenkamp's brief, on the other hand, presents an objective, unbiased analysis of the evidence supporting a decision in favor of removal. This is not just an abuse of discretion appeal. This is an appeal based upon an improper application of the relocation standard. Mize v. Mize, 621 So. 2d 417 (Fla. 1993) provides that relocation should ordinarily be allowed. Despite this

---

[2]Mr. Russenberger acknowledged that Mrs. Steltenkamp could best serve the interests of the children and that she should be designated as the primary residential parent. See Marital Settlement Agreement. Also, the same conclusion was reached by the trial court at the relocation/modification of custody final hearing. Mr. Russenberger's request to modify custody was denied.

presumption in favor of relocation, Mrs. Steltenkamp's request was denied.

To supplement her initial brief, and as support for the argument that relocation should be allowed here, Mrs. Steltenkamp presents the following additional discussion of the Hill relocation factors.

The first factor requires an analysis of whether the move will improve the quality of life for Mrs. Steltenkamp and the children. It is evident that Mrs. Steltenkamp is being penalized for providing a good life for the children in Pensacola. Since the children are doing well in schools in Pensacola and are well adjusted, the trial court determined that their quality of life will not be improved by a move to New York. One can only assume that the lifestyle will be even better in New York since Mrs. Steltenkamp will be happier. Although the testimony illustrates that relocation will be a positive force for this family, Mrs. Steltenkamp reiterates her initial brief argument that improvement of the quality of life should not be the focus in relocation requests. Again, it must be recognized that physical locale is not important. It must be presumed, despite location, that the custodial parent will best serve the children's interests.

As to factor two, the evidence does not support a finding that the motive for the move is for the express purpose of defeating visitation. The motive for the move is Mrs. Steltenkamp's desire to live with her husband. Even though the trial judge acknowledged that the motive for the move was not to defeat visitation, the trial judge improperly carried her analysis one step further and concluded that the impact of the move would defeat visitation. Of course, relocation will modify visitation. The trial courts, however, must acknowledge this fact and work to provide adequate substitute visitation. In this case, the proposed schedule offers contact twice a month, once in Florida and once in New York. The schedule also provides for holiday visits and

uninterrupted summer visits. Mr. Russenberger is a multimillionaire who can visit with the children wherever he chooses. If substitute visitation is not feasible here, considering the financial means of the parents, it is difficult to fathom a case when substitute visitation would be acceptable.

When considering motives, it becomes apparent that Mr. Russenberger's motives are questionable. Mr. Russenberger's behavior toward his former wife is vindictive and bitter. The evidence shows that Mr. Russenberger would be highly unlikely to allow visitation if the tables were turned. For example, Mrs. Steltenkamp's thwarted attempt to visit her new husband in the state of New York while this litigation was pending provides an illustration of Mr. Russenberger's vindictive behavior. At that time, the parties had signed a settlement agreement that provided for every other weekend visitation. The parties' settlement agreement provided for no week day visitation. Mrs. Steltenkamp, however, quite often encouraged week day visitation. During the relocation litigation, Mrs. Steltenkamp wished to take the children for a short 10 day vacation in New York to visit with Dr. Steltenkamp. In response, Mr. Russenberger filed a motion for contempt and forced Mrs. Steltenkamp to return to Florida. Obviously, Mr. Russenberger is motivated by bitterness and control.

As to whether Mrs. Steltenkamp will comply with substitute visitation, the trial court's determination that visitation will "peter out" is entirely unsupported by the evidence. Mr. Russenberger has abused and manipulated the litigation process to his benefit. By filing several "speaking motions" for contempt, Mr. Russenberger convinced the judge that his former wife would not allow visitation. It is important to recognize that all of the motions for contempt were filed during the relocation litigation. Before that time, from the filing of the petition in March of

1991 to February of 1993, the parties had experienced no visitation problems.

Furthermore, history does not show that the visitation will "peter out." History does show that Mr. Russenberger exercised limited involvement with the children. Even the trial judge acknowledged that Mr. Russenberger did not involve himself in the children's lives until separation. Also, history shows that despite the verbal and physical abuse inflicted by Mr. Russenberger, Mrs. Steltenkamp continued to encourage relationships between the children and their father. Mrs. Steltenkamp should be commended for her behavior. She should not be punished.

If Mr. Russenberger chooses, he can maintain a relationship with the children after relocation. The substitute visitation schedule proposed by Mrs. Steltenkamp allows for more visitation than Mr. Russenberger originally requested and permits longer periods of uninterrupted time. During the summer, the visitation includes five uninterrupted weeks. During that time, Mrs. Steltenkamp will have no corresponding alternating weekend visitation and no Wednesday visitation. In the original settlement agreement, Mr. Russenberger asked for visitation every other weekend. Mr. Russenberger did not request holiday visitation, summer visitation, or weekday visitation. One can only assume that Mr. Russenberger would have insisted upon scheduled visitation if visitation problems existed before that time. The substitute relocation visitation schedule gives frequent contact, together with longer periods of uninterrupted contact at holiday time and in the summer. Considering Mr. Russenberger's financial wherewithal, frequent visitation is certainly feasible.

Finally, relocation will best serve the interests of the children. Mrs. Steltenkamp, as the children's primary residential parent, should be allowed to relocate to live with her husband in

order to provide a blended family for the benefit of the minor children. The children should not be forced to live apart from both their father and stepfather.

C. TRIAL JUDGE, HEARINGS AND PLEADINGS

Next, Mr. Russenberger argues that the case should be affirmed because the trial court was familiar with the parties. In support of this position, Mr. Russenberger states that 33 pleadings were filed, and that 11 hearings and two status conferences were held. This argument misleads this court. First, several different judges handled these proceedings. One judge entered the final judgment and approved the settlement agreement. A different judge heard the issues surrounding the temporary injunction. Finally, a third judge handled the final hearing. As to the 33 pleadings, a review of the index shows that most of the pleadings were filed by Mr. Russenberger. All contempt issues were raised during the relocation request period. Most of the filings consist of motions for contempt, motions for temporary injunction orders, and motions for psychological examinations of the children. Mrs. Steltenkamp was forced to file responses to each of these motions. Since very few orders were actually entered on the motions, it is evident that Mr. Russenberger routinely failed to schedule hearings on his motions. Only one conclusion can be drawn: Mr. Russenberger filed speaking motions that contained unsubstantiated allegations in order to improperly influence the trial judge. He should not be allowed to benefit from this misuse of the legal system.

D. POST-MIZE DECISIONS.

Mr. Russenberger argues that a review of post-Mize decisions illustrates that custodial parents and children have been allowed to relocate in the majority of the cases. For this position, Mr. Russenberger cites 10 appellate court cases, seven of which allow relocation, three of which

do not. Mr. Russenberger's argument is misleading. First, many trial court decisions are never appealed. It is quite possible that many relocation requests have been denied. Moreover, numerous appellate cases result in a per curium affirmance without opinion. Mrs. Steltenkamp is personally aware of two other custodial parents that reside in the Escambia/Santa Rosa County area that have been denied permission to relocate with their children. Both appeals resulted in a per curiam affirmance. Holman v. Holman, 645 So. 2d 460 (Fla. 1st DCA 1994) and Lozier v. Lozier, 640 So. 2d 1112 (Fla. 1st DCA 1994). Mr. Russenberger's listing of reported cases does not accurately depict this situation. In reality, relocation requests are routinely denied.

E. CONCLUSION.

In conclusion, Mrs. Steltenkamp urges this court to adopt the three part test presented in her initial brief. Contrary to Mr. Russenberger's assertions, the new test properly focuses on the best interests of the children. In addition, the proposed test makes it easier for trial courts to evaluate a relocation request. The test involves a simple three part examination of the following: 1) has the primary residential parent presented a sincere, good faith reason for relocation? 2) will the move negatively impact upon the best interests of the children (in short, will the children suffer from the move) and 3) will the move adversely effect the visitation rights of the non-custodial parent? Only after a consideration of each of these questions, will the trial court decide the relocation issue. The new test allows the custodial parent the same freedom to relocate for better opportunity as the custodial parent. The focus remains upon the best interests of the children since the custodial parent has been determined to be the parent best equipped to serve the interests of the children. Despite the standard applied, the evidence supports a finding in favor of relocation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 10th day of November, 1995, forwarded to Crystal Collins Spencer, 30 Spring Street, Pensacola, Florida 32596 by hand delivery.

E. JANE BREHANY, ESQUIRE
MYRICK, DAVIS & BREHANY
625 North Ninth Avenue
Pensacola, FL 32501
(904) 433-0084
Florida Bar No.: 715042