SUPREME COURT OF FLORIDA

CASE NO. SC04-1012

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

Petitioner,

v. L.T. Case No. 5DO3-2797

MICHAEL D. HIRSCHMAN,

Respondent.

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

INITIAL BRIEF OF PETITIONER CAROLYN R. WADE

MILLS & CARLIN, P.A.

TRACY S. CARLIN
FLORIDA BAR NO. 0797390
865 MAY STREET
JACKSONVILLE, FLORIDA 32204
(904) 350-0075
(904) 350-0086 FACSIMILE

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Table of Contents i

Table of Citations iii

I. Statement of the Case and of the Facts 1

A. Procedural Background 1

B. The Order on Appeal 4

C. The Original Judgment/Custody Arrangement 8

D. The Child=s Mental State at the Time of the Modification Hearing 9

E. The School-Related Issues 10

F. The Visitation/Contempt Issue 13

G. Interference With Parenting Coordinators 15

H. Mother=s Mental Health/Parental Alienation 18

1. Testimony Regarding Pre-Judgment Events 18

2. Testimony Regarding Post-Judgment Events 20

I. The Father=s Living Arrangements 28

II. Summary of Argument 28

III. Argument 31

A. THIS COURT SHOULD DETERMINE THAT THE CHANGE TEST APPLIES TO THE MODIFICATION OF ROTATING CUSTODY ARRANGEMENTS INCORPORATED INTO FINAL JUDGMENTS 31

Standard of Review 31

B. THIS COURT SHOULD REVERSE THE ORDER BECAUSE THE FATHER FAILED TO MEET HIS EXTRAORDINAY BURDEN UNDER THE CHANGE TEST 37

Standard of Review 37

1. Detriment to the Child 38

2. Substantial or Material Change 40

C. EVEN IF THE COURT CONCLUDES THAT THE BEST INTERESTS TEST SHOULD APPLY TO MODIFICATIONS OF ROTATING CUSTODY ARRANGEMENTS, IT SHOULD REVERSE AND REMAND FOR A FULL HEARING OF ALL THE FACTS APPLICABLE TO THAT TEST 49

Standard of Review 49

IV. Conclusion 50

Certificate of Service 51

Certificate of Compliance 51

TABLE OF CITATIONS

CASES

Bartolotta v. Bartolotta, 687 So. 2d 1385 (Fla. 4th DCA),
review denied, 697 So. 2d 509 (Fla. 1997) 32, 33

Belair v. Drew, 776 So. 2d 1105 (Fla. 5th DCA 2001)..... 48

Boykin v. Boykin, 843 So. 2d 317 (Fla. 1st DCA 2003)..... 33, 40, 41

Cassin v. Cassin, 726 So. 2d 399 (Fla. 2d DCA 1999) 3

Cooper v. Gress, 854 So. 2d 262 (Fla. 1st DCA 2003)..... *passim*

Dansby v. Dansby, ____ S.W.3d ___, 2004 WL 1465757
(Ark. Ct. App. June 30, 2004) 34, 45

Drake v. McCulloh, 43 P.3d 578 (Wy. 2002)..... 34, 45

Elliott v Elliott, 877 So. 2d 450 (Miss. Ct. App. 2003),
cert. denied, 878 So. 2d 66 (Miss. 2004) 34

Grumney v. Haber, 641 So. 2d 906 (Fla. 2d DCA 1994)..... 32, 36, 49

Hadley v. Cox, 470 So. 2d 735 (Fla. 5th DCA 1985) 38

Harpman v. Harpman, 694 So. 2d 101 (Fla. 5th DCA 1997) 33

Holmes v. Greene, 649 So. 2d 302 (Fla. 1st DCA 1995)..... 36, 38

Hunter v. Hunter, 540 So. 2d 235 (Fla. 3d DCA 1989) 32

Interest of C.S., 829 So. 2d 1004 (Fla. 2d DCA 2002) 48

Johnson v. Stephenson, 15 P.3d 359 (Kan. Ct. App. 2000)..... 34, 35

Kelly v. Kelly, 642 So. 2d 800 (Fla. 2d DCA 1994),
rev. den., 651 So. 2d 1194 (1995) 33, 36, 45

Kilgore v. Kilgore, 729 So. 2d 402 (Fla. 1st DCA 1998)..... 46, 47

Knutson v. Knutson, 639 N.W.2d 495 (N.D. 2002) 34

La Valley v. La Valley, 606 N.Y.S.2d 349 (N.Y. App. Div. 1993) 34

Miller v. Miller, 671 So. 2d 849 (Fla. 5th DCA 1996)..... 32, 33, 37, 44, 45

Mooney v. Mooney, 729 So. 2d 1015 (Fla. 1st DCA 1999)..... 2, 36

Newsom v. Newsom, 759 So. 2d 718 (Fla. 2d DCA 2000) 3

Perez v. Perez, 767 So. 2d 513 (Fla. 3d DCA 2000) 33, 34, 36, 37, 47

Poe v. Capps, 599 So. 2d 623 (Ala. Civ. App. 1992)..... 34
Reform Party of Fla., Inc. v. Black, 2004 WL 2075415,

(Fla. Sept. 17, 2004) 31, 49

Ring v. Ring, 834 So. 2d 216 (Fla. 2d DCA 2002) 3, 33

Sanchez v. Sanchez, 575 So. 2d 744 (Fla. 5th DCA 1991)..... 41

Sancho v. Smith, 830 So. 2d 856 (Fla. 1st DCA 2002) 31

Schweinberg v. Click, 627 So. 2d 548 (Fla. 5th DCA 1993)..... 38, 41, 43
Skirko v. Skirko, 677 So. 2d 885 (Fla. 3d DCA 1996),

review denied, 689 So. 2d 1071 (Fla. 1997) 3
Smith v. Coalition to Reduce Class Size & Pre-K Comm.,

827 So. 2d 959 (Fla. 2002) 31

Strickland v. Gay, 817 So. 2d 1082 (Fla. 1st DCA 2002)..... 38

Stricklin v. Stricklin, 383 So. 2d 1183 (Fla. 5th DCA 1980) 37, 40

Timmerman v. Timmerman, 139 S.W.3d 230 (W.D. Mo. Ct. App. 2004)..... 34

Voorhies v. Voorhies, 705 So. 2d 1064 (Fla. 1st DCA 1998)..... 33

Wade v. Hirschman, 872 So. 2d 952 (Fla. 5th DCA 2004) 1

West v. Lawson, 951 P.2d 1200 (Alaska 1998) 33

Williams v. Williams, 619 So. 2d 390 (Fla. 1st DCA 1993)..... 32

Williams v. Williams, 676 So. 2d 493 (Fla. 5th DCA 1996) 43

Young v. Young, 732 So. 2d 1133 (Fla. 1st DCA 1999) 37, 38, 40

Zediker v. Zediker, 444 So. 2d 1034 (Fla. 1st DCA 1984)..... 32, 37, 38

STATUTES

' 61.13(3), Fla. Stat. 6

' 61.13(4)(c)(5), Fla. Stat. 6

' 61.121, Fla. Stat. 35

I. STATEMENT OF THE CASE AND OF THE FACTS

A. Procedural Background

This case began as an appeal from an Order Changing Primary Residence to the Father (the AOrder@). (R:VI:1121-27; Appendix (AA.@) 1-7.) The Order modified the parties= agreed-to rotating custody arrangement the trial court incorporated into the original Consent Final Judgment of Dissolution (the AJudgment@) in October 1999. (A.6-7.) Pursuant to the Judgment, the parties shared a nine-day/five-day split of time with the couple=s only child, with the Petitioner, Carolyn R. Wade f/k/a Carolyn R. Hirschman (the AMother@), having the nine-day majority of the time with the child. (R:II:246.) The Order changed that arrangement by making the Respondent, Michael D. Hirschman (the AFather@), the child=s primary residential parent. (R:VI:1121-27; A.6-7.)

The Mother appealed the Order to the Fifth District Court of Appeal. *See Wade v. Hirschman*, 872 So. 2d 952 (Fla. 5th DCA 2004). (A.8-13.) The Mother argued that the standard, two-part modification test applied and that the Father failed to meet it. (A.10-11.) That test requires the party seeking a custody modification to meet the extraordinary burden of demonstrating: 1) a substantial or material change in circumstances; and 2) that the child=s best interests would be promoted by the change in custody (the AChange Test@). (A.10.) The Fifth District noted that Athis standard has been adopted by *all* of the Florida appellate courts in an effort to forestall repeated child custody modification proceedings being filed and to achieve stability and finality in child custody degrees [sic].@ (A.10.) (emphasis added)). The Fifth District acknowledged that it is not in the best interests of children or parents to constantly litigate over children=s custody or primary residency. (A.10.)

The Fifth District conceded that if the Change Test applied, the Father failed to meet it. (A.10-11.) The court concluded that the Father had not demonstrated a

substantial or material change. (A.11.) In addition, it acknowledged that the evidence showed that the child had no diagnosable emotional distress, was Ahappy go lucky,@ resilient, and doing well in school. (A.11.)

Nevertheless, the Fifth District concluded that it did not have to address the Father=s failure to satisfy the Change Test because that test does not apply where there is no primary residential parent and the parties have rotating custody. (A.11.) The Fifth District stated:

> Once it is established through substantial and competent evidence that the split rotating custody plan has failed and is doomed to future failure, for *whatever reason* (the child=s obtaining school age, or one party=s complete refusal to adhere to the plan), then the court should be free to *redetermine custody* based on the considerations set out in section 61.13, *as though it were making an initial custody determination.*

(A.11-12 (emphasis added)). To reach this decision, the Fifth District relied upon *Mooney v. Mooney*, 729 So. 2d 1015 (Fla. 1st DCA 1999), but recognized the contrary cases of *Cooper v. Gress*, 854 So. 2d 262 (Fla. 1st DCA 2003), *Ring v. Ring*, 834 So. 2d 216 (Fla. 2d DCA 2002), *Newsom v. Newsom*, 759 So. 2d 718 (Fla. 2d DCA 2000), *Cassin v. Cassin*, 726 So. 2d 399 (Fla. 2d DCA 1999), and *Skirko v. Skirko*, 677 So. 2d 885 (Fla. 3d DCA 1996), *review denied*, 689 So. 2d 1071 (Fla. 1997). (A.11-12.)

Because the Fifth District observed that the trial court had addressed all of the necessary factors required under section 61.13(3), Florida Statutes, which is used to determine custody in the first instance (the ABest Interests Test@), and because it found that the trial court=s findings on those factors were supported by competent substantial evidence, the Fifth District affirmed the Order, which made the Father the child=s primary residential parent. (A.11-12.)

The Mother timely filed a Motion for Rehearing and/or for Certification. (A.14-21.) The Mother argued, among other things, that in applying the Best Interests Test, the Fifth District overlooked the fact that: 1) the parties= rotating

custody agreement, as incorporated into the Judgment, did not define what test would be applied in the event of a change in custody; and 2) the Father had conceded in both the trial and appellate courts that the Change Test applied. (A.16-19.) Therefore, the Fifth District granted the Father relief he never requested and changed the rules of the game after the fact. (A.17-18.) Based upon the Mother=s understanding of the proceedings below, the Father had to satisfy the Change Test before the rotating custody arrangement could be modified. (A.17-18.) As a result, the Mother did not litigate the custody issue as if it were an initial custody determination. (A.18-19.) If the Mother had known that the trial court would be deciding the case as if it were determining custody in the first instance, the Mother would have introduced evidence as to the Father=s failings and why it was not in the child=s best interest to reside primarily with the Father and his parents. (A.18-19.) As a result, the Mother requested that if the Fifth District intended to announce a new modification standard applicable to rotating custody arrangements, the court should remand for a new hearing applying the Best Interests Test. (A.19.) Finally, the Mother requested that the Fifth District certify the conflict between this case and *Cooper*. (A.19-20.) The Fifth District denied the Mother=s motion on May 18, 2004. (A.22.)

As a result, the Mother timely filed a notice to invoke the discretionary jurisdiction of this Court. (A.23-24.) After jurisdictional briefing, this Court accepted jurisdiction to resolve the conflict between this case and *Cooper*. (A.25-26.)

B. The Order on Appeal

In the Order entered July 17, 2003, which terminated the rotating custody arrangement and made the Father the primary residential parent, the trial court found that the following conduct by the Mother constituted a substantial or material change in circumstances: 1) in August, 2001, the Mother transferred the child to a new school without telling the Father and in violation of the parenting plan; 2) at the beginning of the 2001/2002 school year, the Mother told the child=s teacher, in front of the child and his classmates, that the Mother was a Avictim of being caught up in a good ole boy system@ as her husband worked for the school board attorney and she Adid not want the child at Ketterlinus Elementary School,@ the school referenced in the parenting plan; 3) during the 2001/2002 school year, the Mother often made excuses for the child when he did not turn in his work on time and requested the teacher to make exceptions for him; 4) during the 2001/2002 school year, the Mother canceled the child=s participation in a school field trip when she found out the child=s paternal grandparents were going as chaperones; 5) the Mother has been obstructionist with the first parenting coordinator, Dr. Mary Horn, by calling her over twenty times within a several day period, and by trying to have her removed when the Mother did not get her way; 6) the Mother refused to sign the parenting agreement as agreed upon by the parties in July 2001, and, as a result, the plan had to be submitted to the trial court for formal approval; 7) the Mother had difficulty focusing on the parenting plan rather than complaining about the Father; 8) the Mother tried to illegally tape a session with Dr. Horn, which resulted in Dr. Horn asking to resign as the coordinator; 9) the Mother was totally disruptive of the parenting coordinator=s efforts; 10) the Mother told, Dr. Risch, the child=s therapist, that she did not want the child to go to tutoring or to baseball because she did not Awant to share the child with anyone@; 11) the Mother unilaterally, without the Father=s knowledge, and in violation of the parenting plan, changed the child=s therapist because she thought the therapist was biased against her; and 12) the

Mother would not allow the child to go to summer school in 2002 because she wanted to spend time with the child and the child Aneeded a break.@ (R:VI:1121-1123; A.1-3.) The trial court concluded that the field trip incident was serious post-Judgment evidence of parental alienation of the Father and his parents by the Mother. (R:VI:1122; A.2.) It further found that Dr. Horn had reviewed the Mother=s psychological evaluation and determined that her MMPI scores fit the profile for parental alienation. (R:VI:1122; A.2.)

The trial court also made certain findings regarding the child=s best interests. (R:VI:1123-26; A.3-4.) The court found that pursuant to section 61.13(4)(c)(5), Florida Statutes, the court had the authority to award custody to the Father, the non-custodial parent, where the custodial parent refuses to honor the other parent=s visitation rights if the award is in the best interests of the child. (R:VI:1123; A.3.) The court then considered the factors contained in section 61.13(3) (a)-(m) of the Florida Statutes. (R:VI:1124-26; A.4-6.)

In so doing, and primarily relying on the same facts the court relied upon to find a change in circumstances as well as one incident where the Mother was held in contempt for violating the Father=s visitation rights, the trial court determined that the Father was 1) the parent most likely to allow frequent and continuing contact with the non-residential parent; 2) more cognizant of a healthy love for the child; 3) employed full time and therefore better able to provide the child with food, clothing, and medical care; 4) able to provide a more stable environment for the child; 5) more mentally healthy than the Mother; and 6) more likely to foster a relationship between the Mother and the child. (R:VI:1124-26; A.4-6.) The court also found that the Mother was guilty of parental alienation of the child against the Father and was potentially suffering from mental illness. (R:VI:1124-26; A.4-6.) The court further found that the child had a better home, school, and community record while in the Father=s care than in the Mother=s. (R:VI:1125; A.5.) Finally, in considering

any other relevant factor, the trial court determined that the Mother=s attempt to tape a session with Dr. Horn was suggestive of mental illness. (R:VI:1126; A.6.)

Based upon these findings, the trial court held that a substantial or material change in circumstances had occurred since the Judgment and that it was in the child=s best interests for the Father to be the primary residential parent. (R:VI:1126-27; A.6-7.) The court did not find that the child=s best interests would be promoted by the change or that it would be detrimental to the child to continue with the pre-existing custody arrangement. (R:VI:1121-27; A.1-7.) In addition, the court concluded that the Mother should not have any visitation rights whatsoever until she completed a psychological evaluation update with specific reference to the safety of the child for visitation and the parameters for visitation, supervised or unsupervised.[1] (R:VI:1126-27; A.6-7.)

C. The Original Judgment/Custody Arrangement

The Father petitioned for dissolution of marriage in October 1999. (R:I:1-7.) At that time, the Father received temporary custody of the couple=s only child. (R:I:178-84.) The trial court limited the Mother=s visitation with the child to after school on Wednesdays and every other weekend. (R:I:179.)

The trial court also appointed a guardian ad litem for the child. (R:I:180.) The guardian reported that the Father described the Mother as being mentally unstable. (R:I:180.) The guardian did not agree. (R:I:180.) She described the Mother as Acapable, well equipped, and able to provide love, security, comfort, and continuity@ in the child=s life. (R:I:180.) Indeed, the guardian recommended that the Mother be the primary residential parent with the Father having frequent and liberal visitation. (R:I:183.)

Subsequently, on October 30, 2000, the trial court entered the Judgment as

[1] Although the Mother objected to the evaluation requirement, she submitted to it, and has since obtained unsupervised visitation with the child.

consented to by the parties. (R:II:245-251.) Pursuant to the Judgment, the parties shared a nine-day/five-day split of time with the child, with the Mother having the nine-day majority of time with the child. (R:II:246.) The Judgment indicated that neither party would be labeled the primary residential parent. (R:II:246.) In addition, the Judgment required the parties to retain a parenting coordinator to assist them in dealing with any disputes that arose regarding the child. (R:II:248.) The court appointed Dr. Mary Horn to serve as the parenting coordinator in the case. (R:II:252-254.)

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

Dr. Risch, the child=s first therapist, met with the child on June 26, 2003, just before the modification hearing. (RT:VII:28-29.)[2] She testified that the child was very guarded and that she felt the child had been told to be careful about what he said to her. (RT:VII:29-30.) Nevertheless, the child reported that he enjoyed spending time with his Mother and was not fearful of her or her treatment of him. (RT:VII:60-61.) In addition, Dr. Risch said that the child did not appear to have any emotional distress she could diagnose. (RT:VII:66-67.)

Similarly, Dr. Hoza, the child=s second therapist, saw the child at the end of December 2002, approximately six months before the modification hearing. (RT:VII:116-17.) Dr. Hoza did not think the child needed therapy at that time. (RT:VII:116-17.) He was not having any significant behavioral issues, his school problems appeared to be related to Attention Deficit Disorder, he was Ahappy-go-lucky,@ and he did not complain about anything. (RT:VII:116-17.) Dr. Hoza did not want to keep him in therapy if he did not need it. (RT:VII:116-17.) She believed the situation could be handled through the parenting coordinator. (RT:VII:116-17.) Indeed, Dr. Hoza never believed that the child was really doing badly. (RT:VII:119.) She thought he was well adjusted under the circumstances. (RT:VII:119.)

The Father agreed that the child was resilient and largely unbothered by the parents= differences. (RT:VIII:316.) The Father also testified that the child is smart, has common sense, and is friendly and well mannered. (RT:VIII:326.) He had these traits before the divorce and he had them at the time of the modification hearing. (RT:VIII:326.)

E. The School-Related Issues

The first major post-Judgment dispute between the parents involved the child=s schooling. A July 2001 parenting plan required the child to remain at Ketterlinus Elementary School for the remainder of his elementary education. (RT:VII:152, Father=s Exhibit (AFx.@) 9.) The Mother said she did not agree to this July 2001 plan (R:II:343-45), and refused to sign it as a result (RT:VII:150-51, 179-81; Fx. 9).

Then, prior to the start of the 2001/2002 school year, the child=s second-grade year, the Mother moved to a new residence in a different school district. (RT:VIII:338-41.) As a result, the Mother believed that she was required to enroll the child in the school in her district, R.B. Hunt Elementary School. (RT:VIII:338-41.) The Father claimed that the Mother enrolled the child at R.B. Hunt without his knowledge (RT:VIII:318), which the Mother denied. (RT:VIII:341-34).

Because the Father objected to the child attending R.B. Hunt, he filed a motion asking the trial court to adopt the July 2001 parenting plan over the Mother=s objections (*see* R:II:343-45) and to enforce the requirement that the child remain at Ketterlinus (R:II:324-31; RT:VIII:318). The trial court granted the Father=s motion, and warned the parties that A[f]ailure to comply with the parenting plan may be considered contempt and could affect the parties [sic] visitation and/or custody rights.@ (R:II:338-39.)

When the Mother took the child to Ketterlinus for the first day of school, she announced in front of the child, the child=s second-grade teacher, and the child=s classmates that the child was ordered to attend Ketterlinus. (RT:VIII:193-95.) The Mother said that the Father worked for the school board attorney, that it was a Agood ole boy@ system, and that the court had ruled against her. (RT:VIII:193-95.)

Ms. Barnes, the child=s second-grade teacher, testified that the Mother was

---

[2] Citations to the transcript, which consists of Volumes VII and VIII of the record, will be to the actual pages (1-360) of the transcript and will be denoted as ART.@

not cooperative with respect to the child=s schooling. At the time of the hearing, however, the child was entering the fourth grade. (RT:VIII:248-50.) His third-grade teacher did not testify. (RT:VII-II.) Thus, Ms. Barnes= information was over a year old. (RT:VIII:190-223, 248-50.)

In any event, Ms. Barnes said she employed strict rules in the child=s second-grade class and that the Mother did not respond well to that. (RT:VIII:198-99.) The teacher spoke frequently with the Mother about not allowing the child to disobey the rules regarding homework and other matters. (RT:VIII:200-01.) The Mother tried to get the teacher to bend the rules for the child and not to penalize him for breaking them. (RT:VIII:200-01.) The child missed twelve homework assignments, eleven when he was with the Mother. (RT:VIII:327.) The teacher testified that when she would ask the child why he did not do something, he would say that his Mother said he did not have to. (RT:VIII:210.) Nevertheless, the teacher felt that by the end of the school year, she had made progress with the Mother. (RT:VIII:209-10.)

The teacher also described an incident involving a second-grade field trip to an I-Max theater, which the child=s paternal grandparents had agreed to chaperone. (RT:VIII:215-17.) The field trip was scheduled on one of the Mother=s days with the child. (Fx. 24.) The Mother would not allow the child to go on the field trip because she claimed he had a fear of loud noises. (RT:VIII:215-17; Fx. 24.) The child had previously been to the I-Max theater without incident, however. (RT:VIII:215-17.)

Before the Judgment, the child failed the first grade while in the Father=s primary custody. (RT:VIII:221-22, 297-98.) The child passed the second grade. (RT:VIII:223-24, 321.) Nevertheless, the school recommended that the child attend summer school after second grade. (RT:VIII:301-02.) The Father said the Mother would not take the child to summer school because she wanted to spend more time

with him and felt he needed a break. (RT:VIII:301-02.) The Father took the child to summer school during his two weeks, but the Mother did not. (RT:VIII:302-03.) The child passed the third grade. (RT:VIII:321.)

F. The Visitation/Contempt Issue

The next post-Judgment dispute occurred in January 2002, when the Father filed a motion for contempt against the Mother. (R:II:349-51.) He alleged that the Mother had denied him two days of holiday visitation to which he was entitled under the parenting plan. (R:II:349-51; RT:VIII:289-90.) The Mother said she made a simple mistake because the holiday-related schedule contained in the plan was confusing. (RT:VIII:358.) The trial court granted the motion for contempt and ordered the Mother to provide the Father with two extra days of visitation and to pay the Father=s attorney=s fees related to the motion. (R:II:372-73.) The Mother complied with all of her obligations under the contempt order. (R:II:378-79.)

Prior to the contempt hearing, the Mother had tried to work the problem out by having a three-way conference call between her, the Father, and the second parenting coordinator, Mr. Rousis. (RT:VIII:334-335; Fx. 17.) The Mother offered to give the Father two extra days with the child as the parenting coordinator suggested. (RT:VIII:356-357; Fx. 17.) The Father said he did not want to work it out, he wanted to take her to court. (RT:VIII:334-335; Fx. 17.) In fact, the Father said he would cancel the contempt hearing only if the Mother would agree to equal time sharing and no child support. (Fx. 17.)

The Father admitted that after the court held the Mother in contempt, the parties created a visitation schedule for 2002/2003, which the Mother has not violated. (RT:VIII:312-13.) Indeed, the Father admitted that other than the two days for which the Mother was held in contempt, the Mother has not otherwise interfered with his visitation. (RT:VIII:312-13.)

Then, in March 2002, the Father filed a motion to modify the Judgment,

which asked the court to make him the primary residential parent for the child and to award the Mother reasonable visitation. (R:II:380-86.) The Mother filed a counter-petition alleging that no change in circumstances had occurred, but nevertheless asking that she be given primary residential parent status and that the Father receive reasonable visitation. (R:II:387-89.) Subsequently, the Father filed an amendment to his motion that requested that if he is not given primary residential parent status, he should at least be given control over the child=s schooling and extra-curricular activities. (R:III:450-52.)

G. Interference With Parenting Coordinators

Another major post-Judgment dispute between the parties was the Mother=s alleged lack of cooperation with the first parenting coordinator, Dr. Horn. Dr. Horn is located in Gainesville, Florida. (RT:VII:155). Because the Mother did not want to drive all the way from St. Augustine to Gainesville for their sessions, Dr. Horn agreed that they could meet by telephone. (RT:VII:155.) She and the Mother had approximately twenty unscheduled telephone calls. (RT:VII:167-68.) Dr. Horn did not testify that all twenty of those calls were over the course of only a few days as the trial court found. (RT:VII:167-68; R:VI:1121-27; A.1-7.)

Dr. Horn described the Mother as uncooperative and not a good candidate for parenting coordination. (RT:VII:165-66.) She was concerned about the Mother=s mental health. (RT:VII:164.) She believed the Mother was thwarting the process by 1) focusing on her anger toward the Father rather than the process and the plan; 2) being unwilling to go to Gainesville to meet with Dr. Horn; and 3) being resistant to taking the MMPI and other psychological tests. (RT:VII:163-64.) The Mother did not want to take the psychological tests because she was afraid they were being requested for custody, rather than parenting coordination, purposes. (RT:VII:178-79.)

Nevertheless, the Mother submitted to a psychological evaluation. (*See*

R:VI:1070-76.) The Mother filed that July 2001, psychological evaluation as supplemental evidence after the hearing. (R:VI:1070-76.) The Father moved to strike the evaluation, but the trial court did not rule on that motion. (R:VI:1077-78.) Instead, the trial court included information from the evaluation in the Order. (R:VI:1121-27; A.1-7.)

The evaluation noted that approximately nine years before the Judgment, the Mother was admitted to Charter by the Sea for depression related to her father=s death and job pressures. (R:VI:1070-6.) She was prescribed Prozac, but did not take it. (R:VI:1070-76.) The evaluator concluded, however, that A[b]y history and clinical observation and testing, [the Mother] presents as a competent individual with a basically solid psychological adjustment,@ and that she had the Aintellectual and emotional requirements of an appropriate parent.@ (R:VI:1070-76.)

Dr. Horn reviewed the Mother=s MMPI scores from that evaluation. (RT:VII:169-70.) In doing so, she referred to an article she had read that indicated that certain MMPI scores provide some indication of parental alienation. (RT:VII:169-70.) Dr. Horn was careful to say that these scores were not a true positive; they were just an indication of a propensity for parental alienation. (RT:VII:169-70). The Mother=s scores fit the profile, but Dr. Horn said she had no idea whether parental alienation was, in fact, taking place. (RT:VII:169-71.)

Mr. Rousis became the parenting coordinator after Dr. Horn caught the Mother trying to audiotape their July 2001 session without Dr. Horn=s knowledge or consent. (R:II:338-39; RT:VII:156, 168-69.) This was the session at which Dr. Horn claims the Mother agreed to the parenting plan. (RT:VII:179-81.) Although the Mother admitted to the taping (RT:VII:354-55), she denied agreeing to the plan (R:II:343-45).

Mr. Rousis reported that one of the main problems between the parents related to the child=s extra-curricular activities. (RT:VII:166-67, 172, 276-78; Fx.

15.) Mr. Rousis said that the Father was the impediment to resolving this problem. (Fx. 15.) Mr. Rousis advised the parents to keep the child out of the middle, and suggested that the parents alternate sport seasons with each parent making the decision as to what extra-curricular activities the child would participate in, if any, during that season. (RT:VIII:276-78, 314-15; Fx. 15.) The Father admitted that he was unwilling to comply with this suggestion because it would have allowed the Mother to decide whether the child could play football. (RT:VIII:314-15.)

H.

Mother=s Mental Health/Parental Alienation

1. Testimony Regarding Pre-Judgment Events

Dr. Risch, the child=s first therapist, treated the child from January, 2000, before the Judgment, through June, 2001, after the Judgment. (RT:VII:12-13; Fx. 19.) When Dr. Risch first saw the child on January 7, 2000, she thought he was having adjustment difficulties as a result of the parents= divorce. (RT:VII:14.) She believed that the child, who was approximately six and a half years old (R:I:178, 181), felt torn between the parents, but that he did not have significant emotional problems at that time (RT:VII:14). The child did report that the Mother told him the Father lied to the judge. (RT:VII:15.) Consequently, Dr. Risch concluded that the Mother was informing the child of the parents= disputes. (RT:VII:15).

During an April 2000 visit, the child told Dr. Risch that the Father would not take him to the eye doctor. (RT:VII:20-21.) Dr. Risch assumed the Mother caused the child to say this because, on many occasions, the child told Dr. Risch that the Mother told him things like this. (RT:VII:20-21.) Dr. Risch=s notes from that day document several negative statements the child made about the Father that Dr. Risch attributed to the Mother. (RT:VII:20-21, Fx. 19.) Dr. Risch did not know where the child actually received this information, however. (RT:VII:53-54).

In May 2000, the Mother called Dr. Risch and expressed concern about the child=s behavior. (RT:VII:21-23.) He was angry and hitting other students. (RT:VII:21-23, 53.) When Dr. Risch suggested that the Mother come to therapy with the child, the Mother said that she did not want to engage in therapy because she did not want to share the child with anyone else. (RT:VII:21-23.) Dr. Risch also reported that the Mother did not seem to be in touch with the child=s needs for social development because she did not want the child to engage in activities that did not involve her. (RT:VII:23-24.) Dr. Risch thought the child needed tutoring because he was failing in school, but observed that the Mother did not want the

child to go to tutoring or baseball because the Mother wanted the child all to herself. (RT:VII:23-24.) Dr. Risch was concerned that the Mother=s attitude was not healthy. (RT:VII:24.) Dr. Risch did not recall that, at this time, the Mother was only seeing the child on Wednesdays after school and every other weekend. (RT:VII:55-56; RT:VIII:221-22, 297-98; R:I:179.)

In June 2000, Dr. Risch formed the impression that both parents were asking the child to make decisions he was not cognitively mature enough to make. (RT:VII:26-27.)

On August 22, 2000, the Father reported that the child was not exhibiting any emotional or behavioral difficulties. (RT:VII:30.)

Dr. Risch testified that the child had stopped talking to her at the September 21, 2000 session. (RT:VII:30-31.) Prior to that time, the child had been open during therapy. (RT:VII:30-31.) Dr. Risch testified that the Mother had obtained copies of Dr. Risch=s session notes and that it was Dr. Risch=s impression that someone told the child not to talk to her during therapy. (RT:VII:30-31.) She also noted that the child had made several negative comments about the Father that she believed came from the Mother. (RT:VII:31.) Nevertheless, Dr. Risch noted that the child was adjusting well to a new visitation schedule whereby he would spend Thursday through Monday every other weekend with his Mother and that Dr. Risch thought it was positive for him to be spending more time with the Mother. (RT:VII:60.)

Then, on October 23, 2000, just days before the entry of the Judgment, the Father brought the child to therapy and denied that the child was suffering from any difficulties or significant changes. (RT:VII:31-32.) Indeed, Dr. Risch noted that the child was adjusting well to the custody situation and that things had settled down between the parties. (RT:VII:61.) She believed this was having a positive impact on the child. (RT:VII:61.)

2. Testimony Regarding Post-Judgment Events

In early November, 2000, Dr. Risch noted that the child was not having any behavioral problems and was open with her. (RT:VII:61-62.) She planned to decrease the frequency of the child=s visits because he was doing well. (RT:VII:61-62.)

The vast majority of one of the December 2000 sessions was taken up with the Mother=s expressions of anger regarding the ongoing problems with the divorce. (RT:VII:34-36.) The Mother was still upset about things that had happened before the separation and the limited visitation schedule she had before the Judgment. (RT:VII:34-36.) The Mother was very emotional in front of the child, which inflamed the child=s emotions. (RT:VII:36-37.) In addition, the Mother reported that the child was suffering from sleep disturbances, headaches, and stomachaches. (RT:VII:36-37.) The child said he would cry and make these complaints to get attention from the Mother. (RT:VII:36-37.) These reports of crying and physical complaints arose only after the child began having significant visitation with his Mother. (RT:VII:67-68.) Thus, Dr. Risch believed that the Mother=s emotional state was contributing to the child=s complaints. (RT:VII:36-37.)

On January 29, 2001, Dr. Risch noted that the Mother had seen the doctor=s notes. (RT:VII:39.) She also observed that the child=s interaction with her had deteriorated. (RT:VII:39.) He would not talk to or play with her during the session. (RT:VII:39.) The child told Dr. Risch at this session that he was seeing someone else. (RT:VII:39-41.) When Dr. Risch asked if it was a therapist, the child told her it was a secret. (RT:VII:39-41.) Dr. Risch asked the Father whether the child had a new therapist, and he said he did not know. (RT:VII:64-65.) As a result, she called the Mother to ensure that the child was not receiving conflicting information from different therapists. (RT:VII:39-41.) The Mother refused to disclose whether the child was seeing another therapist at that time. (RT:VII:39-41.)

Dr. Risch also noted that the child=s and the Mother=s stories became

blended. (RT:VII:42-43.) They used similar words and statements. (RT:VII:42-43.) The child told the doctor that he did not want to talk in therapy. (RT:VII:42-43.) As a result, Dr. Risch assumed the Mother was coaching the child not to say anything. (RT:VII:42-43.)

In March 2001, Dr. Risch noted that the child had been more open and communicative. (RT:VII:65-66.) In addition, the Father reported that the child was doing well in school. (RT:VII:65-66.)

In April 2001, she again formed the impression that the child was feeling torn between his parents. (RT:VII:44-45.)

Then, in June 2001, Dr. Risch learned that the child would continue his therapy at Hope Haven. (RT:VII:45.)

Dr. Hoza, the child=s second therapist, treated the child from June 2001 through October 2002. (RT:VII:75.) Dr. Hoza met with both parents in June 2001. (RT:VII:78-79.) At this meeting, she noted that the Father was polite and waited his turn to speak, but that the Mother was intrusive, critical, and bad-mouthed the Father at every opportunity. (RT:VII:78-79.) The Mother brought up the past constantly. (RT:VII:78-79.)

In September 2001, the Father told Dr. Hoza that the child was being disrespectful, overreacting, pouting, crying, and acting out. (RT:VII:88-89.) The Father believed the child was being caught in the middle of the school issue (*i.e.*, whether he should attend R.B. Hunt or Ketterlinus). (RT:VII:88-89.) The child, however, denied any problems at home or school. (RT:VII:88-89.)

Dr. Hoza met with the Mother later that month and described her as excited and agitated. (RT:VII:89-91.) The Mother spoke rapidly and jumped from one topic to another. (RT:VII:89-91.) The Mother related concerns the child=s teacher had expressed to her about the child in school. (RT:VII:89-91.) The Mother criticized the Father for not allowing the child to go to R.B. Hunt. (RT:VII:89-91.)

Dr. Hoza said it was hard to figure out what the problem was. (RT:VII:89-91.) As a result, the Mother agreed to allow Dr. Hoza to visit the school. (RT:VII:89-91.)

The Mother called Dr. Hoza the next day. (RT:VII:93-94.) Dr. Hoza described her as rambling, unstable, and unhinged. (RT:VII:94-95.) The Mother jumped from topic to topic and did not explain herself well. (RT:VII:94-95.) The Mother reported that the child had regressed the night before by crying and crawling into a ball. (RT:VII:94-95.)

In October 2001, Dr. Hoza visited the child=s school. (RT:VII:97.) The child=s second-grade teacher, Linda Barnes, reported that the child would act off-task and silly. (RT:VII:97.) Dr. Hoza concluded that the child may have Attention Deficit Disorder (AADD@). (RT:VII:97.) Both the child=s teachers reported that he was well adjusted given his situation. (RT:VII:99.) Dr. Hoza testified that this could be a result of ADD, but that she thinks he is just a resilient kid. (RT:VII:99.)

The afternoon of the school visit, Dr. Hoza noted that the child seemed fine and did not report any problems at home. (RT:VII:99-102.) Dr. Hoza thought it was significant that the Mother was carrying the child as if he were a much younger child. (RT:VII:99-102.) The Mother was scattered and had trouble focusing on one topic. (RT:VII:99-102.)

In November 2001, the Father reported that the child was becoming more distant from his paternal grandparents. (RT:VII:102-03.) Dr. Hoza spoke generally with the child about his grandparents. (RT:VII:103-04.) He called them weird and said that when he did something wrong, they slapped his hand. (RT:VII:103-04.) The child said his Mother did not like them. (RT:VII:103-04.) Dr. Hoza perceived that the Mother Abad mouths@ them. (R:I:103-04.) The child denied that the Mother bad mouthed the Father, but said that she did not like him. (RT:VII:119-20.)

Later that month, and again in December 2001, Dr. Hoza described the child as being in good spirits. (RT:VII:104-06; 109-10.) Consequently, Dr. Hoza told

the child that they were going to reduce to monthly visits. (RT:VII:109-10).

At a March 2002 session, which was around the time the Father first moved to become the primary residential parent (R:II:380-86), Dr. Hoza described the Father and the child as in good spirits. (RT:VII:111-12.) The child reported that his parents were not fighting as much. (RT:VII:111-12.) As a result, Dr. Hoza discussed terminating the therapy sessions altogether. (RT:VII:111-12.)

The Father testified that the child has a good relationship with the Father=s parents most of the time. (RT:VIII:290.) He does not limit his parents= time with the child, but the child does not want to spend time with them. (RT:VIII:291-92.) The Father contended that this was because the Mother has been trying to alienate the child from the Father=s parents. (RT:VIII:304.)

He also alleged that the Mother has tried to alienate the child from the Father. (RT:VIII:307-08.) He testified that she tried to keep him from seeing or communicating with the child on the child=s recent birthday. (RT:VII:125-30.) He also said that she caused the child to take a picture of a pornographic video the child found in the Father=s drawer. (RT:VIII:308-10.) The child denied that the Mother told him to take that picture. (RT:VIII:253-58.)

The Father testified that he does not believe that the Mother would intentionally harm the child, but that she might do so unintentionally. (RT:VIII:326-327.) He thinks the Mother is unstable and not capable of making rational decisions all the time. (RT:VIII:326-327.) He testified that he has observed this since the Judgment. (RT:VIII:326-327.)

Mr. Rousis, the current parenting coordinator (Fx. 15), reported that the Mother has difficulty following her train of thought and races from issue to issue, both past and present. (RT:VIII:276-78, Fx. 15.) He indicated that the Mother has trouble maintaining emotional control during their conversations and becomes anxious and angry. (RT:VIII:276-78; Fx. 15.) He also noted that although the

Mother had the child the majority of the time, she has trouble tolerating the Father receiving extra time with the child. (RT:VIII:276-78; Fx. 15.)

The Mother=s sisters testified that the Mother and the child have a very positive, relaxed, and loving relationship. (RT:VIII:228-29, 265-66.) The Mother is nurturing and attentive; she listens to the child and respects him as an individual. (RT:VIII:228-29, 265-66.) She talks things through with the child and is thoughtful about discipline. (RT:VIII:228-29, 265-66.)

A family friend, who sees the Mother and child often (RT:VII:131-33), testified that the Mother baby-sits for his children. (RT:VII:139-40.) He is totally comfortable with her and believes that her house is an appropriate place for the child to live. (RT:VII:139-40.) He testified that right after the divorce, he asked the Mother not to disparage the Father in front of the child and that since that time, he has never heard her do so. (RT:VII:141-42.)

Likewise, both of the Mother=s sisters and Dr. Hoza testified that they had never heard the Mother disparage the Father in front of the child. (RT:VII:118-19; RT:VIII:223-34, 266.) The Mother denied that she did so. (RT:VIII:329-30.) The Mother said she goes out of her way to encourage the son about the Father and to acknowledge the nice things the Father has done for him. (RT:VIII:233-34.) The Mother repeatedly asks the child whether he wants to call the Father. (RT:VIII:233-34, 329-30.) She makes it clear that the child can always spend time with the Father if he wants to. (RT:VIII:233-34, 329-30.) Most of the time, however, the child does not want to do so. (RT:VIII:233-34.) The Mother=s sister testified that the Father agreed with her that the Mother was an excellent mother. (RT:VIII:236, 238.)

The Mother is a substitute teacher at Ketterlinus Elementary School. (RT:VIII:347-48.) She substitute taught every day for the last three months of the school year that ended just before the hearing. (RT:VIII:348.) She is one of

Ketterlinus= favorite substitute teachers. (RT:VIII:348.) She has even substituted for Ms. Barnes. (RT:VIII:222-23.)

I. The Father=s Living Arrangements

Since October, 1999, which was before the Judgment, the Father has lived in his parents= home. (RT:VIII:281-82.) The Mother testified that the Father has to follow his parents= rules while in their home as does the child. (RT:VIII:346-47.)

II. SUMMARY OF ARGUMENT

This Court should resolve the conflict between this case and *Cooper* by concluding that the Change Test should apply to modifications of judgments involving rotating custody arrangements, just as the Change Test applies to the modification of all other custody judgments. To allow a trial court to modify a rotating custody arrangement that is incorporated into a final judgment pursuant to the Best Interests Test, *i.e.*, to rule on custody as if it were being decided in the first instance, would be to encourage unstable custodial arrangements for Florida=s children. Indeed, it would render all rotating custody arrangements inherently unstable. Consequently, this Court should conclude that where the parties agree to a rotating custody arrangement and that arrangement is approved by the trial court in the final judgment, the trial court has already determined that rotating custody satisfies the Best Interests Test. As a result, it should further conclude that the Change Test applies to any modifications of that rotating custody arrangement.

If this Court concludes that the Change Test does apply under these circumstances, the Court should vacate the Order because, as the Fifth District concluded, the Father did not satisfy it.

The Father failed to meet his extraordinary burden of demonstrating that it would be detrimental for the child to maintain the status quo, *i.e.*, the nine-day/five-day split, with the Mother having the nine-day majority of time with the child. Although the trial court found that living with the Father was in the child=s best

interests, the trial court did not determine that the child=s best interests would be promoted by the change or that it would be detrimental for the child to continue the pre-existing arrangement.

Even if the trial court had made such a finding, as the Fifth District noted, no competent substantial evidence exists in this record to support it. All of the experts B and even the Father B described the child as well adjusted, despite the parents= disputes. The child=s most recent therapist described the child as Ahappy-go-lucky@ just six months before the hearing. Dr. Risch testified that, just days before the hearing, the child did not exhibit any emotional distress that she could diagnose. The child=s school performance has improved since the time when he was in his Father=s custody and failed the first grade. Thus, no evidence exists in this record that the child would suffer any detriment if he were to remain in the Mother=s primary care for the nine-day/five-day split as set forth in the Judgment. As a result, the change in custody should be reversed.

The Order should also be reversed because the trial court abused its discretion by ordering a modification of the parties= rotating custody arrangement in the absence of any substantial or material change of circumstances. Although the trial court found certain material changes had occurred, the evidence showed that the Mother engaged in the change-related conduct both before and after the entry of the Judgment. Indeed, the trial court expressly relied upon statements and actions by the Mother that predated the Judgment. As a result, there were no post-Judgment changes in the Mother=s conduct that would warrant a modification of the parties= custody arrangement.

In addition, the purported changes relied upon by the trial court are not legally sufficient as a matter of law. Several of the trial court=s findings are not supported by competent substantial evidence and, therefore, cannot provide a proper basis for a custody modification. Consequently, because the Father failed

to prove the existence of a substantial or material change of circumstances, the Order should be vacated.

Even if the Court concludes that the Best Interests Test should apply to the modification of rotating custody judgments, the Court should still reverse the Order and remand with instructions for the trial court to conduct a new hearing utilizing that standard. The Mother=s counter-petition for custody modification asserted that there was no change in circumstances. In addition, because there was no evidence of detriment to the child, the Mother simply fought the Father=s petition rather than prosecute her own. As a result, the Mother did not introduce evidence as to the Father=s relative fitness as a parent or the child=s best interests, as she would have had she known that custody would be decided as if it were an initial custody determination. Consequently, she should be provided with the opportunity to do so. Thus, the Order should be reversed and the case remanded for a full and fair hearing applying the newly imposed Best Interests Test.

III. ARGUMENT

A. THIS COURT SHOULD DETERMINE THAT THE CHANGE TEST APPLIES TO THE MODIFICATION OF ROTATING CUSTODY ARRANGEMENTS INCORPORATED INTO FINAL JUDGMENTS

Standard of Review

Because this case involves the legal question of whether the Change Test or the Best Interests Test is the proper legal standard to be applied to rotating custody modifications, the standard of review is *de novo*. *Cooper*, 854 So. 2d at 265; *see also The Reform Party of Fla., Inc. v. Black*, 2004 WL 2075415, *6 (Fla. Sept. 17, 2004) (stating that where a decision rests on a question of law, the *de novo* standard of review applies) (citing *Smith v. Coalition to Reduce Class Size & Pre-K Comm.*, 827 So. 2d 959, 961 (Fla. 2002); *Sancho v. Smith*, 830 So. 2d 856, 861 (Fla. 1st DCA 2002)).

This Court should conclude that all modification proceedings, whether

involving rotating custody judgments or not, should be subject to the same test. In addition, it should conclude that, for the sake of stability in children=s custodial arrangements, the more stringent Change Test, rather than the more lenient Best Interests Test, should apply. To rule otherwise would be to render all custody judgments inherently unstable. *See Cooper*, 854 So. 2d at 267. Such a result would not be in the best interests of Florida=s children **B** the primary concern of all custody cases. *See Williams v. Williams*, 619 So. 2d 390, 392 (Fla. 1st DCA 1993).

All of the district courts of appeal, including the Fifth District, have agreed that a trial court has much less discretion to modify a child custody award than it has in determining custody in the first instance. *See, e.g., Zediker v. Zediker*, 444 So. 2d 1034, 1037 (Fla. 1st DCA 1984); *Grumney v. Haber*, 641 So. 2d 906, 907 (Fla. 2d DCA 1994); *Hunter v. Hunter*, 540 So. 2d 235, 237 (Fla. 3d DCA 1989); *Bartolotta v. Bartolotta*, 687 So. 2d 1385, 1386 (Fla. 4th DCA), *review denied*, 697 So. 2d 509 (Fla. 1997); and *Miller v. Miller*, 671 So. 2d 849, 852 (Fla. 5th DCA 1996). To apply the Best Interests Test to a modification, even one involving rotating custody, would be to unnecessarily broaden a trial court=s discretion in a particular modification proceeding but not another, which would be unfair not only to the parties, but also to the children involved. Indeed, it would undermine the very purpose of the more limited discretion granted in modifications, which is to ensure the stability of a child=s post-divorce custodial arrangement. *See Perez v. Perez*, 767 So. 2d 513, 517 (Fla. 3d DCA 2000) (AThe requirement that the non-custodial parent demonstrate detriment or harm to the child is the basis for this enhanced burden and is in accord with sound policy recognition that after a divorce and an initial award of custody, it is in the best interests of children to have as much stability in their lives as possible.@).

Historically, as the Fifth District noted, every district court of appeal in the

State of Florida has agreed that before a party may obtain a custody modification, that party must satisfy the two-part Change Test. *See, e.g., Boykin v. Boykin*, 843 So. 2d 317, 320 (Fla. 1st DCA 2003); *Kelly v. Kelly*, 642 So. 2d 800, 802 (Fla. 2d DCA 1994), *review denied*, 651 So. 2d 1194 (1995); *Perez*, 767 So. 2d at 516; *Bartolotta*, 687 So. 2d at 1386; *Miller*, 671 So. 2d at 852. The fact that the original custody arrangement sought to be modified is one involving rotating custody should not alter this conclusion. Indeed, the majority of Florida=s district courts, including a prior panel of the Fifth District, has applied the Change Test to requests to modify rotating custody arrangements. *See, e.g., Voorhies v. Voorhies*, 705 So. 2d 1064 (Fla. 1st DCA 1998); *Ring v. Ring*, 834 So. 2d 216 (Fla. 2d DCA 2002); *Harpman v. Harpman*, 694 So. 2d 101 (Fla. 5th DCA 1997). The same is true for many other states= courts. *See, e.g., West v. Lawson*, 951 P.2d 1200 (Alaska 1998); *Dansby v. Dansby*, ____ S.W.3d ___, 2004 WL 1465757 (Ark. Ct. App. June 30, 2004); *Elliott v Elliott*, 877 So. 2d 450 (Miss. Ct. App. 2003), *cert. denied*, 878 So. 2d 66 (Miss. 2004); *Timmerman v. Timmerman*, 139 S.W.3d 230 (W.D. Mo. Ct. App. 2004) (*en banc*); *La Valley v. La Valley*, 606 N.Y.S.2d 349 (N.Y. App. Div. 1993); *Knutson v. Knutson*, 639 N.W.2d 495 (N.D. 2002); *Drake v. McCulloh*, 43 P.3d 578 (Wy. 2002); *but see Poe v. Capps*, 599 So. 2d 623 (Ala. Civ. App. 1992) (finding that, without a custody determination favoring either parent, modification of alternating custody arrangement required consideration of the best interests of the child).

If the Court were to adopt the Best Interests Test as the Fifth District did, it would ignore the fact that, at the time of the initial custody determination, both the parties and the trial court had already concluded that rotating custody was in the child=s best interests under the Best Interests Test. To then subsequently re-apply the Best Interests Test at the time of modification would be to allow a Ado-over@ to the child=s detriment, contrary to his best interests.

Indeed, adoption of the more stringent Change Test serves two policies. *See Johnson v. Stephenson*, 15 P.3d 359, 363 (Kan. Ct. App. 2000) (considering policies underlying test for modification of custody). First, it promotes the child=s emotional, intellectual, and moral development, which depends upon reasonable stability. *Id; see also Perez* (cited *supra*). Second, it avoids unduly burdening the courts and harassing the parties with repetitive custody actions. *Johnson*, 15 P.3d at 363. Consequently, this Court should conclude that unless the parties otherwise agree, any proceeding to modify a final judgment of child custody, including one involving rotating custody, should be subject to the more stringent Change Test, not the more lenient Best Interests Test.

Also, as the First District pointed out in *Cooper*, although section 61.121, Florida Statutes, allows a court to order rotating custody if it is in the best interests of the child, the longstanding presumption against rotating custody still exists. *Cooper*, 854 So. 2d at 266. Focus on the presumptive disapproval of rotating custody arrangements, however, misses the point. *See id.* at 266-67. In this case, as in *Cooper*, the parties= agreed-to rotating custody arrangement was incorporated into and approved by the Judgment. (R:II:246.) As a result, the trial court had already concluded that rotating custody was in this child=s best interests. (*See* R:II:246.) As the *Cooper* court stated:

> The existence of the presumption against rotating custody in an initial custody determination, or the fact that a trial judge disapproves of rotating-custody arrangements in general, cannot be allowed to undermine the long-established requirement that the party seeking to modify custody satisfy the extraordinary burden set forth in the two-part test [the Change Test]. To hold otherwise would render any rotating-custody scheme in a final judgment inherently unstable. The parties= rotating-custody plan was already in place, in accordance with their own stipulation and agreement, incorporated into the final judgment of dissolution. Whether or not splitting custody 50-50 was appropriate had already been adjudicated; thus, the presumption against such arrangements had been overcome by agreement of the parties and with the agreement of the original trial judge.

Id. at 267.

For the same reason, the fact that the parties in this case agreed to the original rotating custody arrangement, which was then incorporated into the Judgment, should not persuade this Court to apply the Best Interests Test, whether in this case or others like it. The test for modification should still be the Change Test. *See Perez*, 767 So. 2d at 514 (applying the Change Test where the parties originally agreed that the mother should be the primary residential parent); *Holmes v. Greene*, 649 So. 2d 302, 303 (Fla. 1st DCA 1995) (same); *Grumney*, 641 So. 2d at 906 (same); *Kelly*, 642 So. 2d at 800 (same); *see also Cooper*, 854 So. 2d at 265 (indicating that the fact that the parties had agreed to rotating custody did not change their evidentiary burden for modification).

The only reason the court in *Mooney*, applied the Best Interests Test to the rotating custody arrangement there was because the parties had specifically agreed when they stipulated to rotating custody that a particular event would constitute a change that would require the question of custody to be readdressed. 729 So. 2d at 1015. No such agreement existed in this case. Indeed, the Judgment was silent as to the test to be applied in any modification proceeding. As a result, this Court should conclude that the Change Test applies where a party seeks to modify a rotating custody judgment.

If this Court reaches this conclusion, then it must vacate the Order and remand with instructions for the parties to return to the pre-Order status quo, *i.e.*, the nine-day/five-day rotating custody arrangement.

B. THIS COURT SHOULD REVERSE THE ORDER BECAUSE THE FATHER FAILED TO MEET HIS EXTRAORDINAY BURDEN UNDER THE CHANGE TEST

Standard of Review

While the appellate court should review an order changing custody for an abuse of discretion, the review is far less deferential than the abuse of discretion standard applied in other contexts. *Zediker*, 444 So. 2d at 1037-38 (rejecting application of *Canakaris* standard in custody modification cases); *see also Miller*, 671 So. 2d at 852 (noting that a trial court has less discretion in modifying a child custody award than in awarding custody in the first place). As the Fifth District itself has stated:

> For a change of custody, the noncustodial parent must demonstrate: (1) a substantial or material change in circumstances that occurred subsequent to the entry of the original custody order; and (2) that the best interest of the child Y would be **promoted** by a change in custody. In this regard, the party seeking to modify a child-custody award carries an Aextraordinary burden.@

Miller, 671 So. 2d at 852 (emphasis added and citations omitted). The second prong requires the movant to show that maintaining the status quo would be detrimental to the child. *Stricklin v. Stricklin*, 383 So. 2d 1183, 1184 (Fla. 5th DCA 1980); *Perez*, 767 So. 2d at 516; *Young v. Young*, 732 So. 2d 1133, 1135 (Fla. 1st DCA 1999); *cf. Hadley v. Cox*, 470 So. 2d 735, 737 (Fla. 5th DCA 1985) (reversing restrictions on visitation in absence of evidence of detriment to the child). Where the noncustodial parent fails to satisfy both prongs of the Change Test, it is an abuse of discretion to modify custody. *Strickland v. Gay*, 817 So. 2d 1082, 1082 (Fla. 1st DCA 2002); *Holmes*, 649 So. 2d at 304; *Zediker*, 444 So. 2d at 1038.

Also, although the trial court is entitled to some deference, that deference is tempered by the fact that the record must support the trial court=s findings. *Schweinberg v. Click*, 627 So. 2d 548, 552 (Fla. 5th DCA 1993). Thus, the trial

court=s findings on these issues must be supported by competent substantial evidence. *Hadley*, 470 So. 2d at 736, n.1.

1. Detriment to the Child

Here, this Court should reverse the Order. Not only did the trial court fail to address the second prong of the analysis, but also, the Fifth District concluded that the Father had failed to satisfy it. (*See* A.11.) The trial court did not find that maintaining the status quo, *i.e.*, allowing the Mother to continue to have the child for nine out of every fourteen days, would be detrimental to the child. Indeed, the record is devoid of any competent substantial evidence from which to make such a finding. Therefore, regardless of whether a substantial post-Judgment change occurred, the trial court=s modification of the custody arrangement should be reversed.

Indeed, Dr. Risch testified that when she saw the child in June 2003, just before the hearing, he had no emotional distress she could diagnose. (RT:VII:66-67.) Similarly, Dr. Hoza testified that both of the child=s second-grade teachers described the child as well adjusted despite the disputes between the parents. (RT:VII:99.) Dr. Hoza also repeatedly described the child as in good spirits when she saw him. (RT:VII:104-06; 109-10; 111-12.) When Dr. Hoza saw the child just six months before the modification hearing, she did not think he needed therapy any more. (RT:VII:116-17.) She described him as Ahappy-go-lucky@ and said he did not complain about anything. (RT:VII:116-17.) In fact, Dr. Hoza never believed the child was doing badly; she thought he was resilient and well adjusted under the circumstances. (RT:VII:119.)

Even the Father agreed that the child was resilient and had weathered the parents= conflicts well. (T:II:316.) The Father said the child was smart, had common sense, and is friendly and well mannered. (T:II:326.) This was true before the Judgment and was still true at the time of the modification hearing. (T:II:326.)

Also, although the child failed the first grade before the Judgment and while in the Father=s custody (RT:VIII:321), the child passed every grade since then (RT:VIII:321), while spending the majority of his time with the Mother. In fact, the Father reported that, at the time of the hearing, the child was doing well in school. (RT:VIII:298-99.)

These facts do not describe a child for whom it would be detrimental to maintain the pre-Order status quo. They describe a child who is doing just fine.

Moreover, even if it were true that the Father=s home might be Abetter,@ no evidence exists to suggest that the child=s needs are not being met or that his living conditions with the Mother are detrimental to him. *See Young*, 732 So. 2d at 1135. In fact, the only testimony was that the Mother=s home was an appropriate place for the child to live. (RT:VII:139-40.) Consequently, no competent substantial evidence exists to support a finding that the Mother=s post-Judgment conduct has been harmful to the child or that maintaining the status quo would be detrimental. As a result, the Order should be reversed. *Cf. Stricklin*, 383 So. 2d at 1184 (finding a lack of evidence of detriment where the social investigation showed the child was happy, healthy, well behaved, and developing normally); *Boykin*, 843 So. 2d at 321 (reversing a change in custody where the trial court did not make a finding that the alleged change in circumstances was detrimental to the child).

2. <u>Substantial or Material Change</u>

As the Fifth District acknowledged, the Father also failed to satisfy the first prong of the Change Test: he did not establish the existence of a post-Judgment substantial or material change in circumstances. Although the Court need not reach this issue if it finds no evidence (or finding) of detriment, the Mother would be remiss not to address this issue.

The party seeking a change of custody must show by strong, competent testimony or evidence that a substantial or material change in the condition of one

of the parties has occurred. *Sanchez v. Sanchez*, 575 So. 2d 744, 744 (Fla. 5th DCA 1991). The focus is on changes that have occurred *after* the dissolution. *Schweinberg*, 627 So. 2d at 550. The change must also be one that was not reasonably contemplated at the time of the original judgment. *Cooper*, 854 So. 2d at 265.

The Father did not establish such a change in this case. Viewing the evidence most favorably to the Father, the evidence arguably showed that, both before and after the Judgment, the Mother 1) involved the child in the parents= disputes; 2) was allegedly mentally unstable; 3) disparaged the Father to the child and others; 4) had a potentially unhealthy attachment to the child; and 5) coached the child=s statements to her advantage. Because these problems existed before the Judgment, no change has occurred. *See Schweinberg*, 627 So. 2d at 550; *Boykin*, 843 So. 2d at 320-21.

Indeed, several of the trial court=s findings are based upon pre-Judgment conduct or events. For example, the Mother=s statements that she did not want to share the child (RT:VII:21-23) and that she did not want him to participate in tutoring or baseball because she wanted to spend time with him (RT:VII:23-24) were made prior to the entry of the Judgment (and at a time when the Father had custody of the child and the Mother=s visitation was extremely limited) (RT:VII:55-56; RT:VIII:221-22, 297-98; R:I:179).[3] Similarly, Dr. Risch=s testimony that the Mother was not aware of the child=s need for social development was contained in a pre-Judgment session note. (RT:VII:23-24.) In addition, the trial court=s finding that the Mother had been hospitalized for depression and prescribed Prozac **B** but did not take it **B** referred to an event that occurred approximately nine years before the Judgment. (*See* R:VI:1070-76.) Nevertheless, the trial court relied upon these facts in finding a post-Judgment change in circumstances and in its consideration of

[3] The Mother=s visitation is similarly limited now.

the child=s best interests.

Also, to the extent these findings contributed to the trial court=s concerns about the Mother=s mental health, those concerns were also present pre-Judgment. The Father had asserted, pre-Judgment, that the Mother was mentally unstable (R:I:180), but he nevertheless agreed to the nine-day/five-day custody split in the Judgment (R:II:245-51). Consequently, any issues related to the Mother=s mental health are not post-Judgment concerns. Because all of these facts and concerns existed pre-Judgment, they do not constitute a material change that would support a custody modification. *See Schweinberg*, 627 So. 2d at 550 (stating that modifications must focus on post-dissolution changes).

Likewise, the fact that the Mother denied the Father visitation on one occasion, for which she was held in contempt, is not sufficient to support a change of custody. *Cf. Williams v. Williams*, 676 So. 2d 493 (Fla. 5th DCA 1996) (affirming custody modification pursuant to section 61.13(4)(c)(2), Florida Statutes, where the father willfully and repeatedly refused to honor the mother=s visitation rights). Additionally, in this case, the Mother offered to permit the Father to make up the days he missed when she confused the holiday visitation schedule, but the Father refused the offer, choosing instead to hold the Mother in contempt. (RT:VIII:334-35; Fx. 17.) The Father admitted that the Mother denied the Father visitation on only this one occasion and that after she was held in contempt, he has never had a problem again. (RT:VIII:312-13.) Given that this one incident was appropriately handled by contempt and the problem did not become chronic, this is not a substantial or material change in circumstances that would warrant a change in custody. *See Schweinberg*, 627 So. 2d at 550 (reversing modification even though the father arbitrarily denied the mother visitation).

Similarly, although the Mother transferred the child from Ketterlinus to R.B. Hunt without the Father=s consent, the trial court corrected that situation by

enforcing the parenting plan. This correction occurred two years before the hearing. No problems have occurred since. Because the school transfer and visitation issues were properly handled through sanctions and contempt proceedings, a change in custody based upon this same conduct was not warranted. *See Miller*, 671 So. 2d at 852 (stating that animosity and disputes between the parties can be handled by sanctions or contempt citations).

Further, the only post-Judgment change in the child=s schooling has been a change for the better. When the child was in the Father=s custody (before the Judgment), the child failed first grade. (RT:VIII:297-98.) The Father admitted that since the child has been in the Mother=s care the majority of the time (post-Judgment), the child has passed every grade. (R:II:321.) Consequently, all of the second-grade-related findings regarding the missed homework assignments, alleged attempts by the Mother to make excuses for the child to the child=s second-grade teacher, and refusal to send the child to summer school are irrelevant. By the Father=s own admission, at the time of the hearing on modification, the child was doing well in school. (RT:VIII:298-99.) Because the child=s school performance had improved, the fact that the Mother may have been giving him improper instruction about homework during his second-grade year does not constitute a substantial or material change in circumstances. Even the child=s second-grade teacher acknowledged that the Mother=s conduct improved by the end of the second-grade year. (RT:VIII:209-10.) Thus, the Mother=s conduct related to the child=s performance in second grade is not a substantial or material change in circumstances. *See Kelly*, 642 So. 2d at 802 (reversing custody modification where alleged changes were corrected by time of hearing). This is particularly true because the child had passed the third grade and was entering the fourth grade at the time of the hearing.

The Father=s primary claim is that the modification was warranted because

the parties could not get along and because the Mother resisted the concept of parenting coordination. These problems were expressly contemplated by the Judgment and existed before it. (*See* R:II:245-51.) As a result, these problems are not sufficient to support modification. *See Cooper*, 854 So. 2d at 265.

Moreover, the mere fact that the Mother and the Father cannot get along is not a substantial or material change of circumstances that warrants a change of custody. *Miller*, 671 So. 2d at 852; *see also Cooper*, 854 So. 2d at 265; *but see Drake*, 43 P.3d 583 (concluding that in cases involving rotating custody, the parties= inability to communicate or get along with one another is a change, but finding no detriment); *Dansby*, ___ S.W. 3d at ___, 2004 WL 1465757 (same). As the expert in *Cooper* noted, changing a child=s primary residence will not cure the parties= inability to communicate and cooperate with one another. *See Cooper*, 854 So. 2d at 266. That problem will exist no matter where the child primarily resides. *Id*.

In addition, the trial court=s conclusions that the Father=s home is better than the Mother=s home and that the Father is a better provider for the child is not supported by competent substantial evidence and is not a post-Judgment change in circumstances that is material or that will support the trial court=s action in this case. *Cf. Kilgore v. Kilgore*, 729 So. 2d 402, 403 (Fla. 1st DCA 1998) (reversing a change in custody based upon an improper comparison of the parents= respective fitness). Both before and after the Judgment, the Father lived in his parents= home. (RT:VIII:281-82.) The Mother lives in her own home that she purchased after the dissolution. (RT:VIII:338-41.) Other than one witness= statement that the Mother=s home is an appropriate place for the child to live (RT:VII:139-40), the record is devoid of any evidence as to the quality of the Mother=s home as compared to the Father=s.

Similarly, no competent evidence exists in this record to establish that the Father is better able to provide the child with clothes, food, and medical care

simply because the Father works full time and the Mother works only part time. (R:VI:1124-26.) The trial court heard no evidence as to the parties= respective post-Judgment financial conditions. Consequently, the trial court=s conclusions on this issue are pure speculation. Even if it were true that the Father=s home is nicer than the Mother=s or that the Father is financially better off, the fact that a child might be Abetter off@ with one parent or another is not a sufficient basis upon which to modify custody. *Perez*, 767 So. 2d at 516; *see also Kilgore*, 729 So. 2d at 408.

The trial court=s finding that the Mother is guilty of parental alienation also is not supported by competent substantial evidence. Although Dr. Horn testified that the Mother=s MMPI scores fit the profile for parental alienation, Dr. Horn admitted she had no actual evidence of parental alienation in this case (RT:VII:169-71). Indeed, she was very careful to state that elevated MMPI scores were not a true positive for parental alienation. (RT:VII:169-71.)

Also, although Dr. Hoza and Dr. Risch testified that they had the impression the Mother bad mouthed the Father in front of the child, they had no direct evidence of that fact. In fact, Dr. Hoza and the Mother=s sisters testified that they had never heard the Mother disparage the Father in front of the child. (RT:VII:118-19; RT:VIII:223-34, 266.) The fact that, on one occasion, the Mother said that the Father was a member of the Agood ole boy@ network in front of the child is not competent substantial evidence of parental alienation. That incident occurred nearly two years before the hearing on the modification. (RT:VIII:193-95.) The Father did not present any more recent allegations of the Mother disparaging the Father in front of the child. Thus, this incident is insufficient. *See Kelly*, 642 So. 2d at 802.

Likewise, the fact that the Mother cancelled the child=s participation in a field trip where the paternal grandparents were going to be chaperones is not evidence of parental alienation toward the Father. Grandparental alienation is not a basis for a change of custody. Grandparents have no constitutional right to participate in the

child=s school activities or upbringing without the parents= permission. *In the Interest of C.S.*, 829 So. 2d 1004, 1005 (Fla. 2d DCA 2002). The trial court may not order the Mother to permit the paternal grandparents to have access to the child over her objections and on days when the child is in her custody. *Cf. Belair v. Drew*, 776 So. 2d 1105, 1106 (Fla. 5th DCA 2001) (holding that the court may not order grandparent visitation over a divorced parent=s objection). The disputed field trip was on one of the Mother=s days. (Fx. 24.) Consequently, the Mother=s decision not to allow the child to participate in the field trip with the grandparents was within her rights and does not amount to alienation of the Father, the only alienation that matters.

None of the Mother=s alleged Achanges@ or Aantics@ as found by the trial court occurred more recently than the child=s second-grade school year, which was at least one full year before the hearing. At the time of the hearing, no current allegations existed that the Mother had any further outbursts in front of teachers, parenting coordinators, or the child. The current parenting coordinator, Mr. Rousis, stated that the Mother, and not the Father, was amenable to parallel parenting in order to eliminate the parties= disputes over the child=s extra-curricular activities. By the Father=s own admission, the Mother has complied with the visitation schedule. As a result, there was no substantial or material change in circumstances that would warrant a change in custody. *Cf. Grumney*, 641 So. 2d at 907-908 (finding that none of actions complained about had occurred more recently than two years before the hearing and, therefore, as the mother=s situation had stabilized by the time of the hearing, a change in custody was not warranted). Consequently, because the Father failed to meet his extraordinary burden on this issue, the Order should be reversed.

C. EVEN IF THE COURT CONCLUDES THAT THE BEST INTERESTS TEST SHOULD APPLY TO MODIFICATIONS OF ROTATING CUSTODY ARRANGEMENTS, IT SHOULD REVERSE AND REMAND FOR A FULL HEARING OF ALL THE FACTS APPLICABLE TO THAT TEST

Standard of Review

The application of the proper legal standard is reviewed *de novo*. *Cooper*, 854 So. 2d at 265; *Black*, 2004 WL 2075415, at *6.

In this case, although both parties sought a change in custody, the Mother=s counter-petition alleged that there was no change in circumstances to support a modification. (R:II:387-89.) As a result, the focus of the hearing in the trial court was whether the Father had satisfied the Change Test. (*See* RT:VII-VIII.) Because the evidence showed that there was no detriment to the child and because the Mother had no reason to believe that the Best Interests Test would be applied as if custody were being determined in the first instance, the Mother did not present evidence regarding the Father=s relative fitness as a parent. *Id.* Under the Change Test, she did not need that evidence to defeat the Father=s request for a modification. Indeed, the Father conceded at the trial and appellate levels that the Change Test applied. (A.17.) By applying the Best Interests Test, however, the Fifth District changed the rules of the game after the game was already over. As a result, should this Court conclude that the Best Interests Test applies under these circumstances, the Court should provide the Mother with a full and fair hearing as to the parties= respective fitness as primary residential parents.

IV. CONCLUSION

For the foregoing reasons, this Court should conclude that the Change Test applies in all custody modification proceedings, even those involving rotating custody arrangements. If it does, the Court should then vacate the Order, which will return the parties to the rotating custody arrangement established by the Judgment. Alternatively, if the Court concludes that the Best Interests Test applies, the Court should nevertheless vacate the Order and remand with instructions for the trial court to conduct a full and fair hearing of all the evidence under the Best Interests Test.

MILLS & CARLIN, P.A.

Tracy S. Carlin
Florida Bar No. 0797390
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 350-0086 Facsimile

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Linda Logan Bryan, Esquire**, Miller Shine & Bryan, P.L., Post Office Box 3376, St. Augustine, Florida 32085-3376, Attorney for Respondent, this _____ day of October, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Attorney