IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC04-1012

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

Petitioner,

v. L.T. Case No. 5D03-2797

MICHAEL D. HIRSCHMAN,

Respondent.

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

REPLY BRIEF OF PETITIONER CAROLYN R. WADE

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The Father=s argument that the Best Interests Test should apply because it is a two-part test that requires both a showing that the rotating custody agreement has failed and that the designation of a primary residential parent is in the child=s best interests under section 61.13(3), Florida Statutes, should not persuade this Court to approve *Wade v. Hirschman*, 872 So. 2d 952 (Fla. 5th DCA 2004), and reject or disapprove *Cooper v. Gress*, 854 So. 2d 262 (Fla. 1st DCA 2003).

By arguing that application of the Best Interests Test to modify rotating custody arrangements would always make more sense, especially if the child involved is a pre-schooler or a baby, the Father overlooks the fact that the original custody judgment could specifically provide that the child=s reaching school age would be a substantial change and that custody would be re-determined at that time by applying the section 61.13(3) factors. *See, e.g., Greene v. Suhor*, 783 So. 2d 290, 292 (Fla. 5th DCA), *review denied*, 796 So. 2d 538 (Fla. 2001); *Mooney v. Mooney*, 729 So. 2d 1015, 1015 (Fla. 1st DCA 1999) (discussed below). Thus, the Father=s argument that if the Court were to apply the Change Test to the modification of rotating custody arrangements, parties would never agree to rotating custody where they may realize that a future event may make the plan unworkable, is not well-taken. *See* AB, pp. 22-23.

The Mother does not argue that the Change Test must always be applied to rotating custody agreements. She argues that it should apply only to those cases where, as here, the judgment does not otherwise provide what standard should be applied when one party seeks a modification. Nor does the Mother suggest that a judgment could not require the application of the Best Interests Test to any future modification of a rotating custody arrangement or that such a requirement would be unenforceable. In any event, that issue is not before this Court. Neither the Judgment in this case nor the one in *Cooper* included such a provision and,

therefore, the Change Test should be applied. *See* R:II:245-51; *Cooper*, 854 So. 2d at 268.

The Father=s reliance on Judge Wolf=s concurrence in *Hammac v. Hammac*, 866 So. 2d 191 (Fla. 1st DCA 2004), is misplaced. Judge Wolf concurred in the court=s affirmation of the denial of the requested custody modification in that case. *Id.* at 191. In doing so, Judge Wolf noted that much of the conduct alleged to be a change was also occurring prior to the final judgment. *Id.* at 191. That is the case here as well.

Judge Wolf also stated:

> The correct message is that the burden of proof in modification of custody cases is difficult but not insurmountable. *Young v. Young*, 732 So. 2d 1133 (Fla. 1st DCA 1999). Issues such as promoting family stability and deterring endless litigation between feuding parents, as well as considering the limited resources and capabilities of the courts to remedy familial problems, mandate the extraordinary burden a party must meet to prevail in a change of custody proceeding.
>
> We do, however, recognize that in certain cases the need for protecting children may overcome that burden:
>
> [A] change in custody is appropriate only when . . . the trial court finds that [the] change . . . will so clearly promote or improve the child=s well-being to such an extent that any reasonable parent would understand that maintaining the status quo would be detrimental to the child=s overall best interests. This test involves more than a decision that the petitioning parent=s home would be Abetter@ for the child, and requires a determination that there is some significant inadequacy in the care provided by the custodial parent.

Id. at 192 (citing *Young*, 732 So. 2d at 1134 (quoting *Gibbs v. Gibbs*, 686 So. 2d 639, 641 (Fla. 2d DCA 1996)). Although Judge Wolf then said that he was concerned that the holding of cases like *Boykin v. Boykin*, 843 So. 2d 317 (Fla. 1st DCA 2003), and *Young* have left trial courts with the impression that they cannot intervene, even where the well-being of a child might require action by the trial court, he nevertheless recognized that the Change Test, with its detriment

component, is the applicable test. *Hammac*, 866 So. 2d at 192.

In any event, Judge Wolf=s concerns are inapplicable to this case. Here, the trial court merely found that the Father=s home would be Abetter@ for the child, not that the child=s well-being was detrimentally affected by the split custody arrangement or that he would be harmed by maintaining the status quo. Even the Father seems to concede that the trial court did not find that the child=s best interests would be promoted by the change or that any reasonable parent would understand that maintaining the status quo would be detrimental to the child=s overall best interests. *See* AB, pp. 44, 46, 49 (stating only that the trial court found that modification was in the child=s best interests). Indeed, the evidence was to the contrary. As a result, Judge Wolf=s concerns are not applicable here.

Likewise, the Father=s argument that the child=s best interests should not take a backseat in modification proceedings completely overlooks the fact that the Change Test includes a more stringent best interests component than the Best Interests Test. The Change Test requires the party seeking a modification to show that the child=s best interests would be *promoted* by the change, *i.e.*, that it would be detrimental to the child not to modify custody. *See, e.g.*, *Young*, 732 So. 2d at 1134. As a result, the Change Test is more protective of a child=s best interests because it requires a party seeking to destabilize the child=s pre-existing custody arrangement to demonstrate that maintaining the old arrangement would be detrimental to the child=s best interests. This protects children from becoming veritable ping-pong balls between parents who cannot get along and who choose to use their children as pawns in their own disputes.

Also, although the Father argues that the Fifth District=s test requires a threshold showing that the rotating custody arrangement has failed, the Father overlooks the fact that the failure can be Afor whatever reason.@ *Wade*, 872 So. 2d at 954-55. Consequently, the movant need only establish that the other party will

not cooperate with the parenting plan to satisfy the threshold question. A mere showing that the parents cannot cooperate with one another or the court-appointed mediator should not be enough to undermine a rotating custody arrangement that is not causing the child (as opposed to the parents) any detriment. As the expert in *Cooper* noted, when the parents cannot get along, it does not matter where the child resides; a change in primary residence will not change that fact. *See Cooper*, 854 So. 2d at 266.

Further, the Father mischaracterizes *Cooper*. *See* AB, p. 26. The Father argues that the *Cooper* court reversed because there was no threshold showing that the rotating custody plan had failed. AB, p. 26. In fact, the opposite is true. The mother in *Cooper* argued that there had been a change of circumstances because, according to the mother, she had agreed to rotating custody only because the father agreed to cooperate, but the father=s cooperation had since ceased. *Cooper*, 854 So. 2d at 264. Thus, the mother=s argument in *Cooper* is almost identical to the Father=s argument in this case. Yet, the First District appropriately concluded that because the mother did not satisfy the Change Test, a modification of custody was not warranted. *Id*. at 268.

Similarly, the Father=s analogy of the Fifth District=s test to the two-part test in section 61.13(4)(c)(5), Florida Statutes, should not persuade this Court to adopt the Best Interests Test. *See* AB, pp. 27-28. The legislature did not create a similar two-part test related to rotating custody. To the contrary, the legislature specifically stated that the court may order rotating custody if it is in the child=s best interests. *See* ' 61.121, Fla. Stat. Had the legislature wished to distinguish modifications of rotating custody from other custody modifications governed by the Change Test, it could have done so. It did not, and this Court should not exercise legislative judgment to do so now. Instead, the Court should conclude that where, as here, the original custody judgment finds that rotating custody is in the child=s best

interests and does not identify any other standard to be applied in future modification proceedings, the Change Test should be applied.

The cases of *Greene*, *Mooney*, and *Skirko v. Skirko*, 677 So. 2d 885 (Fla. 3d DCA 1996), *review denied*, 689 So. 2d 1071 (Fla. 1997), do not dictate a different result.

In *Greene*, the judgment specifically provided that the rotating custody arrangement would remain in place until the child began kindergarten and then residential custody would be with the mother, but that either party could seek reconsideration of the mother=s position as primary residential parent without a showing of a change in circumstances. 783 So. 2d at 290-91. The Fifth District concluded that this language indicated a requirement that any change to the custody arrangement contained in the judgment would be subject only to the Best Interests Test. *Id*. at 292.

Similarly, in *Mooney*, the parties agreed to rotating custody until the child began kindergarten, at which time the arrangement would be readdressed. 729 So. 2d at 1016. The First District concluded that this agreement, which was incorporated into the judgment, illustrated the parties= intent to require that when the child began kindergarten, the court would redetermine custody as if it were being decided in the first instance. *Id.*

Contrary to the Father=s assertion, *see* AB, p. 29, the parties had no such agreement in this case. Likewise, unlike the judgment in *Greene*, the Judgment here did not address the applicable standard for modification proceedings. *See* R:II:245-57. Moreover, the Father conceded in proceedings before both the trial court and the Fifth District that the Change Test applied.

This Court also should not be persuaded to follow *Skirko*. In that case, a Georgia court entered a divorce decree granting Ajoint custody@ to the parties. 677 So. 2d at 886. When both parties contended that a change had occurred because

the child had reached school age, the trial court concluded that it could decide custody as if it were doing so in the first instance, based solely upon the factors contained within section 61.13(3). *Id.* at 887. The Third District concluded that where the parties have Ajoint custody@ and have both established a change of circumstances, the trial court did not abuse its discretion by making a custody determination as if it were doing so in the first instance, pursuant to the section 61.13(3) factors. *Id.* at 888.

The *Cooper* court distinguished *Skirko* by concluding that, in *Skirko,* both parents alleged *and proved* a material change in circumstances, *i.e.*, the child=s attaining school age. *Cooper*, 854 So. 2d at 268. In this case, neither the Mother nor the Father proved a substantial change in circumstances and, therefore, *Skirko* should not persuade this Court to adopt the Best Interests Test.

Even if they had, the Court still should not conclude that the Best Interests Test applies. *Skirko* is an aberration that flies in the face of the very policies supporting the Change Test. Indeed, *Skirko* has never again been cited for the proposition that where both parties prove a change, custody may be re-determined pursuant to section 61.13(3), Florida Statutes, as if it were an initial custody determination.

Contrary to the Father=s arguments, the Change Test is the one that best protects the stability of a child=s post-divorce custody arrangement. The Change Test requires a showing that the child=s **B** and not the parents= **B** best interests will be promoted by the change. Thus, the Change Test should apply.

The Court also should not be persuaded by the Father=s arguments based upon *Johnson v. Stephenson*, 15 P.3d 359 (Kan. Ct. App. 2000), and that court=s conclusion that the Change Test should not apply to decrees that arise from default or stipulation. *See* AB, p. 34-35. That is simply not the law in Florida. *See Arrieta-Gimenez v. Arrieta-Negron*, 551 So. 2d 1184, 1186 (Fla. 1989) (holding

that consent final judgments have the same preclusive effect as judgments entered after the resolution of the parties= dispute by the court); *Champlovier v. City of Miami*, 667 So. 2d 315, 316 (Fla. 1st DCA 1995) (AThe policy in Florida which strongly favors finality of judgments is applicable whether a judgment is reached through contest or consent.@ (citation omitted)). Florida courts have regularly applied the Change Test even where the final judgment incorporated the parties= agreement as to custody. *See Perez v. Perez*, 767 So. 2d 513, 514 (Fla. 3d DCA 2000) (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 v. Haber* 641 So. 2d 906, 906 (Fla. 2d DCA 1994) (same); *Kelly v. Kelly*, 642 So. 2d 800, 800 (Fla. 2d DCA 1994), *review denied*, 651 So. 2d 1194 (Fla. 1995) (same); *see also Cooper*, 854 So. 2d at 265 (stating that the fact that the parties had agreed to rotating custody did not change their evidentiary burden for modification). Indeed, this Court has admonished trial courts not to simply sign whatever is put in front of them but to make actual findings. *See Perlow v. Berg-Perlow*, 875 So. 2d 383, 389-90 (Fla. 2004). Once a consent judgment is entered, it is the judgment of the court. *See Arrieta-Gimenez*, 551 So. 2d at 1186. Thus, the fact that the rotating custody arrangement was by agreement of the parties is of no consequence. The Change Test should still apply. Therefore, this Court should resolve the conflict between this case and *Cooper* by concluding that (unless the judgment otherwise specifies) the Change Test applies to the modification of rotating custody arrangements as it does to all other custody situations.[1]

The Mother agrees that the first prong of the Change Test is whether there is

[1] This Court should not conclude that there is no actual conflict between the Fifth District=s opinion in this case and *Cooper* as the Father suggests. *See* AB, p. 36, n. 12. As set forth in the Mother=s jurisdictional brief, an express and direct conflict exists between this case and *Cooper*. *See* Petitioner=s Jurisdictional Brief, pp. 1-10. Thus, jurisdiction was not improvidently exercised in this case.

a substantial or material change, not whether there is detriment. *See* AB, pp. 38-39. To satisfy the Change Test, however, the Father had to prove both a change *and* detriment. *See Miller v. Miller*, 671 So. 2d 849, 852 (Fla. 1st DCA 1999). The Mother addressed the detriment prong first in the Initial Brief because it is the one that is the most clear.

A simple review of the Order demonstrates that the trial court only found that the modification was in the child=s best interests, not that his best interests would be promoted by the change or that maintaining the status quo would be detrimental to him. *See* R:VI:1121-27. Even the Father seems to concede this point. *See* AB, pp. 44, 46, 49. In addition, as set forth in the Initial Brief at pages 38-40, no competent substantial evidence of detriment exists in this record upon which to make such a finding.

Further, Dr. Risch=s testimony that the stress imposed by the mother=s conduct *could* impact the child=s *future* relationship with adults is not sufficient to show a *present detriment* to the child. *See* RT:VII:47-48. This is particularly true where Dr. Risch could find no current emotional distress (RT:VII:66-67), and Dr. Hoza testified that the child did not need therapy, had no behavioral problems, and was Ahappy-go-lucky@ just six months before the hearing (RT:VII:116-17).

Furthermore, the Father=s argument that the Mother pulled the rug out from under the child when she violated the Father=s visitation rights is totally unsupported by the record. *See* AB, p. 45. No evidence exists that the Mother=s one-time violation of the Father=s visitation rights had any impact on the child whatsoever. Instead, the record shows that the Mother provided the Father with the required make-up visitation. Thus, there could have been no detriment to the child. As a result, this Court should disregard this argument, which is totally unsupported by the record.

Likewise, absolutely no competent substantial evidence exists to support the

trial court=s finding that the Mother=s failure to cooperate with the parenting coordinator rendered the child=s life Atumultuous@ during his time with the Mother. *See* AB, p. 45. Nearly three years before the entry of the Order, the child reported that he sometimes faked illness to get attention from the Mother (RT:VII:36-37), but there is no evidence that this behavior continued or that the child was, in any way, impacted by the Mother=s alleged failure to cooperate with the parenting coordinator at the time of the Order. Instead, the evidence showed that the child was resilient, Ahappy-go-lucky,@ doing well in school, and otherwise not suffering from any emotional distress at the time of the modification hearing. *See* RT:VII:66-67, 116-17.

The fact that the child was not achieving his full potential at school was never attributed to the Mother=s conduct, but was believed by Dr. Hoza to be a result of the child=s Attention Deficit Disorder. (RT:VII:116-17.) Moreover, being resilient, *i.e.*, being able to recover quickly from adversity, is a sign of positive mental health, not of detriment. The Father=s argument that a child should not have to recover from a situation that could be improved by a change, AB, p. 47, overlooks the fact that the Father=s burden was not to show that the child would be Abetter off@ with the Father, but that leaving the nine-day/five-day split custody arrangement in place would be detrimental to the child. Because the Father failed to make this showing, the Order should be reversed.

The Order should also be reversed because the Father failed to prove the existence of a material change in circumstances. The Father=s current characterization of the Mother as mentally ill is not supported by the record. *See* AB, pp. 38-43. The Mother=s pre-Order psychological evaluation concluded that she had the Aintellectual and emotional requirements of an appropriate parent.@

R:VI:1070-76.[2] Thus, even though there was evidence that the Mother had difficulty restraining her emotions or maintaining her train of thought under stress, there was no evidence of mental illness in this case.

Also, the requirement that the parties enter into a parenting plan and utilize the services of a parenting coordinator was imposed in anticipation of the fact that the parties would have ongoing disputes. Thus, the parties= inability to cooperate and agree was expressly contemplated at the time the Judgment was entered. Therefore, any inability of the parties to cooperate is not a post-Judgment, material change that would support a custody modification. *See Cooper*, 854 So. 2d at 265 (stating that the material change must be one not contemplated at the time of the judgment).

Moreover, the Father=s reliance upon the concurring opinion in *Bergmann v. Bergmann*, 617 So. 2d 469 (Fla. 4th DCA 1993), is misplaced. There, Justice Anstead stated that he concurred in the Fourth District=s affirmance of the trial court=s change of custody to the mother because he concluded that rotating custody was established when the children were pre-schoolers, that their obtaining school age was a material change, and that the children were suffering some detriment as a result of that change. 617 So. 2d 469, 469 (Fla. 4th DCA 1993). That situation is distinguishable from the one here.

In this case, the child was in first grade at the time of the divorce. He was going into the fourth grade at the time of the modification hearing. Thus, there was no change in the child=s school-related status; he was in school before and after the Judgment. Further, the only change in his academic performance was that it had improved post-Judgment. Also, no evidence existed that the Mother=s conduct, rather than the child=s ADD, was affecting his school performance. *Compare Kelly*, 642 So. 2d at 802 (reversing change of custody in part because no evidence

[2] A post-Judgment psychological evaluation of the Mother also concluded that she was not mentally ill and that she should have liberal and unsupervised visitation with the child.

existed that the child=s problems were attributable to the mother=s conduct). Thus, *Bergmann* is distinguishable.

The Father also continues to try to confuse the Court by blending the Mother=s pre- and post-Judgment conduct. *See e.g.*, AB, pp. 43 (citing to Mr. Roussis=s report that the Mother involved the child in the parties= disputes, which was a pre-Judgment complaint, *see* RT:VII:15); *id.* at 46 (citing to Dr. Risch=s testimony that the Mother: 1) was not in touch with the child=s need for social development; 2) had an unhealthy attachment to the child because she did not want to share him or let him participate in outside activities; 3) coached the child about therapy; and 4) put the child in the middle of the litigation, which were all pre-Judgment observations, *see* RT:VII:15, 20-24, 30-31). Consequently, because the Father did not prove a post-Judgment material change that was not expressly contemplated by the Judgment, the Father failed to satisfy the Change Test. As a result, the Order should be reversed.

Finally, the Fifth District=s application of the Best Interests Test changed the rules of the game after the fact. Both parties argued **B** both before the trial court and the Fifth District **B** that the Change Test applied. While the Father correctly notes that the Mother filed a second counter-petition in December, 2002, which alleged a substantial change related to the Father=s conduct toward the Mother and the child (R:III:465-68),[3] the hearing focused on the allegations in the Father=s petition (RT:VII-VIII). As a result, if this Court determines that the Best Interests Test applies, it should remand with instructions for the trial court to conduct a new hearing as to all the evidence supporting that test.

[3] The Mother=s counsel=s failure to discuss this second counter-petition was a mere oversight on her part, not an intentional attempt to mislead the Court as to the facts of the case.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Initial Brief, this Court should grant the relief requested in the Initial Brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Linda Logan Bryan, Esq.**, Miller, Shine, & Bryan, P.L., P.O. Box 3376, St. Augustine, Florida 32085-3376, Attorney for Respondent, by U.S. mail this 25 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