SUPREME COURT OF FLORIDA

JAMES JOHNS,

Petitioner,

v.

MELODY JOHNS,

Respondent.

CASE NO, 92,340

District Court of Appeal,
5th District - No. 97-2681

APPELLANT'S BRIEF ON THE MERITS

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PREFACE

Citations to the attached Appendix are referenced by an "Ap" followed by the appropriate page number. The Appendix attached is identical to the appendix in the court below with the exception of the addition of the opinion of the Fifth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

This appeal arises from the Fifth District Court of Appeal's affirmance of the Trial Court's Order transferring jurisdiction in a child custody modification action to a Michigan Court sua sponte without giving the Father an opportunity to present evidence. (Ap82)

The parties were originally divorced in Osceola County, Florida on November 3, 1994. (Ap1) The parties have one minor child; C.J., who was born on December 23, 1990. The parties were awarded shared parental responsibility with the primary physical residency with the Mother in the original divorce. (Ap1)

Subsequently, the venue of the case was transferred to Lake County, Florida due to the Mother's move to Lake County. On March 13, 1995, the Mother filed a Petition for Modification in the Circuit Court of the Fifth Judicial Circuit in and for Lake County, Florida, requesting that the Mother be allowed to move to Michigan. (Ap16) The reasons for the Mother's move, as stated in the Petition, were that she had lost her job and that there were better

jobs and educational opportunities in Michigan. (Ap16, 17)

The parties reached a Stipulation for Modification of Final Judgment of Dissolution of Marriage allowing the Mother to move with the minor child to Michigan. (Ap20) This Stipulation maintained the shared parenting arrangement and provided for a liberal visitation schedule with the Father in the State of Florida. (Ap20-26) Furthermore, the parties agreed that jurisdiction "as to all matters relating to the minor child" would remain in the State of Florida so long as the Father resided in the State. (Ap26)

On July 20, 1995, the Circuit Court in Lake County, Florida entered its Order modifying the Final Judgment of Dissolution of Marriage and incorporating the Stipulation for Modification as part of the Court's Order. (Ap29)

On February 6, 1996, a hearing was held on a Michigan Petition to Establish a Limited Guardianship for the minor child. (Ap74) The proposed limited guardians were Marlene and Eugene Tierney, the Mother's sister and brother-in-law. (Ap74) At the hearing, it was stated that the purpose in establishing a limited guardianship was to provide health insurance for the minor child. (Ap77) Additionally, it was stated both at the hearing and in the Order that was subsequently entered that nothing in the Order would derogate or effect in any manner the present or future parental or other rights of the Father of the minor child, JAMES JOHNS. (Ap48, 77)

On April 18, 1997, the Father filed a Motion to Transfer Venue from Lake County back to Osceola County as Osceola County was the Father's residence and the Mother now resided in Michigan. (Ap31) Attached to the Father's Motion to Transfer Venue was his proposed Petition for Modification which asserted that, since the Mother had moved to Michigan, her health had deteriorated to the point that she was totally unable to care for the minor child. (Ap31, 33) Additionally, the Father alleged that the Mother and the Mother's sister and brother-in-law, Marlene and Eugene Tierney, were interfering with his contact with C.. (Ap33) Subsequently, the actual Petition for Modification was filed. (Ap99)

In response to the filings in Florida, the Mother filed a Petition in the Michigan Court to try and place the custody of the minor child with Eugene and Marlene Tierney. (Ap49) Additionally, the Mother obtained Florida counsel and filed a "Motion to Dismiss/Stay for Lack of Subject Jurisdiction Under the Uniform Child Custody Jurisdiction Act" in Lake County. (Ap36)

The Father filed a response in the Michigan Court which pointed out that the Florida Court had entered the Final Judgment of Divorce and later of modification and had never relinquished jurisdiction. (Ap53) Additionally, the Father challenged the factual assertions in the Mother's pleadings and confirmed that the Father had never agreed to any guardianship plan beyond the provision of health insurance benefits. (Ap53, 55, 56) The Father's response challenged the jurisdiction of the Michigan Court

to make any ruling as to the custody of the minor child. (Ap53, 56, 57)

On June 18, 1997, the Circuit Court in Lake County entered its Order denying without prejudice the Mother's Motion to Dismiss/ Stay for Lack of Subject Jurisdiction Under the Uniform Child Custody Jurisdiction Act and granting the Father's Motion to transfer the case to **Osceola** County. (Ap58) Because of the sequence in the entry of the Orders, there was a delay in transferring the file from Lake County to Osceola County. (Ap62)

On August 8, **1997,** Judge John Kirkendall of the State of Michigan entered an Order determining jurisdiction under the Uniform Child Custody Jurisdiction Act in which he stated that he previously had three (3) conversations with Judge Maura T. Smith of the Circuit Court of the Ninth Judicial Circuit in and for **Osceola** County and that Judge Smith had agreed that the State of Michigan should assume jurisdiction. (Ap70)

The file on this case was not transferred from Lake County to Osceola County and therefore was not available for Judge Smith's inspection until August 12, 1997. (Ap69)

As of the August 8, 1997 Michigan Order, no evidence had been presented in Michigan and no Florida hearing had been held since Judge Richard Singeltary of Lake County had denied the Mother's "Motion to Dismiss/Stay for Lack of Subject Jurisdiction Under the Uniform Child Custody Jurisdiction Act". Assuming that Judge Smith decided sua sponte to raise the issue of the transfer of the case based on inconvenient forum, no notice was ever sent to the

parties in this case and no opportunity for the presentation of evidence by affidavit or otherwise was ever given.

When the Father became aware of the Michigan Court's Order, the Father filed a Motion for Clarification, Rehearing, Evidentiary Hearing and Other Relief. (Ap63)

In his Motion, the Father asked the Court to clarify whether or not the Michigan Court's factual statements were correct (i.e., whether there had been three (3) conversations with the Osceola Judge and whether the Court had relinquished jurisdiction). The Motion further asked the Court that whether or not such a decision had been made, that the Court give the Father an opportunity to present his evidence showing that Florida was not an inconvenient forum and that jurisdiction should continue in Florida. (Ap63) In the Father's Motion, the Father proffered evidence to show that some of the factual assertions in the Michigan Court's Order were not correct[1] and that the Father had witnesses residing in Florida that would testify to the continuing contact with the minor child, the relationships the minor child had developed in Florida during her visits, and her care and schooling if her residence would be in Florida. (Ap65, 67) The Father also, in his Motion, pointed out to the Court that the parties had already agreed that jurisdiction would remain in the State of Florida so long as the Father continued to reside in Florida. (Ap64) The Father asked the Court

[1] It is difficult to understand how the Michigan Court made the findings in its Order without any evidentiary hearing. It can only be surmised that the Michigan Court looked at the pleadings on file and made some determination based on the pleadings.

to suspend any ruling that it made regarding the transfer of jurisdiction, to hold an evidentiary hearing on the issue and to contact the Michigan Court to notify it of the proceedings in Florida. (Ap63, 64)

The hearing on the Father's Motion was held on August 25, 1997. (Ap87) At the hearing, Judge Smith stated that she had spoken with Judge Kirkendall. (Ap89) The Mother's position at the hearing was that all the Uniform Child Custody Jurisdiction Act required was for the Court to confer with the Michigan Judge. (Ap89) At the end of the hearing, the Court indicated that it would read the briefs and then set a hearing if needed. (Ap97)

On September 2, 1997, Judge Smith entered her Order denying the Father's Motion and adopting the Order entered by the Michigan Court as the Court's ruling. (Ap82) Thus, without any evidentiary hearing ever being held in Florida, which is the appropriate forum, or even Michigan, which would have been inappropriate, the Trial Court transferred the action to the Courts of Michigan. The Father timely filed his Petition for Writ of Certiorari with the Fifth District Court of Appeal. The Fifth District Court of Appeal denied the Father's Petition for Writ of Certiorari citing its decision in Chaddick v. Monosoli, 677 So. 2d 347 (Fla. 5th DCA 1996), then pending review in the Supreme Court.

SUMMARY OF ARGUMENT

The Trial Court was required to give the Father notice and an opportunity to present evidence when it considered the issue of

whether to relinquish jurisdiction that the Trial Court already had to the State of Michigan based on Florida being an inconvenient forum. If the requirement for a hearing is not absolute under Fla.Stat. §61.1316, then the Court abused its discretion in not holding an evidentiary hearing on the facts of this case.

ARGUMENT

The Florida Trial Court has jurisdiction over this case and it is only the Florida Trial Court that can decide to release jurisdiction. In Yurgel v. Yursel, 572 So.2d 1327 (Fla. 1990), the Florida Supreme court clarified the existing confusion over jurisdiction in a child custody modification action. In Yurgel, the Court made clear that the Uniform Child Custody Jurisdiction Act does not serve to terminate the jurisdiction of the Florida Court over child custody matters once it has already been acquired. Thus, the mere fact that the minor child lived in Michigan, even for two years, does not terminate the Florida Court's jurisdiction. Yurgel v. Yurgel, 572 So.2d 1327, 1332. Under Yurgel, the Florida Court's jurisdiction continues until the Florida Court determines on some basis other than the Uniform Child Custody Jurisdiction Act that jurisdiction is no longer appropriate, until virtually all contact with Florida has ceased, or until some other Florida statute or the Parental Kidnapping Prevention Act terminates jurisdiction. Yurgel v. Yurgel, 572 So.2d 1327, 1332. Only the Court with initial jurisdiction can determine whether jurisdiction has been lost or should be released. Yurgel v. Yurgel, 572 So.2d

1327, 1332; Lamon v. Rewis, 592 So.2d 1223 (1st DCA 1992).

In this case, there is no dispute that contact with the State of Florida continued. The Father has continued to reside in the State of Florida. The First District Court of Appeal has held that this fact alone represents continuing contact with this State sufficient for the Court to maintain jurisdiction. Lamon v. Rewis, 592 So.2d 1223 (1st DCA 1992). In addition, the Father proffered to the Court his willingness to present evidence to show that the minor child had continued to visit with the Father here in Florida during summers and all holidays since the Mother had moved to Michigan. (Ap63, 65-67) There is no other Florida statute nor does the Parental Kidnapping Prevention Act, under the facts of this case, serve to terminate jurisdiction. Thus, jurisdiction continues with the Florida Court until the Florida Court decides on some other basis that jurisdiction would be inappropriate. Yurqel v. Yurqel, 572 So.2d 1327, 1332.

The only basis that would appear on the record for the Court to consider relinquishing jurisdiction would be that of inconvenient forum. Fla.Stat. §61.1316.[2] Although the Mother's original Motion to change jurisdiction was titled "Motion to Dismiss/Stay for Lack of Subject Jurisdiction Under the Uniform Child Custody Jurisdiction Act", it would seem clear that under the

[2] The Mother cited to the Trial Court statutes and case law dealing with the Court's initial assumption of jurisdiction such as Fla.Stat. §61.1314. It is submitted that these statutes and cases are inapplicable to the facts of this case. The Florida Court already had jurisdiction. The issue before the Court was whether or not Florida had become an inconvenient forum for determining the modification issues.

applicable case law what the Mother was actually doing was seeking a transfer to Michigan based on inconvenient forum. The Trial Court can decline to exercise its jurisdiction if it finds that it is an inconvenient forum to make the custody determination under the circumstances of the case and that a Court of another State is a more appropriate forum. Fla.Stat. §61.1316(1). Under Yurqel, this statute is meant to codify and strengthen the long-standing judicial doctrine of forum non-convenience. Yurqel v. Yurqel, 572 So.2d 1327, 1329; Booker v. Booker, 636 So.2d 796 (1st DCA 1994).

This Court has recently entered its opinion in the case of Chaddick v. Monopoli, 23 Fla. Law Weekly S327 (Fla. June 12, 1998), wherein the Court held that it was in the Trial Judge's discretion, depending on the facts of the particular case, whether to hold an evidentiary hearing regarding the issue of another State's appropriate exercise of jurisdiction. In Chaddick, the initial divorce decree had been entered in the State of Massachusetts. Subsequently, the mother and child had moved to Florida and the father had moved to Virginia. Under this Court's previous analysis of the UCCJA in Yurqel v. Yurqel, 572 So.2d 1327 (Fla. 1990), it would appear that Massachusetts would have lost jurisdiction because all contacts with Massachusetts had ceased. The question then would be which State, Virginia or Florida, should exercise jurisdiction. In Chaddick, the parties had litigated the full custody issue in the State of Virginia before the mother then chose to file a Petition in Florida challenging Virginia's jurisdiction. In issuing its opinion upholding the Florida Trial Judge's decision

not to take jurisdiction without holding an evidentiary hearing, this Court cited, with approval, Judge Harris' concurring opinion in the Fifth District Court of Appeal which had noted that the mother had litigated the full custody issue in Virginia before coming to Florida to challenge jurisdiction.

Unlike in the Chaddick case, in this case, the Court which originally issued the divorce judgment was the Florida Court. Since the divorce, contact with the State of Florida continued. The father had continued to reside in the State of Florida. A Florida Court had entered one modification action which allowed the mother to move to Michigan and which Order had adopted the stipulation of the parties agreeing that jurisdiction would remain in the State of Florida. The father had witnesses in Florida as to his ability to care for the minor child. The minor child continued to visit the father during summers and all holidays since the mother's move to Michigan. Under this Court's decision in Yurqel v. Yursel, 572 So.2d 1327 (Fla. 1990), jurisdiction in Florida continued.

In Chaddick, the question before the Trial Court was whether it should assume jurisdiction it never had under Fla.Stat. §61.1314. In this case, the question before the Trial Court was whether it should release jurisdiction it had validly acquired and never lost under Fla.Stat. §61.1316.

Under Fla.Stat. §61.1314(3), the Trial Court is required to confer with Courts of another State when it learns of a pending proceeding before the Trial Court assumes jurisdiction. (emphasis

added) However in this case, the Florida Court had jurisdiction from the time of the previous divorce and had never relinquished jurisdiction. Under Fla.Stat. §61.1316(4), the Trial Court may confer with the Court of the other State. The language in Fla.Stat. §61.1316(4) is not mandatory, nor should it be, given the particularly factual issues the court must consider before releasing jurisdiction to a more appropriate forum.

As the First District Court of Appeal stated in Booker v. Booker, "the issue of transferring or dismissing a cause on grounds of forum non-convenience traditionally has been an evidentiary matter, . . ." Booker v. Booker, 636 So.2d 796, 800. Unlike an initial determination of jurisdiction which might be made from a review of the verified pleadings, the decision to transfer a cause based on inconvenient forum is particularly factual. It is submitted that of the five (5) factors listed in Fla.Stat. §61.1316(3), that a Court should consider in determining whether another forum is more appropriate (in addition to the best interest of the child), all but one, that being whether another State is the child's home State, are impossible to resolve without the Court reviewing testimony either by affidavit or evidentiary hearing. In this case, the Trial Court made its decision at first without even reviewing the file. After the Father filed his Motion for Rehearing, the Court, without taking any evidence or giving the Father an opportunity to present evidence, merely adopted the Michigan Court's Order. (Ap82) Even if the Michigan Court were an appropriate Court to determine whether or not Florida should

release jurisdiction, there had been no evidentiary hearing in Michigan either. (Ap93)

The Fifth District Court of Appeal has held that a party challenging venue on the basis of inconvenient forum has the burden of showing substantial inconvenience or undue expense. Vero v. Vero, 659 So.2d 1348 (5th DCA 1995). Furthermore, a Trial Court has been summarily reversed when the Court transferred an action based on forum non-convenience without giving the parties an opportunity to present necessary affidavits or sworn proof. Dalomba-Herrera v. Bush, 645 So.2d 117 (5th DCA 1994). Likewise, the Third District Court of Appeal has held, in Government Employees Insurance Company v. Burns, 672 So.2d 834 (3rd DCA 1996), that it is reversible error for a Trial Court to transfer venue without providing the parties with appropriate notice and opportunity to be heard. These decisions, though not directly dealing with Fla.Stat. §61.1316(1), are applicable to the facts of this case. Fla. Stat. §61.1316(1) serves to codify and strengthen the doctrine of forum non-convenience. Yurgelv. Yurgel, 572 So.2d 1327, 1329; Booker v. Booker, 636 So.2d 796, 799. Thus, the Trial Court erred in agreeing to relinquish jurisdiction based on forum non-convenience without giving the Father an opportunity to present his evidence before the Court.

There has been no showing on the record that Florida is an inconvenient forum. While the Mother argues that she and the child live in Michigan and that witnesses to the child's care and upbringing are in Michigan, the Father proffered that witnesses as

to the child's care while the child was with him in Florida are in Florida. Additionally, witnesses as to the child's established relationships with friends were in Florida. Witnesses as to the child's potential schooling would be in Florida. Witnesses as to the child's upbringing in Florida prior to moving to Michigan remain in Florida. The Father and new wife reside in Florida, As the Fifth District Court of Appeal noted in Vero v. Vero, 659 So.2d 1348, 1349 (5th DCA 1995),

> "We **observe that the former husband has relatives, an** expert witness, and other witnesses who live in Marion County. The wife has relatives, the child's teachers, and the child's health care providers who live in Broward County. Other witnesses live in Hillsborough County. No matter which forum is selected, it will be convenient to one party and its witnesses and inconvenient to the other party and its witnesses. Here, venue was proper in more than one county, and the former husband had the right to select one of the appropriate counties."

Likewise, the Fourth District Court of Appeal in upholding the Trial Court's decision to retain jurisdiction over the Mother's inconvenient forum argument stated,

> "Here, the court found **that the father had witnesses** residing in Florida and the mother had witnesses residing in or near South Carolina, and that no matter which forum was selected, it would be convenient for one party and inconvenient for the other." Davidian v. Kessler, 685 So.2d 13, 15 (4th DCA 1996)

As in Vero and Davidian, no matter what forum is chosen, it would be convenient for one party and inconvenient for the other.

In sum, even without the Father being allowed to present his evidence, there was still no evidentiary basis before the Court that would support relinquishment of jurisdiction due to Florida being an inconvenient forum.

Furthermore, the Trial Court ignored that the parties had already chosen which forum to determine issues over the minor child. In the Stipulation which allowed the Mother to move to Michigan, the parties expressly stipulated that Florida would retain jurisdiction so long as the Father remained in Florida. There is nothing in the record to suggest that this agreement was obtained through duress or is in any way invalid. This Court in Siegel v. Siegel, 575 So.2d 1267, 1271 (Fla. 1991) held:

> "When two states have proper jurisdiction, we can conceive of no impediment to the parties agreeing to the exercise of proper jurisdiction in one state in lieu of another State which also has proper jurisdiction."

In this case, notwithstanding the lack of evidence to support the Trial Court's finding of inconvenient forum, the parties had already agreed before the Mother left for Michigan, that Florida would retain jurisdiction. This Agreement was incorporated in the Final Judgment of Modification. The Mother should not be allowed now to challenge this.

The Father would submit that it is necessary and appropriate for this Court to establish as a rule of law, that the Trial Court must hold an evidentiary hearing when faced with the issue of releasing jurisdiction based on an inconvenient forum argument under Fla.Stat. §61.1316. Even if this Court is unwilling to hold that such a hearing is mandatory in all cases under Fla.Stat. §61.1316, the Trial Court abused its discretion when, under the facts of this case, it declined to hold an evidentiary hearing.

CONCLUSION

The Fifth District Court of Appeal committed reversible error when it denied Petitioner's Writ of Certiorari. Based on the foregoing, Petitioner/Appellant would respectfully ask this Court to reverse the decision of the Court below,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to: Scott R. McHenry, Esquire, Post Office Box 2346, Orlando, Florida 32802-2346, on this 21 day of July, 1998.

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