ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC00-1577
Fourth District Court of Appeal Case No. 4D00-195

SAMUEL SHAW,

Petitioner,

v.

ELIZABETH SHAW,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

BRIEF ON JURISDICTION OF RESPONDENT ELIZABETH SHAW

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CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Supreme Court of Florida Administrative Order dated July 13, 1998, Respondent Elizabeth Shaw, certifies that the type size and style of this brief is 14 point Times New Roman.

PREFACE

This request for the Court's discretionary review on express and direct conflict is from an opinion of the District Court of Appeal of the State of Florida, Fourth District, affirming a trial court's decision that shared parental responsibility would be detrimental to the parties' minor child until the father completed a 36-week parenting course ("Opinion"). The district court found the trial court was authorized by section 61.13 to order the course in the best interests of the minor child despite the absence of any request framed by the pleadings.

Petitioner Samuel Shaw will be referred to as the "Father."

Respondent Elizabeth Shaw will be referred to as the "Mother."

The district court's opinion will be cited as "A__."

Petitioner's Jurisdictional Brief will be cited as "PB__."

CITATION OF AUTHORITIES

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STATEMENT OF THE CASE AND OF THE FACTS

This case involves dissolution proceedings begun in April 1997 and concluded two and one-half years later. During that time, the parties' minor child was in the Mother's primary residential custody, and the Father visited the child only four times. When the Mother attempted to arrange other visitations, which she did frequently, the Father either sabotaged the arrangements or refused the visitation (A1).

Based on factual findings such as these, the trial court concluded that shared parental responsibility would be "detrimental to the minor child and not in her best interest" (A1). It awarded the Mother temporary sole parental responsibility, ordered the Father to attend a 36-week parenting course, and directed the parties to return to revisit the issue of shared parental responsibility upon the Father's completion of the course (A1).

The Father appealed a number of issues to the fourth district, including the trial court's resolution of the custody and visitation disputes. In its Opinion, the court first discusses the 36-week parenting course requirement. It rejects the Father's argument that *Williams v. Williams*, 690 So. 2d 601, 603 (Fla. 1st DCA 1996), controls with the following language:

> We do not agree with Williams to the extent that it requires that attendance at parenting classes must be pled. Section 61.13(4)(c) authorizes a court to "order the custodial parent to attend the parenting course approved by the judicial circuit." Although this father is not a custodial parent at this time, we see no reason why the court could not have required the father to attend a parenting class, as a condition to the court's reconsideration of custody.

(A1). The court explained there was "ample evidence" supporting the trial court's decision.

The Father claims that the Opinion conflicts with *Williams* and *Silvers v. Silvers*, 504 So. 2d 30 (Fla. 2d DCA 1987). The Mother disagrees.

SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the Opinion and either *Williams* or *Silvers*. Neither case involves solely a parenting course; neither discusses any statutory basis for a parenting course; and neither was decided in the context of a full trial of custody and visitation disputes. Because there is no express and direct conflict between the Opinion and either *Williams* or *Silvers*, the Court should decline to exercise its discretionary jurisdiction.

The Mother also disagrees with the Father that there was any "violation of due process" (IB3) in this case, but the only issue at this point is jurisdiction.

ARGUMENT

I. THE OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH EITHER *WILLIAMS V. WILLIAMS*, 690 SO. 2D 601 (FLA. 1ST DCA 1996), OR *SILVERS V. SILVERS*, 504 SO. 2D 30 (FLA. 2D DCA 1987), BECAUSE NEITHER DISCUSSED THE STATUTORY AUTHORIZATION FOR PARENTING COURSES ON WHICH THE COURT RELIED HERE, NEITHER WAS DECIDED IN THE CONTEXT OF A TRIAL INVOLVING CUSTODY AND VISITATION DISPUTES, AND BOTH INVOLVED COUNSELING, WHICH WAS NOT INVOLVED HERE.

The Court's jurisdiction is governed by section 3(b)(3) of article V of the Florida Constitution, which provides the Court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." The term "expressly" is defined as "in an express manner," and "express" is defined as "to represent in words" or "to give expression to." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). A "conflict" is the "announcement of a *rule of law* which conflicts with a rule previously announced" or the "application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case." *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960). Under the first test the facts are immaterial; under the second the facts are vital. *Id.* In this case, there is neither a rule of law that conflicts with a rule previously announced nor application of a rule of law to produce a different result in a case with substantially the same controlling facts as a prior case. The Court is therefore without conflict jurisdiction.

Among the issues in the trial of this case were custody of and visitation with the parties' minor child (A1). In the Final Judgment, the trial court concluded that it would be detrimental to the child to award shared parental responsibility to the Father until he completed a parenting course and the court revisited the issue at a

hearing thereafter (A1). On that basis the trial court gave the Mother temporary sole parental responsibility pending the Father's completion of the course. On appeal to the fourth district, the Father relied on *Williams*, 690 So. 2d at 603, to complain that the trial court erred in ordering the parenting course because the Mother never requested that relief. The fourth district rejected the argument based on the statutory authority given the trial court in section 61.13(4)(c), Florida Statutes (1999).

Before this Court, the Father now claims the Opinion conflicts with both *Williams*, 690 So. 2d at 603, and *Silvers*, 504 So. 2d at 31. Because the facts of both cases are distinguishable from this case, and because neither case involved construction of any statutory authority for parenting classes, there is no express and direct conflict and the Court is without jurisdiction.

In *Williams*, 690 So. 2d at 602, the issue before the trial court was child support increases and arrearages in post-judgment case proceedings limited to enforcement and modification of the child support provisions of the parties' settlement agreement. Neither custody nor visitation was at issue. Nevertheless, the trial court ordered the former husband to attend parenting classes and to obtain alcohol abuse counseling. *Id.* at 603. In reversing, the first district held that it was "improper to enter an order which exceeds the scope of relief sought by the pleadings, absent notice which affords the opposing party an opportunity to be heard with respect to the proposed relief." The reason, explained the court was that the "former husband was not afforded notice that such a provision was contemplated." *Id.* Nothing in the opinion suggests that any statutory argument was made to the court.

Similarly, in *Silvers*, 504 So. 2d at 31, also in post-dissolution proceedings, the issue before the trial court was only child support arrearages. Neither custody nor visitation was at issue. Yet in its order, the court required both parents and their current spouses to participate in joint counseling and to complete two junior college

courses in parenting, communications, building self-esteem in the family, adjusting to divorce, or step-parenting. *Id.* In reversing, the second district noted that the trial court had "no jurisdiction" to order the classes and counseling and that it was error to impose the conditions without motion, notice, or an opportunity to be heard. Again nothing in the opinion suggests that any statutory argument was made.

In the five other cases cited by the Father, the courts dealt with orders on:

- determining child support, transportation costs, and grandparental visitation in a hearing set only for parental summer visitation, *see Barreiro v. Barreiro*, 377 So. 2d 999, 1000 (Fla. 3d DCA 1979);
- terminating visitation rights in a post-dissolution hearing set only for enforcement and expansion of those rights, *see Brady v. Jones*, 491 So. 2d 1272, 1273 (Fla. 2d DCA 1986);
- changing a month visitation with the parties' child to weekend-only visitation in a post-dissolution hearing set only to arrange a "structured exchange" of the child, *see Little v. Little*, 718 So. 2d 341, 342 (Fla. 4th DCA 1998);
- transferring temporary custody of a child at a post-dissolution hearing set only to enforce visitation and child support, *see Moody v. Moody*, 721 So. 2d 731, 733 (Fla. 1st DCA 1998); and
- directing weekly counseling for a mother and child with a particular therapist and ordering that the therapist confer with the father's attorney in a post-dissolution hearing set only to determine the circumstances of a single visitation, *see Winddancer v. Stein*, 25 Fla. L. Weekly D1298, *1 (Fla. 1st DCA May 26, 2000).

While the Father does not claim that the Opinion conflicts with the above cases, he uses them to support his argument that the trial court's order here violates due process (P4). Like *Williams* and *Silver*, however, not one of the above cases was decided in trial proceedings involving the conditions of custody and parental responsibility, and not one of the cases involves an order directing only a limited-time parenting course as a condition of shared parental responsibility.

In this case, unlike in *Williams*, *Silver*, or the other cases on which the Father relies, the trial court ordered the parenting class after a full trial on issues of custody and visitation, and the district court upend the order on statutory authority. As the Opinion explains, the fourth district's disagreement with *Williams* is only to the extent that it requires a party's pleading to seek attendance at parenting classes notwithstanding statutory authorization for such a class as a condition of custody (A1). Had the district court discussed *Silver*, it would no doubt have found the same distinction. But neither *Williams* nor *Silver* indicates any statutory argument was made.

The Opinion, therefore, is the sole case discussing a statutory basis for an order regarding a parenting class. It is also the sole case decided in the context of a full trial on custody and visitation, the sole case involving only a parenting class, and the sole case approving a parenting class as a condition to expanded custody and visitation in the best interest of the minor child. The rule of law announced in the Opinion is that a court has statutory authority at trial to order parenting classes, whether or not requested by the parties, if the classes are in the best interests of the minor child with respect to shared parental responsibility and custody.[1] That is not

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[1] The trial court could have ordered sole parental responsibility without giving the Father any chance to rehabilitate himself. The Opinion inherently recognizes that such a decision would have been within the trial court's discretion.

the rule of law announced in *Williams* or *Silvers*. And the facts reflected in the Opinion are not substantially similar to any of the cases on which the Father relies. The foundations for this Court's conflict jurisdiction, as established in *Nielsen*, 117 So. 2d at 734, are therefore absent.

An argument similar to the one made here by the Father was made in *Cortez v. State*, 731 So. 2d 1267, 1268 (Fla. 1999). In rejecting the argument, the Court held that there was no express and direct conflict to give it jurisdiction because the district court in *State v. Cortez*, 705 So. 2d 676, 678-79 (Fla. 3d DCA 1998), based its decision on the scope of section 856.031, Florida Statutes (1997), while the cases with which conflict was claimed did not discuss the effect of the statute. *Compare Cortez*, 705 So. 2d at 678-79, *with D.L.B. v. State*, 685 So. 2d 1340 (Fla. 2d DCA 1996), *K.R.R. v. State*, 629 So. 2d 1068 (Fla. 2d DCA 1994), *Freeman v. State*, 617 So. 2d 432 (Fla. 4th DCA 1993), *G.E.C. v. State*, 586 So. 2d 1338 (Fla. 5th DCA 1991), *Lucien v. State*, 557 So. 2d 918 (Fla. 4th DCA 1990), *T.L.F. v. State*, 536 So. 2d 371 (Fla. 2d DCA 1988), and *Springfield v. State*, 481 So. 2d 975 (Fla. 4th DCA 1986). Here, as the Court confirmed in *Cortez*, there cannot be direct and express conflict because the Opinion is based on the effect of 61.13, while the statute was not discussed in either *Williams* or *Silver*.

CONCLUSION

For the foregoing reasons, the Court should find it is without conflict jurisdiction and dismiss the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U.S. Mail to Diane H. Tutt, Esq., 8211 West Broward Boulevard, Suite 420, Plantation, Florida 33324-2741, this 25th day of August, 2000.

Respectfully submitted,

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