SUPREME COURT OF FLORIDA

CAROLYN R. WADE f/k/a
CAROLYN R. HIRSCHMAN,

Petitioner,

vs.

CASE NO. SC04-1012
L. T. 5D03-2797

MICHAEL D. HIRSCHMAN,

Respondent.

ON CONFLICT REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Linda Logan Bryan, Esquire
Florida Bar No. 286303
97 Orange Street
P. O. Box 3376
St. Augustine, FL 32085
904-824-0484
Attorney for Respondent, Father,
Michael D. Hirschman

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I. STATEMENT OF THE CASE AND FACTS

Respondent Michael D. Hirschman is the father of the minor child who is the subject of this custody dispute (hereafter "Father"), and the ex-spouse of Petitioner Carolyn R. Wade, f/k/a Carolyn R. Hirschman, the child's mother (hereafter "Mother"). Father will limit this statement to the facts which Mother has misstated and/or omitted. For the convenience of the Court, Father will follow the same outline used by Mother.

A. Procedural Background

The Fifth District did not concede that if the "Change Test"[1] applied, the Father failed to meet it. Likewise, the *Wade v. Hirschman* court did not conclude that the Father had not demonstrated a substantial or material change in circumstances. 872 So. 2d 952, 954 (Fla. 5th DCA 2004); Appendix of Respondent at 3[2] (emphasis added). The Fifth District acknowledged the Mother's argument that the Father had failed to meet this test and concluded that the record supported her argument that her conduct toward the child and the Father and mental instability occurred both before and after the final divorce decree. *Id.*, AR. 3. Further, the appellate court below acknowledged Mother's argument that the child had not

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[1] Mother's nomenclature for the test most often called the "extraordinary burden" test. *E.g.*, *Knipe v. Knipe*, 840 So. 2d 335, 340 (Fla. 4th DCA) *rev. denied*, 849 So. 2d 1088 (Fla. 2003).

[2] "AR. __" refers to page(s) in the Appendix of Respondent that accompanies this Answer Brief on the Merits.

suffered detriment in her care and pointed to evidence that indicated that the child was not negatively impacted by Mother's behavior --- there was "no diagnosable emotional stress." *Id.*, AR. 3 (emphasis added). The court concluded

> "[w]e do not need to address the issues of whether [Father] sufficiently established a substantial change of circumstances and that the change of custody was in the child's best interests, including whether a detriment to the child was established if left in the original rotating custody arrangement... ." *Id.*, AR. 3.

The Fifth District did not decide whether the total and complete failure of the rotating custody plan was a substantial change in circumstances and that as a result the modification of the plan was in the child's best interests. *Id.* at 954-55, AR. 3.

Instead, the Fifth District found that the competent and substantial evidence demonstrated the total failure of the rotating custody plan, allowing the trial court to redetermine custody based on the section 61.13(3), Fla. Stat. considerations as though making the initial custody determination. Then, the district court below found that the trial court's consideration of all the statutory factors was supported by the competent substantial evidence. Therefore, the trial judge did not abuse his discretion in making the custody decision. *Id.* at 955, AR. 3.

In reaching these evidentiary conclusions the *Wade v. Hirschman* court found that more than hostility between the parties and their inability to get along was established in this case.[3] *Id.*, AR. 4. The Fifth District upheld the trial court's finding

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[3] *Cf., Cooper v. Gress*, 854 So. 2d 262, 266 (Fla. 1st DCA 2003) (This court found parents' failure to communicate and hostility toward each other, without

that Mother undermined, alienated and refused to cooperate with the parenting coordinators responsible for making the custody plan work.[4] *Id.*, AR. 4. Finally, the district court found that the trial court's approval of the rotating custody arrangement was based on parental compliance with the custody plan and cooperation with the parenting coordinator and that this assumption was not fulfilled. *Id.*, AR. 4. Based on the competent substantial evidence of the plan's failure and the competent substantial evidence of the trial court's findings regarding the section 61.13(3) primary custody factors, the Fifth District found no abuse of discretion and affirmed the Order Changing Primary Residence to the Father (hereafter "Modification Order"). *Id.* at 953, AR. 2.

Father responded to Mother's Motion for Rehearing and/or Certification. AR. 25-43. Mother's actual argument was, inter alia, that the Fifth District overlooked law that held that a party could not be held to a standard or test to which she did not agree. A. 16, ¶ 3 (Father refers to Mother's Appendix). Father pointed out that the Fifth District had cited, not overlooked, the law on which Mother relied and that it did not support Mother's position. AR. 27-29, ¶ 2. Also, while it is and was true that Father believes that the record facts support the Modification Order even under the

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more, was not a change in circumstances warranting modification).

[4] Though not essential to its decision, the Fifth District noted that at the time when it had to enter an order approving the plan to which the parties had previously agreed, it warned the parties that failure to comply with the plan could affect custody. 872 So. 2d at 953, 955; AR. 2, 4.

Change Test, Father's argument below did not prevent the Fifth District's affirmance of the trial court's result. AR. 31-32, ¶ 4. The instant trial court made sufficient findings of fact to cover all three tests reported by the Fifth District below. 872 So. 2d 953-954; AR. 2-3. In his response to Mother's motion, Father cited *Jaworski v. State*, 804 So. 2d 415, 419 (Fla. 4th DCA 2001) for the proposition that an appellate court is obligated to entertain any basis to affirm a judgment under review even if the appellee does not argue it. AR. 31-32, ¶ 4. Citing to her motion for rehearing, Mother states that the proceedings below prevented her from introducing evidence such that she should be entitled to another evidentiary hearing on modification. Initial Brief of Petitioner at pages 4-5 (hereafter "IBP at __"). Father's response addressed this argument, too. AR. 33-35, ¶'s 6, 7 & 8. The evidence regarding modification was heard on cross-petitions for modification, both alleging a substantial change in circumstances and including factual allegations intended to support both prongs of the test. 872 So. 2d at 953; AR. 2, Vol. VI, R. 1121, AR. 5[5]; Vol. II, R. 380-85; Vol. II, R. 387-89 and Vol. III, R. 466-68.

B. **The Order on Appeal**

In her description of the Modification Order, Mother incorrectly states that the trial court did not find that the child's best interests would be promoted by a change

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[5] "Vol. __, R. __" refers to a citation to the record volume and record page(s) of the Record on Appeal.

in the custody plan. IBP at 7. The trial court made sufficient findings of fact to cover all three evidentiary tests potentially applicable to the proceeding. 872 So. 2d 954; AR. 3. After finding facts to support a change in circumstances; finding that Mother had refused to honor Father's visitation rights; and considering the best interests of the child measured against the section 61.13(3) primary residence criteria, the trial court found that the shared custody agreement incorporated in the final judgment was "no longer in the best interests of the child," and found the award of primary residential custody to the Father to be "in the best interests of the minor child." Vol. VI, R. 1121-26, 1126, AR. 5-11, 11.

In addition, Mother failed to disclose that the trial judge found that Mother's testimony "[was] not credible." Vol. VI, R. 1123, AR. 7. Also the trial judge found that the witnesses called by Mother "[had] little credibility." Vol. VI, R. 1123, AR. 7. Finally, the trial court found that Mother's witnesses had little knowledge of Mother's post-judgment conduct. Vol. VI, R. 1123, AR. 7.

C. **The Original Judgment/Custody Arrangement**

In describing the history of the minor child's custody, Mother omits the fact that in early October 1999, she asked the Father and the minor child to leave the marital residence. They did. Vol. I, R. 179-80 (emphasis added). Then the Father filed for dissolution, Vol. I, R. 1-7, and was granted temporary custody of the minor child, Vol. I, R. 179, which lasted for a year until the entry of the Consent Final Judgment on October 30, 2000 (Vol. VI, R. 1121, AR. 5), in which Father agreed to

a rotating custody plan. Vol. II, R. 245, AR. 12.

Mother's statement includes evidence that she was not mentally unstable and was apparently free of erratic conduct prior to the judgment implementing the agreed rotating custody plan. IBP at 8. This contradicts her description of the record in her brief, IBP at 18-20, 41, and her argument that her post-judgment behavior does not support a finding of changed circumstances.

Mother's summary of the Consent Final Judgment omits key provisions. In the Consent Final Judgment to which the parties had agreed, the trial judge found, inter alia, as follows:

> "It is in the best interest of the minor child of the parties, that no primary residential parent be designated, and that the parties share parental responsibility under the oversight of a parenting coordinator, whose duties shall be designated herein." Vol. II, R. 245, ¶ B, AR. 12, ¶ B.
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> ...
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> "The parties hereto have consented to the entry of this Final Judgment, and as to all of its terms and conditions. Vol. II, R. 245, ¶ C, AR. 12, ¶ C.
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> ...
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> "The designation of no primary residence is intended to promote and encourage flexibility and cooperation between the parties." Vol. II, R. 248, ¶ 6, AR.15, ¶ 6.
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> ...
>
> "The parties shall retain a parenting coordinator, who shall arbitrate disputes regarding all aspects of the time sharing and shared parental responsibility of the minor child. Vol. II, R. 248, ¶ 7, AR. 15, ¶ 7.

Both Mother and Father agreed to Dr. Horn as the initial parenting coordinator, Vol. II, R. 338. At the time of the parties' agreement to the plan which was incorporated

in the Consent Final Judgment, the minor child was six and one-half years old. Vol. II, R. 246, ¶ 2, AR. 13, ¶ 2. Even though Father had custody at that time, Father agreed to the rotating custody plan so that the child could have as much access to both parents as possible and premised upon Mother's agreement to follow the plan. Vol. VIII, R. 1245, Tr. 282-286[6] (emphasis added). Within two days of the consent judgment, the parties agreed to the parenting coordinator and to comply with the parenting coordinator's recommendations. Vol. II, R. 252-54, ¶ 5, AR. 43-45. Pursuant to the parents' proposals within three days of the consent judgment, the trial court entered an order defining the parenting coordinator's duties. Vol II, R. 255-60, AR. 46-51. The parties were required to cooperate with the parenting coordinator. Vol. II, R. 256, ¶ 2, AR. 47, ¶ 2 . Almost a year later, the trial court had to "order" the parenting plan to which the parties had previously agreed and warn the parents that failure to comply with the plan could affect custody. Vol. II, R. 338-39, ¶ 1, AR. 52-53, ¶ 2 .

D. **The Child's Mental State at the Time of the Modification Hearing**

Mother's presentation of the child's mental state at the time of the modification hearing omits instructive facts. The clinical psychologist, Dr. Risch, opined that the stress imposed upon the minor child by the Mother's conduct could impact his

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[6] "Tr. __" refers to page(s) of the transcript of the modification hearing in the trial court. The transcript consists of two volumes of the record including 360 pages. Vol. VII is found at page 1244 of the record. Vol. VIII is found at page 1245 of the record.

future relationship with adults. Vol. VII, R. 1244, Tr. 45, 47-48. Dr. Risch also testified that the Mother was not in touch with the child's needs for social development, Vol. VII, R. 1244, Tr. 23-24; that Mother's refusal to share the child or allow the child to engage in outside activities was not healthy, Vol. VII, R. 1244, Tr. 22-24; that Mother coached the child, encouraging him not to talk to Dr. Risch in the sessions, Vol. VII, R. 1244, Tr. 30-31; that the child "gets sick" with the Mother because the Mother adversely impacts the child with her emotions, Vol. VII, R. 1244, Tr. 29, 36, 52-53; and that the child was overly protective of Mother because of her excessive display of stress in front of the child. Vol. VII, R. 1244, Tr.48. Mother manipulated and used the child, causing undue stress.

Dr. Hoza was the child's second therapist after the Mother, who was unhappy with Dr. Risch's advice, engineered a change in therapists. Vol. VI, R. 1122-23, AR. 6-7. Dr. Hoza testified that Mother displayed her anger toward the dissolution proceedings in front of the child, Vol. VII, R.1244, Tr. 86-87; that Mother refused her advice to keep the child out of litigation disputes, Vol. VII, R. 1244, Tr.16; that Mother pressured the child to reduce his extracurricular activities, Vol. VII, R. 1244, Tr. 99; and that Mother ranted in front of the child and his classmates at school. Vol. VII, R. 1244, Tr. 98. Dr. Hoza recommended that the situation could be handled through a parenting coordinator rather than therapy. IBP at 10; Vol. VII, R. 1244, Tr. 116-117. However, Mother refused to cooperate with or follow the parenting coordinator's advice or the parenting plan. Vol. VI, R. 1122-23, AR. 6-7.

Also, Father's statements about the child are taken out of context. Father testified that he did not have any reason to believe that Dr. Hoza's testimony about the child being resilient and weathering conflict well was not true. Vol. VIII, R. 1245, Tr. 316. Father also testified that at the time of the modification hearing, the child's academic performance was not what it could be, Vol. VIII, R. 1245, Tr. 307; that the child was having behavioral problems in school; and that the Mother did not provide a stable environment for the child. Vol. VII, R. 1245, Tr. 308. Father testified that, although the second parenting coordinator, Mr. Rousis, reported everything to be fine at his first meeting with the family in January of 2002, the very next day after the meeting when the Father went to pick up the child from school, he could not find him because the Mother had taken the child in violation of the plan. Father reported that what had seemed fine the day before, deteriorated very quickly after the initial meeting with Mr. Rousis. Vol. VIII, R. 1245, Tr. 310-11. Father stated that the child did a good job of holding up under the pressure with the help of the therapist. Vol. VIII, R. 1245, Tr. 316.

E. **The School-Related Issues**

Mother offers an explanation and denial of her unilateral, unannounced removal of the child from the agreed school district to another district, Vol. VI, R. 1121, AR. 5, citing her own testimony at the hearing. IBP at 10-11. This factual issue was resolved by order of the trial court much earlier than the final hearing. The trial judge found that Mother's change of the child's school contrary to the parties' agreement

was without Father's knowledge or consent. Vol. II, R. 338, AR. 52.

Additionally, Mother states that Father asked the court to adopt a parenting plan to which she had objected. IBP at 11. This was another fact resolved before the modification hearing. When the trial court was required to hold a hearing on the adoption of the plan, it held that the parties had agreed to the plan in the spring of 2001, but that at the hearing on November 8, 2001, Mother objected to all paragraphs in the plan. The trial court found the plan to be well taken, specific and to address the problems, and that Mother's objections were unreasonable and without merit. The court entered an order approving the plan previously agreed, ordered the parties to comply and warned that failure to comply could affect custody. Vol. II, R. 338-39, AR. 52-53.

Mother includes some incidents regarding the child's schooling and progress, but omits others. First, with respect to Ms. Barnes, the child's second grade teacher, Mother reports that she made progress with the child despite the Mother's conduct. IBP at 12. Actually, when asked about her success in overcoming the obstacles presented by the Mother, Ms. Barnes testified that they kept the child from realizing his potential, Vol. VIII, R. 1245, Tr. 206, and Ms. Barnes testified that she felt like she had made some progress, but was disappointed because she had met with resistance for so much of the year, Vol. VIII, R. 1245, Tr. 209-10. Ms. Barnes explained that when she told the child to do something in class, he would reply that his Mother said he didn't have to do her work. Vol. VIII, R. 1245, Tr. 210.

Mother's description of the child's academic record is incomplete. Mother states that the child failed the first grade in the Father's custody. IBP at 13. Mother omits the fact that at the end of the child's kindergarten year prior to the couple's separation in October 1999, Mother and Father had a meeting with his kindergarten teacher and the principal to discuss problems with the child that had been identified in kindergarten. The principal's policy was to wait and hold children back in the first grade, not kindergarten, so the Mother and Father agreed to the promotion to first grade with the understanding that the child would likely be held back after his first grade year. Mother participated in and agreed to this plan. Vol. VIII, R. 1245, Tr. 297-98. In addition, after the child's second year in first grade, the Father had him tested for the Exceptional Student program, he was enrolled in that program and his grades improved in second grade when he was being given the special help of the program. Vol. VIII, R. 1245, Tr. 299-300; Vol. VII, R. 1244, Tr. 109. Mother was unhappy with the child being placed in the special program and complained to the parenting coordinator. Vol. VII, R. 1244, Tr. 109. After the child finished second grade, the school recommended that the child attend summer school; however, Mother refused to take him when he was with her. Vol. VIII, R. 1245, Tr. 301. The child passed third grade, but was not working to his academic potential. Vol. VIII, R. 1245, Tr. 307.

F. **The Visitation/Contempt Issue**

Again, Mother relies on her own testimony at the modification hearing to revise

the record facts concerning her interference with Father's visitation. IBP at 13. The trial court's Order of Contempt found that the provision of the final judgment on the visitation schedule was not confusing and that the Mother's violation of the schedule was a willful interference with the Father's visitation. Vol. II, R. 372; Vol. VI, R. 1123, AR. 7. Mother's willful violation of the plan occurred in early January 2002. Father immediately contacted the parenting coordinator to discuss it. However, the parenting coordinator said he could not discuss it until he had an opportunity to speak with the Mother. Vol. VIII, R. 1245, Tr. 311. Father filed a motion for contempt. Only after weeks had passed did the Mother indicate that she wanted to work it out. Vol. VIII, R. 1245, Tr. 312. Father testified that Mother did not violate the schedule again after he "held her feet to the fire." Vol. VIII, R. 1245, Tr. 313.

Again, Mother reports that her counter-petition for an award of primary residential custody alleged no change in circumstances had occurred. IBP at 14. This is not true. Mother filed two counter-petitions, one in July 2002, Vol. II, R. 388-89, and one in December 2002. Vol. III, R. 466-68. In her first petition Mother sought primary residential status alleging that the parenting plan was "unworkable" and cost and time prohibitive, Vol. II, R. 388, but also alleged Father's petition should be dismissed due to his "failure to establish a substantial change in circumstances... ." Vol. II, R. 389. Mother's later, second, counter-petition sought an award of primary residential custody and alleged a substantial change in circumstances based, inter alia, on Father's continuing failure to cooperate with

shared parental responsibility and on numerous factual allegations regarding the Father's alleged improper conduct, temper and thwarting of visitation. Vol. III, R. 466-67. The final modification hearing came on to be heard upon both Father's and Mother's allegations of a substantial change in circumstances. 872 So. 2d at 953; AR. 2; Vol. VI, R. 1121, AR. 5.

G. **Interference with Parenting Coordinators**

Mother states that her interference with the parenting coordinators is a "dispute between the parties." IBP at 15. However, the trier of fact found that Mother failed to follow the coordinator's recommendations and disrupted the plan, then tried to fire the coordinator. Vol. VI, R. 1123, AR. 7. Dr. Horn, the first coordinator, observed Mother to "brick wall" the parenting process and to be uncooperative. Vol. VII, R. 1244, Tr. 165. Although Mother denied this conduct at the hearing, the trial judge found her testimony not credible. Vol. VI, R. 1123, AR. 7.

Mother's statement regarding the issue of parental alienation also omits important facts. Dr. Horn testified that Mother's test scores were quite high indicating her propensity for parental alienation. Although Dr. Horn testified that she had no personal knowledge of same in this case, she also testified that Mother was jealous of Father's time with the child. Vol. VIII, R. 1244, Tr. 167, 169-71. The trial court found Mother's actual behavior, including her statements to Dr. Risch about not wanting to allow the child to go to tutoring or baseball games because she did not want to share the child and her conduct in refusing to allow the child to go on a field

trip because the Father's parents were chaperones, to be evidence of parental alienation. Vol. VI, R. 1122, 1124, AR. 6, 8.

Again, Mother reports that she did not agree to the parenting plan. IBP at 17. The record demonstrates the opposite. Vol. II, R. 338-39, AR. 52-53.

Mother selectively reports the comments of the second parenting coordinator, Nick Rousis. IBP at 17. Mr. Rousis' report was dated June 24, 2003, two weeks before the modification hearing. Vol. IV, R. 712-15; Vol. IV, R. 712-15. At this time, he reported that Mother had difficulty maintaining emotional control during the parenting sessions, that she had difficulty focusing on the issues, that she resisted scheduling appointments, and that she wanted many changes in the plan but would not take the time to come in and discuss them. He reported that she tended to become anxious and angry and her thoughts were scattered; that although she had the child more time than Father, she had difficulty tolerating the Father's receiving extra time with the child; and that Mother placed the child in the middle of the parental disputes by having the child contact the therapist to make an appointment to discuss where he should live. He reported Father to be cooperative. Vol. VIII, R. 1245, Tr. 276-78; Vol. V, R. 841-44. The Rousis report supports the trial court's findings regarding Mother's interference with the custody plan and failure to cooperate with the parenting coordinators.

H. **Mother's Mental Health/Parental Alienation**

Mother differentiates between what she describes as testimony regarding pre-

and post-judgment events. The final judgment approving the rotating custody arrangement was entered on October 30, 2000. Vol. VI, R. 1121, AR. 5. The trier of fact found that the rotating custody plan failed based on post-judgment events. Vol. VI, R. 1121-27, AR. 5-11. Mother restates her own testimonial denials and that of her witnesses. IBP at 26-27. The trial court found that neither she nor her witnesses were credible. Additionally, the trial court found that her witnesses had little knowledge of post-judgment events. Vol. VI, R. 1123, AR. 7. Finally, Mother reports that she was one of Ketterlinus' favorite substitute teachers. IBP at 27. Mother attributes this statement to Ms. Barnes, the child's second grade teacher. Vol. VIII, R. 1245, Tr. 348. Also, Mother states that she has substituted for Ms. Barnes. IBP at 27. In fact, Ms. Barnes was the child's second grade teacher who struggled with the Mother's attempts to undermine her authority and failure of cooperation. Vol. VI, R. 1121-22, AR. 5-6. Ms. Barnes' actual response to whether she had ever asked Mother to teach her class was "no, I have not." Vol. VIII, R. 1245, Tr. 322. Then, when asked if she had ever asked Mother to substitute in her class, Ms. Barnes' said that she did at the end of the school year on a day when they were not having instruction and she could not find a substitute anywhere else. Ms. Barnes stated that she previously told school officials not to allow Mother to substitute in her class. Only when they were desperate that day and looking for a "warm body" did she allow Mother to substitute for approximately an hour and a half. Vol. VIII, R. 1245, Tr. 322-23.

I. Father's Living Arrangements

Mother implies that the Father lives with his parents who make the rules for the Father and the son. IBP at 28. This is not true. Father lives in a family-owned home which is titled to his parents' real estate trust. He has exclusive possession of the home; his parents do not live with him. Vol. VIII, R. 1245, Tr. 280-81.

II. SUMMARY OF THE ARGUMENT

This Court has accepted jurisdiction based on a conflict between the Fifth District in *Wade* v. *Hirschman* and the First District in *Cooper* v. *Gress* with respect to the proper evidentiary test to be applied to child custody modifications in which there is a rotating custody plan without designation of a residential parent. In *Wade* v. *Hirschman*, the Fifth District applied a two part test which requires competent, substantial proof of the failure of the custody plan, for whatever reason, then permits the trial court to determine primary residential custody pursuant to the section 61.13(3) factors as if it were an initial custody determination. In *Cooper* v. *Gress*, the First District applied the Change Test, or "extraordinary burden" test which is a two-pronged test which first requires competent, substantial proof of a substantial post-judgment change in circumstances and a determination that a change in custody is in the best interests of the child.

A.

The standard of review for this Court's determination of the proper evidentiary test is *de novo*. This Court should approve the test announced by the Fifth District

which is sensible and fair, and correctly focuses on the best interests of the child when there has been no designation of residential parent. This test does not offend the stability of custody decrees because it requires threshold proof of the failure of the custody plan and recognizes that a trial court should be permitted the same discretion as in an initial custody decree when the rotating plan has failed - for whatever reason - because there is no presumption in favor of a previously designated custodial parent. This Court should affirm *Wade v. Hirschman* and overrule *Cooper v. Gress* insofar as it is inconsistent.

B.

If this Court finds that the Change Test or "extraordinary burden" test applies in the instance of a rotating custody agreement without the designation of a residential parent, the instant trial court's findings with respect to a substantial change in circumstances and the best interests of the child are subject to review based on an abuse of discretion. The trial court has less discretion in a modification proceeding than in an initial determination; however, the trial court should be permitted to make a decision that recognizes that the protection of the child is paramount. The competent substantial evidence *sub judice* demonstrates that the failure of the rotating custody plan was a substantial and material post-judgment change of circumstances, that the total failure of the plan as a result of Mother's refusal to abide by her agreement was not contemplated by the parties at the time of the entry of the judgment and that the best interests of the child will be served by changing custody

and designating the Father primary residential parent. This Court should affirm the result in *Wade v. Hirschman* and remand to the Fifth District with instructions.

C.

This Court's approval of the modification test announced by the *Wade* v. *Hirschman* court does not entitle the Mother to a new evidentiary hearing. Mother's petitions for modification below demonstrate that she should have been prepared to introduce evidence of the Father's fitness as a parent in accordance with the best interests of the child, proof shared by both tests. Mother was not deprived of a full opportunity to prove her petition for modification and/or defend against the Father's petition for modification. Mother's request for another modification hearing should be denied.

III. ARGUMENT

A. IN THE CIRCUMSTANCE OF A SPLIT ROTATING CUSTODY PLAN WITH NO PRIMARY RESIDENTIAL PARENT, WHEN THE RECORD ESTABLISHES THAT THE CUSTODY PLAN HAS FAILED, AN AWARD OF PRIMARY RESIDENTIAL CUSTODY SHOULD BE BASED ON A CONSIDERATION OF THE SECTION 61.13(3) "BEST INTEREST" FACTORS.

(In Response to Mother's Argument III.A.)

1. **Standard of Review**

This Court's determination of the proper legal standard or test for custody modification based on the instant record facts is a question of law; therefore, the standard of review is *de novo*. *Cooper v. Gress*, 854 So. 2d 262, 265 (Fla. 1st DCA

2003); AR. 21; *In Re Guardianship of J.D.S.*, 864 So. 2d 534, 537 (Fla. 5th DCA 2004) (a pure question of law is reviewed *de novo*).

2. **The Proper Test**

The modification test announced by the Fifth District in *Wade v. Hirschman* should be approved and its decision affirming the trial court's modification of the instant rotating custody plan affirmed. Below, the Fifth District reviewed a trial court's order modifying a rotating custody plan that did not designate a primary residential parent and which was incorporated in the final judgment of dissolution by consent of both parents. 872 So. 2d at 953, AR. 2. The trial court heard competing petitions[7] for modification in which both parents alleged a post-judgment substantial change in circumstances and sought an award of primary residential custody. The competent substantial evidence demonstrated that the rotating custody plan had failed and was doomed to failure. 872 So. 2d at 954-55, AR. 3-4. The instant rotating plan failed because the Mother refused to abide by the parenting plan required by the parties' custody agreement, and interfered with the duties and functioning of the parenting coordinator, which was also a key provision in the parties' custody plan. *Id*., AR. 4. The reason for the failure of the plan did not determine the test. The Fifth District articulated a test applicable in any instance in which a rotating custody plan without a designated residential parent has failed, is unworkable and is doomed

[7] The evidentiary test applied to this modification did not require that there be competing petitions.

to future failure --- for whatever reason. *Id*. at 954-55, AR. 3. The *Wade v. Hirschman* court reasoned that once a rotating custody plan becomes unworkable for whatever reason,[8] the trial court should be free to redetermine custody and designate a primary residential parent as if it were an initial custody determination by considering the factors provided in section 61.13(3)(a)-(j), Fla. Stat., sometimes called the "primary residence criteria." Vol. VI, R. 1124, AR. 8. Applying the statutory factors, the trial court then determines the best interests of the minor child as demonstrated by the competent substantial evidence. *Id.*, AR. 3. The *Wade v. Hirschman* test is applicable only to the modification of a rotating custody plan without a designated residential parent, not all modification proceedings, and it is a two-tiered test requiring the parent seeking modification in these circumstances to

> 1) prove by competent substantial evidence that the rotating custody plan has failed and doomed to future failure for whatever reason,

and

> 2) prove by competent substantial evidence that an award of primary residential custody is in the best interests of the child based upon a consideration of the section 61.13(3) factors. 872 So. 2d at 954-55, AR. 3 (emphasis added).

The petitioning parent must meet the evidentiary threshold of establishing the failure of the plan before the trial court is free to determine the best interests of the child

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[8] The district court cites as examples a child becoming school age or one parent's complete refusal to adhere to the plan. 872 So. 2d at 955, AR. 3.

pursuant to the statutory factors. When the assumption underlying the split rotating custody plan fails, it is sensible to let the court return to "'square one.'" *Id*. at 955, AR. 4. The instant plan was premised upon the understanding that the parties would comply with the parenting plan and cooperate with the parenting coordinators. Vol. II, R. 253, 255-59, AR. 44, 46-50. The Mother did not do so. 872 So. 2d 955, AR. 3-4. This test promotes the best interests of the State's children and does not offend existing policy considerations, including specifically the stability of custody decrees and the avoidance of harassing litigation --- policies said to favor the Change Test. 872 So. 2d at 954, AR. 3.

This test is sensible because, in effect, this is an initial custody determination as is contemplated by section 61.13(3). In this instance, a trial court has not previously considered the statutory factors to determine a primary residential parent. Accordingly, this is not a "do over" as the Mother argues. IBP at 34. It is fair to both parents and provides a reasonable basis for rescuing a minor child from an unworkable circumstance. Moreover, and unlike the Change Test or "extraordinary burden" test, it does not require that the potential failure of the custody plan be uncontemplated at the time of its implementation. *Cf.*, *Pimm v. Pimm*, 601 So. 2d 534, 536 (Fla. 1992) (the substantial change must be one that was not reasonably contemplated at the time of the original judgment). With respect to any agreement, there is always a potential for failure. The instant Father believed that the Mother would abide by the parenting plan and cooperate with the parenting coordinator,

especially if there were no designated residential parent, Vol. VI, R. 1245, Tr. 281-85, and he agreed to allow the Mother the increased access to the young child which was permitted by this plan, even though it is arguable that some of her past behavior should preclude this opportunity. The Father focused on the welfare of the child. Similarly, in the circumstance of divorced parents with a baby or pre-schooler, the Fifth District's test would permit them to enter into a rotating custody arrangement such that both parents can have equal and open access to the children at this young age, even though both may realize that there may come a time when school attendance renders the split plan unworkable. This test avoids the requirement for proof of whether the instant Father should have known whether this plan would work and promotes the opportunity for mutual and equal parental access to the child. If the Change Test were the only test, as Mother urges, IBP at 32, divorcing parents could not agree to a rotating custody plan in a situation where either or both may realize that a future event will make the plan untenable.

This test permits the trial court the flexibility to protect the welfare of children in modification proceedings when the best parental intentions go awry. This discretionary flexibility is a significant concern of Florida's appellate courts which feel constrained to review the modification of custody pursuant to the Change Test. *Cf.*, *Hammac v. Hammac*, 866 So. 2d 191, 192 (Fla.. 1st DCA 2004) (Judge Wolf concurs with an opinion to emphasize that the need for protecting children may overcome the so-called "extraordinary burden," and to contradict the impression that

the burden of proof should prevent trial courts from intervening even where the well-being of a child might require action).

Mother asks this Court to conclude that all custody modification petitions be judged by the same evidentiary test, i.e., what she calls the "Change Test." IBP at 32. The protection of children and the promotion of their best interests should not take a back seat to the all-encompassing, unbending rule of law that Mother proposes. Mother contends that to do otherwise would render all custody judgments "inherently unstable." IBP at 32. Her reasoning is fallacious.

The Change Test requires that a party seeking modification of an existing custody order must establish by competent and substantial evidence that there has been a substantial and material change in circumstances since the entry of the order to be modified and that the best interests of the child will be served by a modification of custody. 872 So. 2d at 953, AR. 2; *Stricklin v. Stricklin*, 383 So. 2d 1183, 1184 (Fla. 5th DCA 1980) (emphasis added). The Change Test is described as two-pronged, i.e., the "substantial change" prong and the "best interests" prong. *Cooper v. Gress*, 854 So. 2d at 265, AR. 21; *Boykin v. Boykin*, 843 So. 2d 317, 320 (Fla. 1st DCA 2003); *accord*, *Wade v. Hirschman*, at 953, AR. 2. Modification of child custody under this standard requires a petitioning parent to establish the threshold prong, a substantial change in circumstances since the original custody order by competent substantial evidence, *e.g.*, *Sanchez v. Sanchez*, 575 So. 2d 744 (Fla. 5th DCA 1991), then he must establish by competent substantial evidence that the change

in custody would promote the best interests of the child which requires a consideration of the section 61.13(3) factors. *Cooper v. Gress*, 854 So. 2d at 265, AR. 7; *Young v. Young*, 732 So. 2d at 1134-35. Consideration of only the "best interests" factors of section 61.13(3) as is permitted in an initial determination of custody is often described as a lesser burden not appropriate to the policies underlying review of modifications of custody. *E.g.*, 854 So. 2d at 265, AR. 7. Mother's argument regarding a "one size fits all" test for modification is premised upon her categorization of the *Wade v. Hirschman* test as the more lenient "best interests test." IBP at 32.

The Fifth District was not unmindful of the policy considerations underlying the use of the Change Test by all appellate courts in an effort to "forestall repeated child custody modification proceedings" and "to achieve stability and finality in child custody decrees." No one would argue that the best interests of children are served by constant, protracted litigation concerning child custody or primary residency. 872 So. 2d at 954, AR. 3. The *Wade v. Hirschman* test does not undermine these policies. To begin with, the Fifth District's test does not apply to a change in the primary residence of the child. 872 So. 2d at 954, AR. 3. It is tailored to a much more specific situation, i.e., that of a rotating custody arrangement without a designated residential parent --- a circumstance that has historically presented courts with difficulty with respect to the application of an appropriate test. *E.g.*, *Cooper v. Gress*, 854 So. 2d at 268, AR. 23-24 (distinguishing cases that have not applied the

Change Test to rotating custody situations). Moreover, the Fifth District's test is more than the "best interests" test which tracks the factors of section 61.13(3). As briefed *supra*, it is a two-tiered test which first requires competent substantial proof of the "failure of the custody plan," requiring a parent seeking to modify the plan to meet this evidentiary threshold before the trial court is permitted to apply the section 61.13(3) "best interests" test. 872 So. 2d at 954-55, AR. 3.

Although the instant review is premised upon a conflict between the Fifth District below and the First District in *Cooper v. Gress*, the Fifth District's approach to the review of rotating custody plans is analogous to the approach of the First District. In *Cooper v. Gress*, which involved a rotating custody plan without a designated residential parent, the First District reversed the trial court for using only the "best interests" prong of the Change Test to award the mother primary residential custody. Emphasizing the extraordinary burden applicable to modification proceedings, the First District reversed the trial court's modification because it did not require threshold proof of a substantial change in circumstances. The overriding mistake of the trial court in *Cooper v. Gress* was that there was no "threshold ground" alleged or established for changing the custody plan. 854 So. 2d at 267, AR. 23. Similarly, the *Wade v. Hirschman* test requires competent and substantial proof of a threshold ground for changing the plan --- the failure of the plan. 872 So. 2d at 954-55, AR. 3. Accordingly, the horribles to be avoided, i.e., the instability and lack of finality in child custody circumstances which would permit parents to prove only

the primary residence criteria in modifications, will not be eroded by the adoption of the Fifth District's test which does not permit either parent to modify the custody plan based solely on proof that he or she has satisfied the proof requirements of the primary residence criteria.

Significantly, existing State policies with respect to modification of custody, support the adoption of the Fifth District's test. The Fifth District identified, but determined inapplicable, another evidentiary test used to determine the propriety of custody modifications.[9] Though not applicable on the instant facts, section 61.13(4)(c)(5), Fla. Stat., gives the trial judge the option of awarding custody to a non-custodial parent upon his or her request if the custodial parent refuses to honor the other parent's visitation and if the award is in the best interests of the child. 872 So. 2d at 953, AR. 2 (emphasis added). This legislatively sanctioned approach to modification does not require proof of a substantial change in circumstances. *Williams v. Williams*, 676 So. 2d 493, 495 n.1 (Fla. 5th DCA 1996). The Fifth District described it as having "arguably lesser proof requirements," than the Change Test. *Id.*, AR. 2. Clearly, the State is not persuaded that the use of anything but the Change Test in custody modifications would render all custody judgments inherently unstable. The proof requirements of the section 61.13(4)(c)(5) test parallel the instant

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[9] The district court determined that there was little evidence in the record that the instant Mother "substantially interfered" with the Father's visitation rights; therefore, it found section 61.13(4)(c)(5), Fla. Stat., did not apply. 872 So. 2d at 953, AR. 2.

test as it requires threshold proof of substantial interference with visitation, then the trial court is permitted to change custody based on a determination of the best interests of the child by considering the primary residence criteria of section 61.13(3), *Williams v. Williams*, 676 So. 2d at 495 n.3; whereas, proof of the failure of the rotating custody plan is the trigger for the section 61.13(3) consideration *sub judice*. Further, this interference with visitation threshold addresses a circumstance in which there has been a designation of primary residential parent in that it refers to "custodial" or "non-custodial" parents, § 61.13(4)(c)(5), Fla. Stat.; a situation that traditionally requires that a petitioning parent overcome the presumption in favor of the previously designated parent. *E.g.*, *Hastings v. Rigsbee*, 875 So. 2d 772, 778 (Fla. 2d DCA 2004). In the rotating custody plan without a designated parent, there is no presumption. According, the often-quoted policies of the State do not mandate only one modification test. Moreover, the instant two-part test does not undermine the stability of judgments.

The test applied by the Fifth District below finds support in other Florida appellate decisions. The Fifth District relied upon *Mooney v. Mooney*, 729 So. 2d 1015 (Fla. 1 DCA 1999). 872 So. 2d at 954 n.6, AR. 3. Mother argues that the *Mooney* decision is not applicable because the instant parents did not agree that a particular event would constitute a change in circumstances requiring custody to be readdressed. IBP at 36. Mother incorrectly implies that the *Mooney* parents had designated the test to be applied in a modification. In *Mooney*, the First District

determined that neither parent was required to prove the allegedly higher burden of the Change Test in a post-dissolution modification of child custody because the initial custody order granted the parents rotating custody until the child began school. In *Mooney*, the First District, the same district that decided *Cooper v. Gress*, affirmed the trial court's modification of custody as if it were an initial custody determination. The *Mooney* parents had agreed to a rotating custody plan until the summer before the child was scheduled to begin school. The parents did not specify the test for modification, but their custodial plan indicated that the start of school rendered the weekly switch of custody untenable; therefore, the trial court that had never made an initial designation of primary residential parent, was free to treat the circumstance as if it were an initial custody determination. 729 So. 2d at 1016. The Fifth District perceived the *Mooney* circumstance as analogous to the failure of the instant custody plan, albeit for a different reason. The *Mooney* plan was premised upon the child not being in school; whereas, the instant custody plan was premised upon the parents abiding by the parenting plan and cooperating with the parenting coordinator. Vol. II, R. 245, ¶ C, AR. 12. When the underlying assumption for the plan is not fulfilled or ends, it is sensible to let the trial court determine custody as in the initial circumstance. 872 So. 2d at 955, AR. 4. The instant parents had an agreement like that in *Mooney*. Neither agreement provided the test to be applied in a modification proceeding; however, both agreements were based on a circumstance, the failure of which would render the plan untenable. Much like other contractual agreements, an

absence of the consideration for the custody agreement should void the agreement and allow the trial court to start over with respect to the determination of custody. *Cf.*, *Ballantyne v. Ballantyne*, 666 So. 2d 957, 958-59 (Fla. 1st DCA 1996) (Recognizing that a marital settlement agreement is a contractual agreement to be addressed and interpreted, much like other contracts). The consideration for the instant rotating custody agreement failed; therefore, the absence of a designated residential parent was not in the child's best interests. Mother's material breach of the parties' agreement voided the agreement such that the child's best interests should be determined in the absence of the parenting plan and parenting coordinator and pursuant to the primary residence criteria used in an initial custody determination. In the *Mooney* circumstance, the basis for the rotating custody agreement had expired, requiring a designation of residential parent. The *Mooney* rationale supports the test applied in *Wade v. Hirschman*.

The *Mooney* court found its circumstance essentially indistinguishable from that in *Skirko v. Skirko*, 667 So. 2d 885 (Fla. 3d DCA 1996), *rev. denied*, 689 So. 2d 10771 (Fla. 1997).[10] In *Skirko*, the Third District reviewed a modification of a rotating custody plan in which there had been no designated primary residential parent, and affirmed the grant of primary residential custody to the father. The *Skirko* court determined that the record evidence supported the conclusion that the minor

[10] The Fifth District suggests that *Skirko* is contrary to its position, 872 So. 2d at 955 n.6, AR. 3; however, this is not the case and must be a scrivener's error.

child had spent almost equal amounts of time with each parent pursuant to a joint custody award, and that the joint custody plan was no longer workable now that the child was in school. On these facts, the trial court made findings of fact in accordance with the evidence based upon the application of the section 61.13(3) factors typically used in initial custody determinations. On appeal, the mother argued that the trial court had applied the wrong standard, urging the Third District to apply the Change Test. The Third District acknowledged the Change Test, but agreed with the trial court that the modification was warranted upon the test applied, holding that under the circumstances presented, including the joint custody plan and the fact that both parents had alleged a substantial change in circumstances, the trial court did not abuse its discretion by treating the situation as if it were an initial custody determination. 677 So. 2d at 887. Finding competent substantial evidence to support the trial court's application of the statutory best interests factors, the Third District concluded that the award of primary residential custody was not an abuse of discretion. *Id*.

In addition, in so much as the two cases are similar, the *Cooper v. Gress* result does not require reversal of the *Wade v. Hirschman* test. Both district courts reviewed the modification of stipulated rotating custody agreements incorporated into final judgments. Likewise, both of the parents in *Cooper v. Gress* had filed petitions for modification, seeking designation as primary residential parent, as is the case *sub judice*. The father alleged that the mother had failed to abide by the terms of the final

judgment by interfering with visitation, speaking disparagingly to the children about him and refusing to keep him informed about the whereabouts of the child and the child's medical care. 854 So. 2d at 264-65, AR. 20-21. The mother alleged a substantial change in circumstances based on the parties' failure to communicate with each other, the father's occasionally inability to care for the children and the children's desire to live with the mother. 854 So. 2d at 264, AR. 20-21. The trial court treated this circumstance as if it were an initial custody determination, tracking the factors of section 61.13(3), and designated the mother as primary residential parent. On appeal, the father claimed error based on the trial court's application of only the best interests test, contending that the "extraordinary burden" or Change Test was applicable. *Id*. at 265, AR. 21 (emphasis added). The First District noted that the mother's substantial change allegations were insufficient as a matter of law to support a substantial change and that the record facts demonstrated that the custody plan had not failed, rather it was an instance of the parties' mutual failure to communicate effectively and their hostile treatment of each other. Determining that the Change Test should apply, the First District concluded that the mother had not established the threshold ground of a substantial change in circumstances, reversed the trial court and remanded with instructions to reinstate the rotating custody plan. *Id*. at 266-68, AR. 22-23. Specifically, the First District found that the fact that the parties had a rotating custody agreement, or that both parties were seeking designation as primary residential parent did not lessen the evidentiary threshold,

"given the facts in this case." 854 So. 2d at 265, AR. 21-22. Thereafter, the First District distinguished the *Mooney v. Mooney* decision, *supra.*, the *Skirko v. Skirko* decision, *supra*, and the *Greene v. Suhor* decision.[11] 854 So. 2d at 268, AR. 23. The First District distinguished these cases, concluding that its facts "materially differ from the specific circumstances in those cases that warranted a *de novo* modification determination." *Id.*, AR. 10. The *Wade v. Hirschman* facts are materially different also. They demonstrate more than parental hostility and a failure to communicate. 872 So. 2d at 955, AR. 4. They demonstrate that the rotating custody plan had failed. Moreover, this failure is the threshold ground that allows the court to determine custody pursuant to the primary residence criteria. Moreover, as previously briefed, *supra* 21, both courts require proof of a threshold ground before consideration of the best interests test. The *Cooper v. Gress* court maintains that it must be a substantial change in circumstances; whereas, the *Wade v. Hirschman* court states that it can be the failure of the rotating custody plan. *Cooper v. Gress* distinguished cases like *Wade v. Hirschman*. 854 So. 2d at 268, AR.23-24. Moreover, under the reasoning of the *Cooper v. Gress* court, the failure of the rotating custody plan would have been a substantial change in circumstances which

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[11] *Cf.*, *Greene v. Suhor*, 783 So. 2d 290 (Fla. 5th DCA 2001) (stating that father seeking primary residential custody was not required to prove a substantial change in circumstances where original custody order provided for rotating custody and provided that either parent could seek modification without showing a substantial change in circumstances).

would have permitted the trial court to consider the best interests of the child. See *infra* at pages 38-42. Accordingly, and only insofar as these two cases may be in conflict, the *Wade v. Hirschman* decision is the better reasoned opinion with respect to the test that should be applied to a failed rotating custody plan without a designation of primary residential parent.

Finally, although the decision as to which evidentiary test to apply is a question of Florida policy and Florida law, decisions in other jurisdictions are instructive. Mother relies on *Johnson v. Stephenson*, 15 P.3d 359 (Kan. Ct. App. 2000) for the policies underlying the adoption of the Change Test. IBP at 34. In fact, the Kansas appellate court engages in an extended review of the policies that impact a trial court's modification of custody. The *Johnson* court acknowledges that child custody is one of the most difficult areas faced by a trial court, concluding that the paramount question for determination of custody is what "best serves the interests and welfare of the children. All other issues are subordinate thereto." 15 P.3d at 362. The test for modification of custody is prescribed by statute in Kansas. *Id.* Addressing the tension between the material change of circumstances rule (Change Test) and the best interests test, this court notes that some states have abolished the substantial change rule entirely and in those states, the <u>only issue</u> in a modification action is whether the change in custody would be in the best interests of the child. This approach is consistent with the primary focus on the best interests of the child. 15 P.3d at 365. It recognizes that the sole application of the best interests test may

undermine the stability of custodial relationships, *cf.*, *Wade v. Hirschman* (Requires threshold proof of the failure of the plan prior to the application of the "best interests" test); nevertheless, Kansas and other states have concluded that the material change of circumstances rule should not apply to decrees resulting from default or stipulation. 15 P.3d at 365 (emphasis added). The Kansas court recognizes that such custody decrees are not always adjudicated and when they are, the *res judicata* policy underlying the material change test is not very persuasive. This court notes that the involvement of the parents in the resolution of domestic matters is important and this policy favors stipulated custody. 15 P.3d at 366. In Kansas, the Change Test would not have applied *sub judice*.

Mother also cites *Poe v. Capps*, 599 So. 2d 623 (Ala. Civ. App. 1992) as contrary to *Johnson v. Stephenson*, *supra*. IBP at 34. Although the results may be different, the rational of the Alabama court is comparable to the Kansas court. Reversing the trial court and holding that the proper standard of review of the modification of a rotating custody plan was the child's best interests, the *Poe* court stated that an initial custody determination, the parties stand on equal footing without a favorable presumption to either; however, to change custody from one parent to another, the burden is on the party seeking to show some change of circumstances justifying the change. 599 So. 2d at 624. In this rotating custody arrangement, there had not been a custody determination favoring either parent; therefore, the change of circumstances standard was not appropriate to that fact situation. *Id.* Certainly, these

policy considerations are similar to those announced by the Kansas court and they support the approval of the *Wade v. Hirschman* modification test *sub judice*.

This Court should approve the Fifth District's test, affirm the *Wade v. Hirschman* decision and find that insofar as *Cooper v. Gress* is inconsistent with its decision, it is overruled.[12]

B. **THE FATHER SATISFIED THE BURDEN OF THE CHANGE TEST; THEREFORE, THE MODIFICATION ORDER SHOULD BE AFFIRMED**. (In Response to Mother's III.B. Argument)

1. **Standard of Review**

The standard for review of a modification proceeding in which the trial court has employed the change or "extraordinary burden" test is whether the trial court abused its discretion. *E.g.*, *Strickland v. Gay*, 17 So. 2d 1082 (Fla. 1st DCA 2002). The often repeated mantra under these circumstances is that the discretion is less than at the time of the initial decree. *E.g.*, *Miller v. Miller*, 671 So. 2d 849, 852 (Fla. 5th DCA 1996). It is equally true that appellate courts should defer to trial courts to resolve factual questions, *Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976), especially in child custody matters because they are able to see and judge the witnesses much better than an appellate court. *E.g.*, *Schweinberg v. Click*, 627 So. 2d 548, 552 (Fla.

[12] Alternatively, because of the materially different factual circumstances considered by these courts and because the *Cooper v. Gress* court disapproved only the *de novo* determination of custody without a threshold ground for change, these two cases may be reconciled and the Mother's petition for jurisdiction dismissed as having been improvidently granted.

1st DCA 1993) (citation omitted) (emphasis added). The Change Test is a two-prong test which first requires proof of a substantial or material post-judgment change, and secondly requires proof that the best interests of the child will be promoted by a change in custody. *E.g.*, *Miller v. Miller*, 671 So. 2d at 852 (emphasis added). This burden is described as extraordinary, primarily because unlike the initial custody determination when the trial court is free to consider only the best interests of the child in making the primary residential custody determination, this test first requires proof of a substantial or material change. *E.g.*, *Cooper v. Gress*, 854 So. 2d at 265, AR. 21. Mother argues that this burden requires proof that maintaining the status quo would be detrimental to the child. IBP at 37. Below the Fifth District acknowledged that some courts seem to say that the "best interests" prong also requires evidence of detriment to the child. 872 So. 2d at 953, AR. 2. Courts that use the "detriment" terminology state that the change in custody must "so clearly promote or improve the child's well-being to the extent that any reasonable parent would understand that maintaining the status quo would be detrimental to the child's overall best interests." *Young v. Young*, 732 So. 2d 1133, 1134 (Fla. 1st DCA 1999) (emphasis added). Contrary to Mother's position, detriment is not a separate prong of the test, but an explanation of the test. This explanation of the "best interests" prong of the test must be tempered by the fact that the burden of proof in modification cases that apply the Change Test is difficult, "but not insurmountable." *Hammac v. Hammac*, 866 So. 2d 191 (Fla.. 1st DCA 2004). In *Hammac*, Judge

Wolf wrote a concurring opinion to explain the burden dilemma. Judge Wolf pointed out that the cases in which this detriment language has arisen, including *Gibbs v. Gibbs*, 686 So. 2d 639, 641 (Fla. 2d DCA 1996) and *Boykin v. Boykin*, 843 So. 2d 317 (Fla. 1st DCA 2003) and the *Young* decision above, have left trial courts with the mistaken impression that they cannot intervene even where the well-being of the child requires action. In certain cases the need for protecting children must overcome the burden. 866 So. 2d at 192, Judge Wolf concurring.

2. **Substantial or Material Change**
(In Response to Mother's III.B.2. Argument)

The Fifth District below did not acknowledge that the Father failed to show a substantial or material change. The Fifth District acknowledged that the record supported Mother's argument regarding her apparent mental instability both before and after the final judgment, 872 So. 2d at 954, AR. 3; however, the court concluded that it did not need to address the issue of whether Father sufficiently established a substantial change of circumstances because it did not think this to be the applicable test. *Id.*, AR. 3. Moreover, contrary to Mother's argument, IBP at 41, proof of a substantial or material change is the threshold issue with respect to the application of the Change Test --- not proof of detriment. *Cooper v. Gress*, 854 So. 2d at 267, AR. 22-23. The substantial change threshold, if applicable here, is not Mother's pre- and post-judgment instability. The threshold change on the instant facts is the failure of the rotating custody plan with a designated residential parent. The parenting plan and

cooperation with the parenting coordinator were the basis of the rotating custody arrangement. The trial court heard the testimony and determined the credibility of the witnesses and found that the plan had failed. Vol. VI, R. 1121-26, AR. 5-11.

The Consent Final Judgment which incorporated the parties' rotating custody agreement was entered October 30, 2000. The rotating custody plan included specific provisions regarding the child's school attendance. Nevertheless, the Mother changed the minor child's elementary school in August 2001 without telling the Father, contrary to the parenting plan. Vol. VI, R. 1121, AR. 5. Even though the Mother had agreed to the parenting plan in July 2001, she subsequently refused to abide by the plan and claimed that she objected to all provisions of the plan such that the Father had to acquire a court order to approve the plan. Vol. VI, R. 1122, AR. 6. Mother repeatedly frustrated the efforts of the parenting coordinator and caused the resignation of the first parenting coordinator. Vol. VI, R. 1122, AR. 6. Mother intentionally and willfully breached the visitation provisions of the parenting agreement in January 2002. Vol. VI, R. 1123, AR. 7. Mother undermined the therapy afforded by the initial therapist, Dr. Risch, and unilaterally changed the child's therapist when she did not want to follow Dr. Risch's advice. Vol. VI, R. 1123, AR. 7. The parenting plan and the cooperation with the parenting coordinator were the heart of the parties' agreement. The absence of a designated primary residential parent was based upon the oversight of a parenting coordinator whose duties were designated in the Consent Final Judgment. Vol. II, R. 245, AR. 12. The Mother's

devastation of the parties' agreement is and was the Father's basis for the modification. Vol. II, R. 380-85; Vol. VIII, R. 1245, Tr. 281-85. The Mother's claim, IBP at 45, that this is an instance of the parties' inability to get along is disingenuous. More than hostility between the parties and their inability to get along or communicate was established in this case. 872 So. 2d at 955, AR. 4; Vol. VI, R. 1121-26, AR. 5-11. Mother correctly states that her resistance to the concept of parenting coordination is a pivotal issue. IBP at 45. However, Mother wrongly states that her failure to abide by the parenting plan was contemplated by the judgment and existed before it. IBP at 45. Her resistance to the parenting plan certainly could not have occurred before its existence. Moreover, Mother agreed to the parenting plan. Vol. II, R. 245, AR. 12; Vol. II, R. 338-39, AR. 52-53. Mother tried to deny her approval of the plan at the modification hearing, but her testimony was not credible. Vol. VI, R. 1123, AR. 7.

The failure of the plan was also not expressly contemplated by the final judgment as Mother argues. IBP at 45. The exact opposite is true, as is true with all agreements. The basis for the agreement is each party's adherence to the promises and covenants which he or she makes. The law presumes that parents will abide by the terms of a final judgment. *Knipe v. Knipe*, 840 So. 2d 335, 341 (Fla. 4th DCA 2003). Although the *Knipe* court reviewed a post-judgment change in visitation, it employed the Change Test. On appeal, the Fourth District addressed whether the evidence supported the post-dissolution modification of the visitation because the

parents had failed miserably at shared parental responsibility. 840 So. 2d at 336. The post-judgment conduct of the parents had "shredded" the goal of shared parental responsibility as was mandated in the final judgment. *Id*. at 341. The court determined that the gross inability of the parents to comply with the goals of the final judgment obviously arose after it was entered, despite the father's contention that there was no substantial change in circumstances after the judgment. In its affirmance of that part of the final judgment that modified the visitation between the parties, the Fourth District noted that a court cannot micro-manage a child's custody; however, "given the concern of Florida for the welfare of children, a court should not be precluded in all cases from modifying a final judgment of dissolution after considering how the parties have responded to it." 840 So. 2d at 341.

Mother attempts to dissect the overwhelming facts of her failure to abide by the plan and to cooperate with the parenting coordinators into separate incidents and attempts to explain each away. IBP at 47-49. This divide and conquer strategy does not undercut the overall impact of Mother's repeated failures with respect to the parenting plan and the parenting coordinators — the plan failed as a result of the Mother's conduct and was doomed to failure as a result of her total unwillingness to abide by the plan. The trier of fact weighed the evidence and determined the credibility of the witnesses, finding Mother and her witnesses not to be credible; therefore, Mother's attempt to rehash these findings which are within the province of the trial is legally insufficient to establish an abuse of discretion. The trial court found

Mother's disruption of the plan and her refusal to cooperate s post-judgment substantial and material change in circumstances. Vol. VI, R. 1121-23, 1126-27, AR. 5-7, 10-11.

Bergmann v. Bergmann, 617 So. 2d 469 (Fla. 4th DCA 1993) is instructive with respect to the instant situation and supports the conclusion that the trial court did not abuse its discretion in determining that the Mother's failure to abide by the plan and interference with the parenting coordinator was a substantial and material change in circumstances. The *Bergmann* opinion is a *per curiam* affirmance of a trial court's modification order Judge Anstead concurs specially to explain why he agreed with the majority. In the *Bergmann* circumstance, the trial court modified a custody arrangement earlier agreed to by the parties whereby residential custody of the two young children changed in the middle of each week. The trial court modified the agreed rotating custody arrangement, determining that the mother should be residential custodian and that the father should have generous visitation. On appeal, the *Bergmann* father argued that there had been no substantial change in circumstances, and that the custody arrangement had not resulted in any "serious harm" to the children, although he did acknowledge some school and other problems arguably related to the frequent change in custody, as well as the children's desire to have a single home base. On these "change" facts, Judge Anstead realized that the rotating custody arrangement was made when the children were infants and that in the years since the agreement, there had been a "change in circumstances" which

included the fact that the children were now in school, growing up and changing every day in the way that all children do. Judge Anstead agreed with the modification because the trial court is vested with substantial discretion to look out for the best interests of the children and that, accordingly, there was no abuse of discretion. *Bergmann*, 617 So. 2d at 469. Likewise, the failure of the instant custody plan without a designated residential parent qualifies as a material change in circumstances, such that the absence of a designated residential parent is no longer workable, i.e., was a change in circumstances.

Finally, contrary to Mother's argument, the most recent parenting coordinator's report supports the trial court's findings. IBP at 48. Approximately two weeks before the final hearing, he reported that the Mother did not focus on the current parenting issues, but chose to dwell in the past. He said that she had difficulty maintaining emotional control during coordinator discussions and often became anxious and angry, having difficulty focusing on the issues. He reported that the Mother continued to place the child in the middle of the parties' disputes, one time having the child contact the therapist to arrange an appointment on his preference as to where to live. Vol. IV, R. 712-15. The competent substantial evidence demonstrates the Mother's post-judgment failure to follow the plan; therefore, the trial court did not abuse its discretion by concluding that the Mother's failure to abide by the plan and obstruction of parenting coordinators was a substantial and material change in circumstances since the final judgment. Vol. VI,

R. 1126-27, AR. 10-11. Accordingly, even if this Court determines that the Change Test is applicable, the Modification Order should be affirmed, and the decision of the Fifth District upheld insofar as its result.

3. **Best Interests of the Child**
(In Response to Mother's III.B.1. Argument)

Again, if the Change Test is apropos *sub judice*, the trial court did not fail to address the second prong of the test, i.e., the "best interests" of the child, as Mother argues. IBP at 38. Moreover, the Fifth District did not conclude that the Father failed to satisfy this prong of the test; it did not reach the issue. 872 So. 2d at 954, AR. 3. The trial court made extensive findings as to the "best interests" of the child, Vol. VI, R. 1124-26, AR. 8-10**,** and concluded that the failed rotating custody agreement was "no longer in the best interests of the minor child" Vol. VI, R. 1126, AR. 10, and an award of primary residence to the Father was in the best interests of the child. Vol. VI, R. 1126, AR. 10.

Mother goes behind the Modification Order, focusing only on selected portions of the testimony of the therapists regarding the child's demeanor on particular occasions, his resilience and statements to the effect that he was well-adjusted under the circumstances. IBP at 38-39 (emphasis added). For example, the second parenting coordinator initially met with the family in early January 2002, stating that things seemed fine; however, immediately after this visit, the Mother pulled the rug out from under any temporary stability by intentionally and willfully

disregarding the provisions of the plan when she picked the child up from school when it was the Father's day for visitation. Mother later attempted to excuse her behavior by feigning confusion and claiming that the child was sick. She did not tell the Father about the illness when he attempted to discuss the matter with her. Her conduct was willful and inexcusable. Vol. II, R. 372.

The trial court found that Mother's assault on the custody plan rendered the child's life "tumultuous" during his time with the Mother. Vol. VI, R. 1125, AR. 9. Although the Fifth District stated that the record indicated that the child was "not negatively impacted" by the Mother's actions, 872 So. 2d at 954, AR. 3, the basis of this statement is the testimony of the therapist who said that the child had no diagnosable emotional distress. *Id.*, AR. 3. The Fifth District's assessment of the impact on the child is contradicted by the trier of fact's findings regarding the lack of stability in the child's life. Moreover, the weight which the Fifth District improperly assigns to the factual evidence begs the question as to whether or not the factual basis for negative impact requires permanent psychological damage. The primary focus on the child's best interests, *e.g.*, *Hammac*, 866 So. 2d at 191-92, should dictate otherwise. Although Dr. Risch concluded that she could make no clinical diagnosis, she also opined that the stress imposed on the minor child by his mother's conduct could impact his future relationship with adults; she testified that the Mother was not in touch with the child's need for social development; she testified that the Mother's desire not to share the child, contrary to the plan which

was based on open and equal access, Vol. II, R. 247, 256, AR. 14, 47, or allow the child to engage in outside activities was not healthy; that the Mother had coached the child with respect to the therapy sessions that were part of the parenting plan; that the Mother had put the child in the middle of the litigation, contrary to the plan, Vol. II, R. 256, AR. 47; and further, that the child "gets sick" with the Mother because the Mother has adversely impacted the child with her emotions. Vol. VII, R. 1244, 15-53. Moreover, focusing only on the impact of the Mother on the child obscures the focus of the failure of the plan and its effect on the child. The failure of the rotating custody plan without a designated residential parent created instability that was not in the best interests of the child. This focus was not lost on the trial judge who made findings that the rotating custody plan no longer served the best interests of the child. Vol. VI, R. 1123, ¶ 7, 1124, ¶'s 9 & 10, 1125, ¶'s 12 & 16, 1126, ¶ 18, AR. 3-6. Common sense dictates that if the absence of a primary residential base for the child is replaced by the oversight of a parenting coordinator and a parenting plan, as in this case, Vol. II, R. 245, 248, ¶ 6, AR. 12, 15, ¶ 6, then the failure of the parenting plan and parenting coordinator's function leaves a void that requires the designation of a residential parent to promote the best interests of the child.

Describing the child as "resilient" and well-adjusted "under the circumstances" also begs the question. Resilience means the ability to recover quickly from illness, change or misfortune. The American Heritage Dictionary of the English Language, 1106, New College Edition, 1981. There are misfortunes that children cannot avoid;

however, the instant split custody plan is not one of them. A child should not have to recover from a circumstance that can be vastly improved or remedied by a modification of custody. The trial court made extensive findings supported by the substantial and competent evidence that designating the Father the primary residential parent promoted the best interests of the child. Vol. VI, R. 1124-26, AR. 8-10. Arguing that the child has passed numerous grades despite the Mother's conduct when the child could have the stability of the Father's academic focus misses the point. The record demonstrates that the child performed better after the Father addressed his needs for exceptional schooling, Vol. VIII, R. 1245, Tr. 299-300; Vol. VII, R. 1244, Tr. 109, and that the Mother's contribution to the child's performance was to undermine his teacher and to refuse to take him to summer school because she did not want to share him. Vol. VI, R. 1125, AR. 9; Vol. III, R. 1245, Tr. 206, 209-10, 301. The competent and substantial evidence supports the trial court; therefore, it did not abuse its discretion with respect to its determination of the child's best interests and award of primary residence to the Father. 872 So. 2d at 955, AR. 3. The change of custody was in the best interests of the child. Accordingly, the Modification Order should be affirmed and the result of the *Wade v. Hirschman* decision should be upheld under the Change Test.

C. **THERE IS NO BASIS FOR A REMAND FOR AN ADDITIONAL EVIDENTIARY HEARING**. (In Response to Mother's III.C. Argument)

In her argument regarding her offered proof at the modification hearing, Mother

does not explain what legal standard she seeks to have this Court review. Assuming that her contention does involve a legal standard, *de novo* review is appropriate. Mother's argument regarding a so-called "change in the rules of the game," IBP at 49-50, after the conclusion of the game is disingenuous under any standard.

As previously briefed, *supra* at 12-13, Mother's counter-petitions for modification not only alleged circumstances which she believed had changed post-judgment, but her final and most recent petition filed in December 2002 also pled the legal buzz words that "[s]ince the final judgment, there has been a substantial change in circumstances requiring a modification of residence, such that the Former Wife should be granted primary residence." Vol. III, R. 466. Mother's only reference to a failure to establish a substantial change of circumstances occurs in her initial petition for primary residence in which she states that the Court should deny the Father's modification petition based on his failure to establish a substantial change. Vol. II, R. 389. There were competing petitions for modification of custody based on the substantial "Change Test;" therefore, neither party was precluded from providing testimony with respect to both prongs of the test, i.e., a substantial change and also the best interests of the child. By seeking primary residence, Mother knew that she must offer proof of the respective fitness of each party to act as the residential parent. Contrary to what the Mother would have this Court believe at this juncture, Mother's modification petition below alleged that the Father was refusing to attend to the child's medical needs, that the Father was exposing the child to

inappropriate conduct, that the Father was disparaging the child in front of the Mother, that the Father had attempted to thwart visitation and that the Father had exhibited a violent temper toward the Mother in front of the child. Vol. III, R. 466-67. If Mother failed to prove the fitness of the Father as a parent, this was either a choice at the time of the hearing, or there was no evidence to support her allegations. Aso, and assuming *arguendo* that the Mother who sought primary residence at the time of the hearing, intended to do so without proof of a change of circumstances, the obvious conclusion is that she intended to do it based on the "best interest" test which requires an assessment of the relative fitness of the parents with regard to primary residential custody. Section 61.13(3), Fla. Stat. Accordingly, there is no record basis for this Court to provide Mother with an additional evidentiary hearing as a result of its approval of the modification test applied by the Fifth District. Mother's request for an additional evidentiary hearing should be denied.

IV. **CONCLUSION**

For the foregoing factual, legal and policy reasons, this Court should approve the modification test announced by the Fifth District in *Wade v. Hirschman* to be applicable to proceedings involving a modification of rotating custody without a designated residential parent, affirm *Wade v. Hirschman* and overrule *Cooper v. Gress* insofar as it is inconsistant with the opinion of this Court. Alternatively, if this Court should determine that the Change Test is applicable *sub judice*, it should determine that the trial court's Modification Order was not an abuse of discretion

because the competent and substantial evidence demonstrates that there was a post-judgment substantial and material change of circumstances and that the best interests of the child were promoted by the change of the rotating custody plan. In this case, this Court should affirm the *Wade v. Hirschman* result and remand with directions consistent with such an opinion. Finally, this Court should deny Mother's request for an additional hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Respondent's Answer Brief on the Merits has been furnished by U.S. Mail, postage prepaid, to Tracy S. Carlin, Esquire, Attorney for Petitioner, Mother, Carolyn R. Wade, at 865 May Street, Jacksonville, Florida 32204 this 20th day of October, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Respondent's Answer Brief on the Merits complies with the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure.

MILLER, SHINE & BRYAN, P.L.

_____

Linda Logan Bryan, Esquire

Bar No. 286303
97 Orange Street
PO Box 3376
St. Augustine, Florida 32085
(904) 824-0484
Attorney for Respondent, Father

SUPREME COURT OF FLORIDA

CAROLYN R. WADE f/k/a
CAROLYN R. HIRSCHMAN,

Petitioner,

vs.

CASE NO. SC04-1012
L. T. 5D03-2797

MICHAEL D. HIRSCHMAN,

Respondent.

APPENDIX OF RESPONDENT (Merits)
(Index)

***** Conformed copy of opinion under review.
****** Conformed copy of conflicting decision.