THE FLORIDA SUPREME COURT

CASE NO. SC06-2072

LOUIS R. MONTELLO,
Petitioner,

v.

SONIA JUCHT MONTELLO,
Respondent

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Appeal From the Third District Court of Appeal
State of Florida

Louis R. Montello, Esq.
Florida Bar No. 0624950
MONTELLO & ASSOCIATES, P.A.
777 Brickell Avenue, Suite 1070
Miami, Florida 33131
Telephone: (305) 373-0300
Facsimile: (305) 373-3739
Attorneys for Petitioner

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PREFACE

1. Appellee/Cross-Appellant Louis R. Montello will be referred to as the **"Former Husband."**

2. Appellant/Cross-Appellee Sonia Jucht Montello will be referred to as the **"Former Wife."**

3. Citations to the General Magistrate's Report and Recommendation, which is located in the record of the related appeal in Case No. 3D04-1094, will be referred to as **"R&R, p. __."**

4. Citations to the Final Judgment of Dissolution of Marriage, which is located in the record of the related appeal in Case No. 3D04-1094, will be referred to as **"Final Judgment of Dissolution, p. __."**

5. Citations to the Report of the General Magistrate (Attorney's Fees and Costs) and Notice of Filing, which is located in Volume II, pages 201-214 of the record for the related appeal in Case No. 3D05-1615, will be referred to as **"Attorney's Fees R&R, p. _____."**

6. Citations to the transcripts of the hearing before the General Magistrate held on December 10, 2004, which are located in Volumes III and IV of the record for the related appeal in Case No. 3D05-1615, will be referred to as "**Trans., 12/10/04, p. ___."**

7. Citations to the transcript of the hearing on the Former Husband's Exceptions to the Attorney's Fees R&R, which is located in the supplemental record, will be referred to as "**Trans. 5/17/05, p. __**."

8. Citations to the transcript of the trial proceedings, which are located in Volumes VIII through XII of the record for the related appeal in Case No. 3D04-1094, may be referred to the relevant volume of the record or as "**Trans., date, p. ___.**"

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STATEMENT OF THE CASE AND FACTS

A. AWARD OF ATTORNEY'S FEES TO THE FORMER WIFE.

The Former Wife filed a petition for dissolution of marriage in December 2001. On January 25, 2002, the trial court referred the case to General Magistrate Robert J. Jones. On August 25, 2003, the General Magistrate issued a final report and recommendation resolving the issues of equitable distribution, alimony, child support and custody (the "**Report and Recommendation**").

In the Report and Recommendation, the General Magistrate reserved jurisdiction to determine entitlement to attorney's fees and costs as well as responsibility for the cost of the parties' joint forensic accountant. (R&R, p. 39; Attorney's Fees R&R, pp. 3-4). On September 5, 2003, the Former Wife filed a motion for award of attorney's fees and costs (the "**Former Wife's Fee Petition**"). (Attorney's Fees R&R, p. 2).

On March 1, 2004, the trial court entered a final judgment of dissolution of marriage (the "**Final Judgment of Dissolution**"). (Final Judgment of Dissolution; Attorney's Fees R&R, p. 2). The Final Judgment of Dissolution wholly adopted the General Magistrate's Report and Recommendation. (Final Judgment of Dissolution; Attorney's Fees R&R, p. 3).

Thereafter, the Former Wife did not file an additional motion for attorney's fees. Instead, more than 30 days after the entry of the Final Judgment of

Dissolution, the Former Wife requested a hearing on Former Wife's Fee Petition, which had been filed 6 months *prior* to the entry of the Final Judgment of Dissolution. (Attorney's Fees R&R, p. 2). On June 9, 2004, the Former Husband filed a memorandum in opposition to the Former Wife's Fee Petition, which opposed the Former Wife's Fee Petition on the basis that the Former Wife had failed to comply with Florida Rule of Civil Procedure 1.525, which requires the Former Wife's request for attorney's fees to be filed within 30 days of the Final Judgment of Dissolution, and requested that the Former Wife's Fee Petition be stricken. (Case No. 3D05-1615 Vol. I, pp. 41-45). On June 18, 2004, the Former Wife filed a memorandum of law in support of the Former Wife's Fee Petition. (Case No. 3D05-1615 Vol. I, pp. 46-58). The hearing on the Former Husband's and the Former Wife's Fee Petition was held on December 10, 2004 (the "**Attorneys' Fees Hearing**"). (Case No. 3D05-1615 Vol. III and IV).

On February 15, 2005, the General Master entered a Final Hearing Report of General Magistrate (Attorney's Fees and Costs) and Notice of Filing (the "**Attorney's Fees Report and Recommendation**"), awarding the Former Wife substantially all of her attorney's fees in the amount of $84,415.50 and requiring the Former Husband to pay all of the joint forensic accountant fees of $29,470.00 (Attorney's Fees R&R, pp. 5-6). In the Attorney's Fees Report and Recommendation, the General Magistrate determined that as a result of the specific

reservation of jurisdiction in the Report and Recommendation, as adopted and approved by the Final Judgment of Dissolution, to determine entitlement to attorney's fees and costs, the requirements of Florida Rule of Civil Procedure 1.525 did not bar the Former Wife's claim for attorney's fees and costs. (Attorney's Fees R&R, pp. 5-6).

The Former Husband filed exceptions to the Attorney's Fees Report and Recommendation on February 25, 2005, which, among other things, requested the trial court to strike the Former Wife's Fee Petition on the basis that the Former Wife had failed to comply with Florida Rule of Civil Procedure 1.525. (Case No. 3D05-1615 Vol. II, pp. 215-233). Thereafter, on March 3, 2005, the Supreme Court of Florida adopted Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So. 2d 467 (Fla. 2005) (the "**Family Law Rules of Procedure Amendments**"). The Family Law Rules of Procedure Amendments adopted Florida Family Law Rule of Procedure 12.525, which provides that "Florida Rule of Civil Procedure 1.525 shall not apply to proceedings governed by these rules." In its opinion adopting Florida Family Law Rule of Procedure 12.525, this Court did not include any language declaring Rule 12.525 applied retroactively or that it applied to pending cases; this Court's opinion simply declared that Rule 12.525 "shall become effective immediately."

On May 10, 2005, the Former Husband filed supplemental authority and an amended memorandum in support of the Former Husband's exceptions to the Attorney's Fees Report and Recommendation. (Case No. 3D05-1615 Vol. II, pp. 238-260). On May 12, the Former Wife Filed Former Wife's Response to the Former Husband's Memorandum of Law in Support of His Exceptions in which the Former Wife argued that the Former Wife's motion for attorney's fees was timely because: (1) the prevailing law in the Third District at the time permitted the trial court to reserve jurisdiction to determine entitlement to attorney's fees and costs in spite of the strict 30-day requirement of Florida Rule of Civil Procedure 1.525; and (2) although it was adopted more than 1 year after the Final Judgment of Dissolution, Florida Family Law Rule of Procedure 12.525 applied to the case and thus Florida Rule of Civil Procedure 1.525 did not apply (Case No. 3D05-1615 Vol. II, pp. 261-320).

On June 1, 2005, the trial court entered an order adopting the Attorney's Fees Report and Recommendation in its entirety (the "**Order Granting the Former Wife Attorney's Fees"**). (Case No. 3D05-1615 Vol. II, pp. 321-325).

The Former Husband timely appealed the Order Granting the Former Wife Attorney's Fees. (Case No. 3D05-1615 Vol. II, pp. 314-320). On appeal the Third District affirmed the Order Granting the Former Wife Attorney's Fees, finding that

Florida Family Law Rule of Procedure 12.525 applied to this case. The Third District held:

> **We agree with the First District Court of Appeal that new Rule 12.525 is applicable to cases that were pending on the effective date of the new rule.** See Smith v. Smith, 902 So. 2d 859, 863 (Fla. 1st DCA 2005). Rule 12.525 became effective on March 3, 2005, see 897 So. 2d at 467, which was after the date of the general magistrate's report but before the date of the trial court's order approving the general magistrate's report. Since this case was pending on March 3, 2005 it follows that Rule 12.525 applies here and Rule 1.525 does not apply.

(A.4-5) (emphasis added). The Former Husband timely invoked this Court's jurisdiction to resolve the certified conflict. By order, this Court deferred its decision on jurisdiction and ordered the parties to prepare briefs on the merits.

B. CHILD CUSTODY AND VISITATION ISSUES.

1. Custody.

The Former Husband sought rotating custody but the General Magistrate denied his request and gave the Former Wife primary residential custody. (R&R, pp. 11-18). The Former Husband was awarded overnight visitation with the children on *alternating weekends* from 9:30 a.m. on Saturday until Monday morning and overnight visitation with the children each Wednesday until Thursday morning. (R&R, p. 13). The General Magistrate awarded the Former Husband continuous uninterrupted visitation with the minor children during specified

holidays or other special days, holiday weekends, and spring, summer, and winter vacations, including Friday nights during such visitation. (R&R, p. 15).

The Former Husband filed an exception as to the General Magistrate's ruling on rotating custody. (Case No. 3D04-788 Vol. IV, pp. 765-767; Case No. 3D04-788 Vol. VI, pp. 1028-1040). Nonetheless, the trial judge awarded primary residential custody to the Former Wife. (Case No. 3D04-788 Vol. VI, pp. 1093-1094). Although the Former Husband very much wants rotating custody and believes such custody would be in his children's best interests, in light of the governing law and applicable standard of review, the Former Husband decided **not** to appeal the trial court's denial of his request for rotating custody.

2. <u>Alternating Weekend Visitation</u>.

The Former Wife is Jewish and the Former Husband is not. (Trans. 4/2/2003, p. 16); (Trans. 4/3/2003, p. 709). The parties agreed that their children would be raised in the Jewish faith. (Trans. 4/2/2003, p. 16); (Trans. 4/3/2003, p. 709). During their marriage, the parties regularly had a Sabbath dinner, which begins at sundown on Friday evenings. (Trans. 4/2/2003, p. 16); (Trans. 4/3/2003, p. 711).

However, the Former Wife is **not** an orthodox Jew. (Trans. 4/3/2003, p. 710). Other than a Friday night dinner, the Former Wife does not keep the

Sabbath. (Trans. 4/3/2003, p. 711). The Former Wife uses electricity on Saturday, drives on Saturday, speaks on the telephone on Saturday, and exercises. Id.

The Former Husband agrees that the children should be raised Jewish. (Trans. 4/3/2003, p. 709). When the children were with the Former Husband on Friday nights, he participated in Sabbath dinners with them. Id.

The General Magistrate ruled that the parties' children should be raised in the Jewish faith. (R&R, p. 2). It appears that based on the children's Jewish religion, the General Magistrate limited the Former Husband's alternating weekend visitation with the children from 9:30 a.m. on Saturday until Monday morning rather than awarding the Former Husband alternating weekend visitation beginning on Friday after school. (R&R, p. 13). The Former Husband objected to not being given Friday night visitation with his children as part of his alternating weekend visitation. (Case No. 3D04-788 Vol. IV, pp. 765-767; Case No. 3D04-788 Vol. VI, pp. 1028-1040).

The Former Husband filed a timely cross appeal of the Final Judgment of Dissolution with respect to the issue of Friday night visitation. On appeal the Third District affirmed the Final Judgment of Dissolution with respect to the Former Husband's cross appeal, holding that the Former Husband had not shown that any reversible error existed with respect to the Final Judgment of Dissolution with respect to this issue (A.2). The Former Husband timely invoked this Court's

jurisdiction to resolve the certified conflict with respect to application of Florida Family Rule of Procedure 12.525. By order, this Court deferred its decision on jurisdiction and ordered the parties to prepare briefs on the merits. By virtue of this Court's jurisdiction on the basis of the certified conflict, this Court has jurisdiction over all of the issues raised in this case. See Fulton County Administrator v. Sullivan, 753 So. 2d 549 (Fla. 1999), and Feller v. State, 637 So. 2d 911, 914 (Fla. 1994).

SUMMARY OF THE ARGUMENT

A. AWARD OF ATTORNEY'S FEES TO THE FORMER WIFE.

The Order Granting Former Wife Attorneys' Fees should be reversed because the Former Wife's request for attorney's fees was not timely filed within 30 days of the Final Judgment of Dissolution and, therefore, failed to comply with the requirements of Rule 1.525 of the Florida Rules of Civil Procedure. At the time the Final Judgment of Dissolution was entered, Florida Rule of Civil Procedure 1.525, which requires the Former Wife's request for attorney's fees to be filed within 30 days of the Final Judgment of Dissolution, applied to all cases, including family law cases. Although the Final Judgment of Dissolution contained a reservation of jurisdiction to determine entitlement to attorney's fees, this Court resolved the conflict that existed between the district courts by holding in Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598 (Fla. 2006), that Florida Rule of Civil Procedure 1.525 established a bright-line time requirement for motions for costs and attorney fees and that a reservation of jurisdiction by the trial court could not serve to extend the 30-day time limit. Consequently, the trial court should have granted the Former Husband's request to strike the Former Wife's Fee Petition as untimely because it was not filed within 30 days of the entry of the Final Judgment of Dissolution.

Furthermore, Florida Family Law Rule of Procedure 12.525, adopted more than 1 year after the Final Judgment of Dissolution, does not apply to this case. On March 3, 2005, this Court adopted new Florida Family Law Rule of Procedure 12.525. See Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So. 2d 467 (Fla. 2005). In its opinion adopting Florida Family Law Rule of Procedure 12.525, this Court did not include any language declaring that the rule applied retroactively or to pending cases; this Court's opinion simply declared that the new rule was effective immediately. This Court has consistently held that rules of procedure are prospective unless specifically provided otherwise. See Natkow v. Natkow, 696 So. 2d 315 (Fla. 1997); Mendez-Perez v. Perez-Perez, 656 So. 2d 458 (Fla. 1995); and Pearlstein v. King, 610 So. 2d 445 (Fla. 1992). Based on the precedent of Natkow, Mendez-Perez and Pearlstein, Florida Family Law Rule of Procedure 12.525 does not apply retroactively to family law cases in which the final judgment of dissolution was rendered before March 3, 2005. Because the Final Judgment of Dissolution was entered on March 1, 2004, more than 1 year before the adoption of Florida Family Law Rule of Procedure 12.525, Florida Family Law Rule of Procedure 12.525 does not apply to this case. As a result, the Third District should have reversed the Order Granting Former Wife Attorney's Fees on the basis that the Former Wife's Fee Petition was untimely.

There is a clear and irreconcilable conflict between the District Courts of Appeal on the issue of whether Florida Family Law Rule of Procedure 12.525 applies retroactively. The Second District in Ponce v. Minda, 923 So. 2d 1250 (Fla. 2d DCA 2006), Italiano v. Italiano, 920 So. 2d 694 (Fla. 2d DCA 2006), review pending, No. SC06-419 (Fla. filed March 3, 2006), Nicoletti v. Nicoletti, 902 So. 2d 215 (Fla. 2d DCA 2005), Caldwell v. Finochi, 909 So. 2d 976 (Fla. 2d DCA 2005) and Sharon v. Sharon, 915 So. 2d 630 (Fla. 2d DCA 2005), and the Fifth District in Reddell v. Reddell, 900 So. 2d 670 (Fla. 5th DCA 2005) have correctly followed this Court's precedent in Natkow, Mendez-Perez and Pearlstein by holding that Florida Family Law Rule of Procedure 12.525 does not apply retroactively. The First District in Smith v. Smith, 902 So. 2d 859 (Fla. 1st DCA 2005) and the Third District in this case have incorrectly held that Florida Family Law Rule of Procedure 12.525 applies to all family law cases pending on appeal at the time this Court adopted the Rule. This Court should resolve the certified conflict by determining that Florida Family Law Rule of Procedure 12.525, adopted effective March 3, 2005, by Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So. 2d 467 (Fla. 2005), does not apply retroactively and, therefore, does not apply to a final judgment of dissolution of marriage entered on March 1, 2004. As a result, this Court should reverse the Third District's affirmance of the Order Granting Former Wife Attorney's Fees.

B. CHILD CUSTODY AND VISITATION ISSUES.

The parties have three children, Kevin, David, and Daniel Montello, who are sixteen, fourteen and eight years of age, respectively. (R&R, p. 1, 4). The trial court abused its discretion in limiting the Former Husband's visitation with his children on alternating weekends, which does not include Friday nights, purportedly based on the Former Wife's desire to have Shabbat dinner with the children. This ruling as to visitation unfairly punishes the Former Husband for not being Jewish. Furthermore, the ruling is not supported by substantial competent evidence and is not in the best interests of the children. The presumption is in favor of overnight visitation. Furthermore, a visitation schedule needs to be practical and to encourage the maintenance of a close and continuing relationship between the minor children and their divorced parents. The exclusion of Friday nights from the Former Husband's alternate weekend visitation is both impractical and impedes the maintenance of a close and continuing relationship between the Former Husband and his children. Therefore, this Court should reverse the Third District's affirmance of the trial court's award of alternating weekend visitation to the Former Husband with the children to begin on Saturday mornings and remand with instructions for the trial court to award the Former Husband visitation on alternating weekends beginning at the end of the school day on Friday.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CERTIFIED CONFLICT BY DETERMINING THAT FLORIDA FAMILY RULE OF PROCEDURE 12.525, ADOPTED EFFECTIVE MARCH 3, 2005, BY AMENDMENTS TO THE FLORIDA FAMILY LAW RULES OF PROCEDURE (RULE 12.525), 897 SO. 2D 467 (FLA. 2005), DOES NOT APPLY RETROACTIVELY TO A FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE ENTERED ON MARCH 1, 2004.

The Former Wife's request for attorney's fees failed to comply with the requirements of Rule 1.525 of the Florida Rules of Civil Procedure because it was not filed within 30 days of the Final Judgment of Dissolution. Rule 1.525 provides:

> Any party seeking a judgment taxing costs, attorneys' fees or both **shall serve a motion within 30 days after filing of the judgment**, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

(Fla. R. Civ. P. 1.525) (emphasis added). The Final Judgment of Dissolution was entered on March 1, 2004. After the Final Judgment of Dissolution was entered, the Former Wife did not file a request for an award of attorney's fees but instead more than 30 days after the date of the Final Judgment of Dissolution requested a hearing on a motion for attorney's fees filed more than 6 months before the entry of the Final Judgment of Dissolution. (A.3-4; Attorney's Fees R&R, p. 2).

Because the application and construction of rules of procedure is a question of law, the standard of review is de novo. See Wade v. Hirschman, 903 So. 2d 928

(Fla. 2005) (citations omitted), and Blanton v. City of Pinellas Park, 887 So. 2d 1224 (Fla. 2004) (citations omitted).

On March 3, 2005, the Supreme Court of Florida approved the Family Law Rules of Procedure Amendments, which adopted Florida Family Law Rule of Procedure 12.525. Florida Family Law Rule of Procedure 12.525 provides that "Florida Rule of Civil Procedure 1.525 shall not apply to proceedings governed by these rules." See Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So. 2d 467 (Fla. 2005). In its opinion adopting Florida Family Law Rule of Procedure 12.525, this Court did not include any language declaring that the rule applies retroactively or to pending cases; this Court's opinion simply declared that "(t)he new rule shall become effective immediately."

This Court's decisions in Natkow and Mendez-Perez are dispositive of the issue of whether Florida Family Law Rule of Procedure 12.525 applies retroactively to cases in which the final dissolution of marriage was entered before the date this Court adopted Florida Family Law Rule of Procedure 12.525 but which were still pending on appeal. Natkow involved the application of an amendment to Florida Rule of Civil Procedure 1.540(b) that became effective after a judgment of dissolution of marriage was entered. The amendment to Florida Rule of Civil Procedure 1.540(b) did not contain any language that the amendment applied retroactively. In Natkow, this Court reiterated that "(t)his Court has held

that rules of procedure are prospective unless specifically provided otherwise." See Natkow, 696 So.2d at 316. See also Mendez-Perez and Pearlstein. In holding that the amendment to Florida Rule of Civil Procedure 1.540(b) did not apply retroactively to the case at hand, this Court held that "(t)he rule in effect at the time that a judgment of dissolution becomes final is controlling." See Natkow, 696 So.2d at 316. See also Mendez-Perez, 656 So. 2d at 459.

As indicated above, the Final Judgment of Dissolution was entered on March 1, 2004. This Court adopted Florida Family Law Rule of Procedure 12.525 effective March 3, 2005, more than 1 year after the Final Judgment of Dissolution was entered. As with Rule 1.540(b) in Natkow, in its opinion adopting Florida Family Law Rule of Procedure 12.525 this Court did not include any language declaring that it applies retroactively or to pending cases. Based on the precedent of Natkow and Mendez-Perez, Florida Family Law Rule of Procedure 12.525 does not apply to this case because it was not in effect at the time the Final Judgment of Dissolution was entered. As result, Florida Rule of Civil Procedure 1.525 applies to the Former Wife's motion for attorney's fees in this case. Consequently, the Former Wife's motion for attorney's fees was untimely because, in contravention of Florida Rule of Civil Procedure 1.525, it was filed more than 30 days after the Final Judgment of Dissolution and, therefore, should be denied.

The foregoing conclusion is consistent with the decisions of the Second District and the Fifth District. See Ponce v. Minda, 923 So. 2d 1250 (Fla. 2d DCA 2006) (Rule 12.525 does not apply retroactively); Italiano v. Italiano, 920 So. 2d 694 (Fla. 2d DCA 2006), review pending, No. SC06-419 (Fla. filed March 3, 2006) (Rule 12.525 does not apply retroactively); Nicoletti v. Nicoletti, 902 So. 2d 215 (Fla. 2d DCA 2005) (Florida Family Law Rule of Procedure 12.525 does not apply retroactively or to pending cases because "(a)mendments to rules of procedure are prospective unless the language of the rule specifically provides otherwise" and "(n)either the text of rule 12.525 nor the Florida Supreme Court's opinion adopting the rule states that it applies retroactively or to pending cases"); Caldwell v. Finochi, 909 So. 2d 976 (Fla. 2d DCA 2005) ("because the judgment that triggered the Former Wife's right to attorney's fees was entered before the effective date of rule 12.525, the rule does not apply in this case"); Sharon v. Sharon, 915 So. 2d 630 (Fla. 2d DCA 2005) (Rule 12.525 does not apply retroactively); and Reddell v. Reddell, 900 So. 2d 670 (Fla. 5th DCA 2005) (Florida Family Law Rule of Procedure 12.525 does not apply retroactively because "in adopting Rule 12.525, the supreme court expressly provided that '(t)he new rule shall become effective immediately and did not include any language indicating an intent to apply it retrospectively"). By holding that Florida Family Law Rule of Procedure 12.525 applies retroactively, the Third District in the case below and the First District in

Smith erroneously failed to follow this Court's precedent as established by Natkow and Mendez-Perez.

Based on the foregoing, this Court should reverse the decision of Third District affirming the trial court's Order Granting Former Wife Attorney's Fees, and hold that Florida Family Rule of Procedure 12.525 does not apply retroactively to cases in which the final judgment of dissolution had been entered prior to the effectiveness of the Rule.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING THE FORMER HUSBAND FRIDAY NIGHT VISITATION WITH HIS CHILDREN ON ALTERNATING WEEKENDS.

The Former Husband sought rotating custody but the General Magistrate denied his request and gave the Former Wife primary residential custody. (R&R, pp. 11-18). Although the Former Husband very much wants rotating custody and believes such custody would be in his children's best interests, in light of the governing law and applicable standard of review, the Former Husband decided **not** to appeal the trial court's denial of his request for rotating custody. However, the Former Husband appealed the trial judge's limitation of his visitation with his children on alternating weekends, which does not include Friday nights, because it unfairly punishes the Former Husband for not being Jewish and is not supported by substantial competent evidence.

The standard of review for this Court's determination of the Former Husband's appeal with respect to Friday night visitation is abuse of discretion. See Barner v. Barner, 716 So. 2d 795, 798 (Fla. 4th DCA 1998).

The Former Wife is Jewish and the Former Husband is not. (Trans. 4/2/2003, p. 16); (Trans. 4/3/2003, p. 709). The parties agreed that their children would be raised in the Jewish faith. (Trans. 4/2/2003, p. 16); (Trans. 4/3/2003, p. 709). During their marriage, the parties regularly had a Sabbath dinner, which begins at sundown on Friday evenings. (Trans. 4/2/2003, p. 16); (Trans. 4/3/2003, p. 711). The Former Husband agrees that the children should be raised Jewish. (Trans. 4/3/2003, p. 709). When the children are with the Former Husband on Friday nights, he participates in Sabbath dinners with them. Id.

The General Magistrate ruled that the parties' children should be raised in the Jewish faith. (R&R, p. 2). It appears that based on the children's Jewish religion, the General Magistrate limited the Former Husband's alternating weekend visitation with the children from 9:30 a.m. on Saturday until Monday morning rather than awarding the Former Husband weekend visitation beginning on Friday night. (R&R, p. 13). This was an abuse of discretion.

"When the matter involves the religious training and belief of a child, we do not agree that the court may make a decision in favor of a specific religion over the objection of the other parent." Abbo v. Briskin, 660 So. 2d 1157 (Fla. 4th DCA

1995) citing Sotnick v. Sotnick, 650 So.2d 157 (Fla. 3d DCA 1995). "A child's religion is no proper business of judges." Id. Here, the General Magistrate's recommendation to limit the Former Husband's visitation with his children to exclude Friday nights, when Shabbat dinner takes place, unfairly punishes the Former Husband for not being Jewish.

There is substantial competent evidence in the record on appeal that the trial court's refusal to award the Former Husband Friday night visitation on alternating weekends (the weekends he has regular visitation with the children) was based on religious grounds. The record is very clear that that Former Wife's counsel's examination at trial sought such a result. The Former Wife's direct examination was as follows:

> Q: Now, we have been here before in other hearings, and we talked about the significance of Shabat. Why is Shabat significant?
>
> A: Because I am Jewish, and the children were raised Jewish by an agreement of both of us, and they – the school that we chose also is a Jewish school, and we agree about celebrating and encourage the children to follow the Jewish faith.
>
> Q: And what is Shabat, so that we have a record, at least as you understand it?
>
> A: Shabat is once a week on Friday night, we have - - we do a special dinner different from the other dinners, and the family sits around the table, and we do numerals of blessings and prayers. And it's opportunity for the family to be around the table and have a dinner and a short time.

* * *

Q: Are there any ceremonies associated with this dinner, the Shabat dinner?

A: There is a lot of Jewish holidays during the year. But Shabat is the most important one because it's the most frequent one, and it's once a week. Every week on Friday night. And also Saturday during the day, but we celebrate it Friday night. The Shabat dinner is a holy holiday.

Q: The question is are there any rituals and ceremonies? For example, are candles lit or prayers said?

A: Yes. The different prayers that we do and we light the candle. The mother lights the candles, and the father does says the prayer of the wine. And the children said it instead because they say the prayer of the wine.

Q: And the children say the prayer of the wine, why is that?

A: Because the father didn't know Hebrew and he doesn't -- he is not Jewish.

(Trans. 4/2/2003, pp. 17-18). Additionally, the Former Wife's proposed final judgment specifically requested that the Former Husband's visitation with the children on alternating weekends not begin until Saturday morning. (Supplemental Record, 1/6/2006).

Furthermore, the Final Judgment specifically directs that the children should be raised Jewish. It states:

The Wife is Jewish and the children have been raised in the Jewish faith. The parties have agreed that the children should continue to be

> raised under that faith. Therefore, the children shall continue to be raised or reared under the Jewish faith.

(R&R, p. 2). This direction in and of itself violates established law because "(a) child's religion is no proper business of judges." Abbo v. Briskin, 660 So. 2d 1157 (Fla. 4th DCA 1995).

Moreover, the decision not to award the Former Husband Friday night visitation is not supported by substantial competent evidence that such a limitation is necessary. The Former Wife is **not** an orthodox Jew. (Trans. 4/3/2003, p. 710). Other than a Friday night dinner, the Former Wife does not keep the Sabbath. (Trans. 4/3/2003, p. 711). The Former Wife uses electricity on Saturday, drives on Saturday, speaks on the telephone on Saturday, and exercises. Id. Moreover, the Former Husband has had and will continue to have Shabbat dinner when the children are with him on Friday nights. (Trans. 4/3/2003, p. 709). At a minimum, because Shabbat dinner takes place at sundown, there is no reason the Former Husband should not be given visitation on alternating weekends beginning on Friday nights after Shabbat dinner is complete. Thus, the trial court's refusal to allow the Former Husband Friday night visitation was an abuse of discretion. See Coyne v. Coyne, 895 So. 2d 469, 473 (Fla. 2d DCA 2005) (restrictions on visitation should be supported by evidence showing that such restrictions are necessary).

Finally, the decision not to award the Former Husband Friday night visitation is not supported by substantial competent evidence in that such a limitation is **not** in the children's best interests. The General Magistrate's implicit determination that denying the Former Husband Friday night visitation on alternating weekends is in the best interests of the children is belied by the fact that the General Magistrate awarded the Former Husband continuous uninterrupted visitation with the minor children during specified holidays or other special days, holiday weekends, and spring, summer and winter vacations. (R&R, p. 15). The Former Wife did not appeal this ruling on the grounds that it interfered with Shabbat dinner. Therefore, there is a lack of substantial competent evidence in the record to support the trial court's determination that preventing the Former Husband from having Friday night visitation on alternating weekends is in the children's best interests. Moreover, the trial court's award of Friday night visitation during holidays and vacations contradicts any finding that it is in the children's best interests to spend every Friday night with the Former Wife. (R&R, p. 15).

Moreover, it is not in the children's best interests to have the Former Husband's alternating weekend visitation with them begin on Saturday mornings rather than on Friday nights. The presumption is in favor of overnight visitation. Andrade v. Dantas, 776 So. 2d 1080 (Fla. 3d DCA 2001). Furthermore, a

visitation schedule needs to be practical and to encourage the maintenance of a close and continuing relationship between the minor children and their divorced parents. Drakulich v. Drakulich, 705 So. 2d 665 (Fla. 3d DCA 1998) citing Russenberger v. Russenberger, 669 So. 2d 1044, 1045 (Fla. 1996). The exclusion of Friday nights from the Former Husband's weekend visitation is both impractical and impedes the maintenance of a close and continuing relationship between the Former Husband and his children.

It is self-evident that the Former Husband cannot take the children on weekend trips and cannot participate in events with the children that begin early on Saturday mornings as a result of not being awarded Friday night visitation with the children. Furthermore, as some of the children are now teenagers, it is self-evident that they do not want to get up early on Saturday mornings so that they are ready to be picked up by the Former Husband at the appointed hour of 9:30 a.m. In turn, the Former Husband is forced to either wake the children up, which creates resentment, or to pick them up later than 9:30 a.m., which then further limits the Former Husband's visitation with the children. Thus, the exclusion of Friday nights from the Former Husband's visitation with his children on alternating weekends is impractical and impedes his ability to maintain a close relationship with his children.

The Former Wife's request that the Former Husband's alternating weekend visitation not begin until Saturday morning is not a result of her devout religious beliefs but merely another attempt by the Former Wife to interfere with the Former Husband's relationship with the children. Indeed, the trial court specifically found that the Former Wife has attempted to interfere with the children's relationship with the Former Husband. The Report and Recommendation found that "The Wife has, at times, inappropriately interfered with the Husband's contact with the minor children. Further, the evidence established that either the Wife does not fully comprehend the concept of 'shared parental responsibility' or she comprehends the concept but simply chooses to willfully disregard it from time to time." (R&R, pp. 4-5). Therefore, this Court should reverse the District Court's affirmance of the trial court's award of alternating weekend visitation to the Former Husband with the children to begin on Saturday mornings and remand this case with instructions for the trial court to award the Former Husband visitation on alternating weekends beginning at the end of the school day on Friday.

CONCLUSION

For the reasons set forth above, this Court should resolve the certified conflict by determining that Florida Family Rule of Procedure 12.525, adopted effective March 3, 2005, by Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So. 2d 467 (Fla. 2005), does not apply to a final

judgment of dissolution of marriage entered prior to the date of the adoption of Florida Family Rule of Procedure 12.525, and, in turn, reverse the Order Granting Former Wife Attorney's Fees. In addition, the Former Husband requests this Court to **reverse** the District Court's affirmance of the trial court's visitation award as to his visitation on alternating weekends beginning on Saturday mornings and to remand with instructions for the trial court to award the Former Husband visitation on alternating weekends beginning at the end of the school day on Friday.

Respectfully submitted,

MONTELLO & ASSOCIATES, P.A.
Attorneys for Louis R. Montello
777 Brickell Avenue, Suite 1070
Miami, Florida 33131
Telephone: (305) 373-0300
Facsimile: (305) 373-3739

By:_____
Louis R. Montello
Florida Bar No. 624950

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of brief was furnished via U.S. mail on December 11, 2006, to counsel for the Respondent, Bernardo Burstein, Esquire, 12000 Biscayne Boulevard, Suite 508, Miami, Florida 33181.

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Louis R. Montello

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

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Louis R. Montello