IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

MICHAEL D. HIRSCHMAN,

Respondent.

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

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

RESPONDENT'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent, MICHAEL HIRSCHMAN (the "Father"), corrects and augments the statement provided by the Petitioner CAROLYN R. WADE, f/k/a CAROLYN R. HIRSCHMAN (the "Mother").

Mother states that the "Fifth District conceded" that the Father had failed to meet the evidentiary burden of what she describes as the Change Test.[1] Petitioner's Jurisdictional Brief at 2 (hereafter "PJB at ___"). Similarly, she states that the fifth district"determined that it did not have to address the Father's failure to satisfy the Change Test," PJB at 2 (emphasis added), because it was not the applicable test. Mother's report of the evidentiary conclusions reached by the fifth district is inaccurate.

The primary issue below was whether the trial court applied the proper evidentiary test in its modification of the stipulated rotating custody plan. Noting the availability of the three potentially applicable standards, the fifth district concluded the trial court "made sufficient findings to cover all bases." *Wade* v. *Hirschman*, 872 So.2d 952, 953-54 (Fla. 5th

[1]The fifth district calls it the "extraordinary burden test." *Wade* v. *Hirschman*, 872 So.2d 952, 953 (Fla. 5th DCA 2004).

DCA 2004); AR.2-3[2] (emphasis added). Acknowledging Mother's claims that Father did not meet the evidentiary standard she espoused, *Wade* v. *Hirschman*, 872 So.2d at 954; AR.3, the fifth district concluded "[W]e do not need to address the issues of whether [Father] sufficiently established a substantial change in circumstances[3] . . . because we do not think that test is applicable. . . ." *Id*. The court below did not concede any evidentiary failure. It did not reach issue of the sufficiency of Father's evidence to satisfy the extraordinary burden test.

Additionally, Father augments Mother's statement of the case which concludes with the decision affirming the trial court's change in custody. PJB at 3. Thereafter, Mother filed a Motion for Rehearing and/or For Certification, seeking a rehearing and requesting that the fifth district certify conflict between *Wade* v. *Hirschman* and the decisions in *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

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[2]"AR ____" refers to a page in the Appendix of Respondent that accompanies this jurisdictional brief.

[3]Required proof in the "extraordinary burden test." 872 So.2d at 953.

1999), and *Skirko* v. *Skirko*, 677 So.2d 885 (Fla. 3d DCA 1996), *review denied* 689 So.2d 1071 (Fla. 1997). The fifth district denied rehearing and denied certification of conflict. Thereafter, Mother filed her Notice to Invoke the Discretionary Jurisdiction of this Court.

SUMMARY OF ARGUMENT

There is no express and direct conflict between the fifth district in *Wade* and the first district in *Cooper* on the same pont of law. The fifth district and the first district apply different evidentiary standards to determine the propriety of a modification in rotating custody plans. Mother argues that the facts material to the respective holdings are identical; therefore, the use of the different tests creates conflict. This is not true because there is a key difference with respect to a fact material to each decision.

The first district applies the so-called “extraordinary burden” test in its reversal of a modification that was premised upon what it describes as a lesser standard, which is applicable to initial custody determinations. The extraordinary burden test requires competent and substantial proof of a substantial change in circumstances and an evaluation of the “best interest” of the child based on a

consideration of section 61.13(3) factors applicable in an initial determination custody. The first district distinguishes other cases which have applied only the "best interest" prong of the extraordinary burden test, which uses the section 61.13 factors, concluding that its facts "materially differ" from those cases. The *Cooper* court limits its application of the extraordinary burden test to its facts and does not disagree with the conclusions of the distinguished cases.

The fifth district in *Wade* also reviews the modification of a rotating custody plan; however, it concludes that the trial court could decide the modification based upon a consideration of the factors set out in section 61.13(3) used to determine the best interest of the child as in an initial custody determination, relying in part on *Mooney v. Mooney*, one of the decisions distinguished by *Cooper*. This allegedly lesser standard approved by *Wade* is based upon the specific factual finding that the competent and substantial evidence established that the rotating custody plan had failed and was doomed to future failure. This evidentiary threshold triggers the *Wade* court's approval of the use of the "best interest" test. The *Wade* holding is based upon this key evidentiary fact, a material fact that does not exist in *Cooper*. In fact,

the *Cooper* court finds the rotating custody plan has not failed.

Both *Wade* and *Cooper* recognize the validity of other standards potentially applicable to the modification of rotating custody plans and specifically limit their determinations as to the proper test to the facts before them. There is no decisional conflict. The petition should be denied.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT IN *WADE* v. *HIRSCHMAN* DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE FIRST DISTRICT'S DECISION IN *COOPER* v. *GRESS* ON THE SAME POINT OF LAW; THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION.

Standard of Review

This Court's discretionary jurisdiction to review direct decisional conflicts is confined to an express grant of authority which must be strictly construed. *See generally Mystan Marine, Inc.* v. *Harrington*, 339 So.2d 200,201 (Fla. 1976). The Florida Constitution grants conflict jurisdiction to this Court, to-wit:

> May review any decision of a district court of appeal . . . that expressly and directly conflicts with the decision of another district court of appeal . . . on the same question of law. Art. V, §3(b)(3). Fla. Const. (emphasis added).

The appellate rules of procedure implement this grant of

jurisdiction, providing in pertinent part that

> *[t]he discretionary jurisdiction of the supreme court may be sought to review*
> (A) decisions of district courts of appeal that . . .
> (iv) expressly and directly conflict with a decision of another district court of appeal . . . on the same question of law;. . .. Fla. R. App. P. 9.030(a)(2)(A)(iv) (emphasis added).

The case law articulates the parameters of conflict jurisdiction. The conflict must "appear within the four corners of the majority decision" brought for review. *See Hill* v. *Hill*, 778 So.2d 967 (Fla. 2001). An underlying conflict in philosophies between two appellate courts is insufficient to confer jurisdiction. *See Hill* v. *Hill*, 765 So.2d at 968, Pariente, J. specially concurring. A reviewable conflict is limited to the facts which appear on the face of the opinion. *See Hardee* v. *State*, 534 So.2d 706, 708 n.* (Fla. 1988). In *Hardee,* the decisions under review may have been harmonized on their actual record facts; however, the determination of jurisdiction was properly based on the conflicting facts in the actual opinions. *Id*.(emphasis added). A reviewable conflict must be express, not inherent. *See Jerry's, Inc.* v. *Marriott Corporation*, 401 So.2d 1335 (Fla. 1981). Further, a reviewable conflict must be direct, not derivative. *See Dodi Publishing Company* v. *Editorial America, S. A.*, 385 So.2d 369 (Fla. 1980). In *Dodi Publishing Company*,

this Court considered a petition to review a *per curiam* opinion with a citation to authority. The Petitioner contended that the authority cited conflicted with another decision. This Court refused to re-examine the case cited in the *per curiam* decision to determine if the contents of the cited case conflicted with other appellate decisions, concluding that the issue on conflict review is "whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority." *Dodi Publishing Company*, 385 So.2d at 1369 (emphasis added). Finally, without a conflict, there is no discretion to review. *See The Florida Star* v. *B.J.F.*, 530 So.2d 286, 288-89(Fla. 1988). This standard is applicable to the instant petition.

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE FIFTH DISTRICT'S DECISION IN *WADE* AND THE FIRST DISTRICT'S DECISION IN *COOPER*.

There is no express and direct conflict between *Wade* and *Cooper* on the same point of law. The fifth district in *Wade* determined the applicable evidentiary standard for a custody modification in a factual circumstance where the parties had agreed to a rotating custody plan without a designation of a primary residential parent and that plan had failed and was

doomed to failure.[4] 872 So.2d at 954-55; AR.3 (emphasis added). On these facts the *Wade* court acknowledged the existence of other potential tests, but held that competent and substantial proof that the rotating custody plan had failed and was doomed to future failure was a sufficient evidentiary threshold to justify modification and permit the trial court to decide the best interest of the child by determining which parent should be the primary residential parent. The best interest determination is made by considering the factors provided in section 61.13(3), Florida Statutes as if the court were making an initial custody determination. 872 So.2d at 954-955; AR.3. Whereas, the first district in *Cooper* determined the applicable evidentiary test for modification of a rotating custody plan without a designation of residential parent in which the custody plan itself had not failed. Only the parents had failed to communicate. 854 So.2d at 263,267; AR. 6,9. On these facts the application of the best interest test alone to determine the better custodial parent was error. 859 So.2d at 268; AR.10. On its facts, the first district applied the so-called

[4]The fifth district pointed out that the evidence established more than hostility between the parties and their inability to get along or communicate. 872 So.2d at 955; AR.4.

"extraordinary burden" test which requires threshold proof by competent and substantial evidence of a change in circumstances since the initial custody decree before the second prong of this test, called the "best interest" prong, can be evaluated to determine which parent is better suited, in light of a consideration of the factors of section 61.13(3), to be the custodial parent. 854 So.2d at 267-68; AR.9-10.

The conclusions reached by each district court are distinguishable on their facts. The *Cooper* court specifically found that changing the custody arrangement would not resolve the underlying parental communication problem. 854 So.2d at 267; AR.9. The *Cooper* court disavowed the use of only the "best interest" standard, applied by its trial court, when there was no threshold ground alleged or established for changing the custody plan at all. The *Wade* court permitted the use of the best interest test only after the threshold ground of the plan's failure was established. These two cases are factually distinguishable.[5]

[5]Moreover, the legal principles underlying the respective opinions do not conflict. Each requires a specific evidentiary threshold to determine whether modification of the rotating plan is warranted. Some would argue that the failure of the plan in *Wade* was a substantial change in circumstances, a distinction made by the fifth district, perhaps without a difference.

Wade relies on *Mooney v. Mooney*, 729 So.2d 1015 (Fla. 1st DCA 1999) for the proposition that there are evidentiary thresholds other than a "substantial change in circumstances" which allow a trial court to redetermine custody based on the factors in section 61.13(3) as though it were making an initial custody determination.[6] 872 So.2d at 954 n.6; AR.3. In *Cooper*, the first district distinguished *Mooney, supra*, and other decisions which approved different evidentiary standards in rotating custody situations. 854 So.2d at 268; AR.10. The *Cooper* court did not disagree with these applications. Instead, it found its facts to be materially different from their circumstances. *Id*.

Mother's repeated contention that the facts of *Wade* and *Cooper* are "virtually identical," PJB at 5 and 8, does not change the instant result. The key material fact in both decisions is the viability of the rotating custodial plan itself. On the face of these decisions, this material fact

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[6]After citing *Mooney*, *Wade* cites *Cooper v. Gress*, *Ring v. Ring*, *Newsom v. Newsom*, *Cassin v. Cassin* and *Skirko v. Skirko* after the introductory signal "*but see.*" 872 So.2d at 454 n.6; AR.3. The fact that the cited cases, including *Cooper*, support a proposition contrary to *Mooney* does not establish a direct conflict. *Cf*., *Dodi Publishing Company*, 385 So.2d at 1369 (conflict must be direct, not derivative). Persuaded that there was no decisional conflict, the fifth district denied Mother's request for certification.

could not have been more divergent. Without the requisite conflict, this Court has no discretion to review Mother's petition, *The Florida Star*, 530 So.2d at 288-89, which should be denied.

CONCLUSION

The *Wade* holding with respect to the evidentiary test to be applied to the modification of a rotating custody arrangement is factually distinguishable from the *Cooper* holding on this same issue; therefore, there is no express and direct conflict on the same point of law. Without conflict, this Court does not have jurisdiction, and the petition for review should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Jurisdictional Brief has been furnished by U.S. Mail to Attorney for Petitioner, Mother, Tracy S. Carlin, Esquire, at 865 May Street, Jacksonville, Florida 32204 this 2nd day of August, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Respondent's Jurisdictional Brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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APPENDIX OF RESPONDENT
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***The opinion with respect to which Petitioner Mother seeks conflict review.

****The opinion which is alleged to expressly and directly

conflict with *Wade v. Hirschman*.