IN THE SUPREME COURT OF FLORIDA

SHAWN M. ARTHUR,

Appellant

v.

JOSETTE A. ARTHUR,

Appellee.
_____/

Case No. SC08-1675
L.T. No. 2D07-1455

Fla. Bar No. 436208

ON APPEAL FROM AN OPINION OF THE
SECOND DISTRICT COURT OF APPEALS

APPELLEE'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF FACTS AND THE CASE

References to the record shall be designated as (R:). References to the transcript of the final hearing shall be designated as (T:). The appellant shall be referred to as the husband, and the appellee as the wife.

This dissolution of marriage action involved a custody and relocation dispute over the parties' infant son, Dominic, born October 16, 2005. (T: 188)

The parties lived together since about 1996, and moved together to Florida from their prior home in Virginia in 1998. (T: 18, 80) They married each other on October 29, 2000, and separated six and a half years later, in March of 2006. (T: 11) They lived together a total of ten and a half years, not six and one half years as set forth in the initial brief. Both parties were thirty six years old on the date of trial, February 2, 2007. (T: 1, 145)

The wife testified at trial that she had no close friends and no family in Florida. (T: 17) Her family resided in the upper peninsula of Michigan, while the husband's family resided in Ohio. (T: 16, 17, 54)

The wife received no emotional or physical help from the husband beyond his payment of court ordered support. (T: 61, 191, 192, 193) The husband left the home about five months after the parties' child was born. (T: 11). He distanced himself from the wife and child a few days after the child was born. (T:

191)

Although the wife agreed to a frequent and liberal visitation schedule, the husband did not fully exercise same, and was frequently late or failed to visit. (T: 12, 13, 14, 15, 59, 95, 96, 212) Part of the delay was because the husband refused to allow court ordered inspection of his apartment as a condition of visitation, for a period of three weeks. He refused to comply with the inspection because he was angry and frustrated, and felt the wife was being intrusive. (T: 15, 212, 217)

The wife therefore requested in her amended pleadings for permission to relocate to Michigan, to reside with her family. (R: 166, T: 16, 17) With them, she would receive free room, board, and day care, as well as emotional support. (T: 17, 102, 103)

The husband opposed the wife's request for relocation, and requested primary residential care of the child in the event the wife relocated to Michigan. (T: 133)

The wife testified at length about what visitation schedule the husband could have in the event that she were permitted to relocate to Michigan. (T: 50 - 53) This included five weeks during the year, with visits eleven or twelve times per year. (T: 52) She testified that she would be willing to return with the child to Florida twice per year, or could meet the husband in Ohio where his family lives to

exchange the child. (T: 54 - 57) She would either drive or fly. (T: 54, 55 - 57) As the child grew older, she felt more visitation would be appropriate. (T: 51)

The wife testified without contradiction that the husband refused to discuss any visitation schedules in the event that she were permitted to relocate to Michigan, so no specifics had been discussed. (T: 94) She was open to more discussion, options and negotiations. (Id.)

She testified she would not oppose the husband picking the child up in Michigan and taking him to Ohio for a week or two, or to Florida. (T: 204)

The trial judge ruled that the wife would be permitted to relocate to Michigan upon the child's third birthday, about eighteen months after the trial. (T: 254)

The final judgment was entered on February 21, 2007. (R: 290) A timely notice of appeal to the Second District Court of Appeal followed. (R: 312)

The Second DCA issued its revised opinion on July 25, 2008.

> "We agree with the Wife that the trial court did not exceed its authority in granting the relocation request upon the child reaching the age of three. We reject the Husband's assertion that the trial court found relocation to be not in the best interest of the child as of the day of the trial. The Husband presumes that the trial court would have denied relocation if it had to decide

whether the Wife could relocate on the date that the final judgment was entered. We cannot accept this interpretation of the trial judge's ruling because it is contradicted by the detailed findings in the final judgment supporting the Wife's relocation request. The trial court found relocation to be in the child's best interest, stating: 'The Husband seeks to prevent relocation for legitimate reasons, but in weighing the child's best interests, relocation is the favored outcome.'"

The court went on to distinguish Janousek v. Janousek, 616 So.2d 131 (Fla. 1st DCA 1993), on the facts of the case.

> "In the present case, the trial court's findings favored relocation by the Wife ... By upholding the relocation in the present case, we are sustaining a ruling that is supported by the trial court's findings. The appeals court did the same in Janousek when it vacated the provision which permitted the wife to relocate after five years. Thus, we conclude that our decision is not in conflict with Janousek."

The husband files his notice of appeal to this court, invoking the discretionary jurisdiction of this court under Rule 9.030(a)(2)(A)(iv), Fla. R. App. P.. The husband alleged in his notice to invoke discretionary jurisdiction that:

> "The July 25, 2008 decision of the Second District Court of Appeal expressly and directly conflicts with a decision of another District Court of Appeal or of the Florida Supreme Court on the same question of law."

After submission of briefs on jurisdiction, this court took jurisdiction over

the matter by order of January 16, 2009.

SUMMARY OF ARGUMENT

It does not appear that conflict jurisdiction is available as a basis of this court taking jurisdiction over this matter. Under the proper standard of review of abuse of discretion, all of the provisions of the final order are based on competent, substantial evidence and the proper application of the law.

The husband's arguments are all based on his failure to observe the proper standard of review, and to argue inferences incorrectly. All inferences to be drawn from the evidence must also be taken in the favor of the wife, as the non-appealing party.

Based on the proper standard of review, the trial court's rulings on custody and relocation of the minor child are well supported by competent, substantial evidence. There are no prospective rulings as argued by the husband, and no conflict with the decisions of other districts due to the lower court's proper

distinguishment of them. The final judgment and the opinion of the Second District Court of Appeals affirming same should be affirmed.

ARGUMENT

1. THERE IS NO BASIS FOR DISCRETIONARY JURISDICTION IN THIS MATTER.

This court has accepted jurisdiction over this matter pursuant, evidently, to the terms asserted by the husband in this case: Fla.R.App.P. 9.030(a)(2)(iv). That provision requires that the decision of the district court of appeal "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law".

The husband in his initial brief on the merits argues that the case of Sylvester v. Sylvester, 992 So.2d 296 (Fla. 1st DCA 2008) contains language critical of the opinion of the Second District below. But the husband is not appealing the Sylvester case; conflict must arise from the order being appealed which "expressly and directly conflict with a decision of another district court of

appeal or of the supreme court on the same question of law".

The husband is requesting that this court resolves a conflict that the lower court found specifically did not exist, and a subsequent decision of another district which also does not certify conflict with the Second District's opinion. This is not permitted under Rule 9.030(2)(a)(iv), Florida Rules of Appellate Procedure. It is not for the husband to certify conflict; it is for the lower court to do so.

Article V, Section 3 (b)(4), Florida Constitution (1980) provides that the Supreme Court::

> "...(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal." Id.

The husband's argument is that the lower court should have certified conflict, or that it erred in failing to certify conflict. This argument is insufficient to sustain this court's jurisdiction to grant him the relief he is requesting, under the Florida Constitution.

Clearly, the decision of the Second DCA did not in fact expressly and directly conflict with any decision of any other district, but in fact expressly and directly stated that there was not any such conflict. The allegedly conflicting case of Janousek v. Janousek, 616 So.2d 131 (Fla. 1st DCA 1993) was expressly

distinguished in the underlying decision, and the Second DCA found specifically that:

> "We conclude that Janousek is not controlling and is distinguishable on its facts. ... Thus, we conclude that our decision is not in conflict with Janousek." Arthur v. Arthur, WL 2852873 (Fla. 2d DCA July 25, 2008)

Likewise, the First District case of Sylvester, supra, cited by the husband as providing additional proof of inter district conflict, also does not specifically or expressly conflict with the Second District's decision in this case.

> "...Thus, it can be argued that our case is distinguishable from Arthur. We disagree with Arthur, however, to the extent that it appears to allow the trial court to look into its crystal ball and determine whether relocation would be in the best interests in the future."Id.

Thus, neither the lower court herein nor the First District has certified conflict of either opinion to this court. It is submitted that therefore is no basis for this court's exercise of jurisdiction over this appeal.

2. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

Assuming that jurisdiction is proper, the standard of review of the trial court's order is abuse of discretion. It is submitted that in this case, consideration under the proper standard of review is dispositive of all issues raised by the husband.

A trial court's rulings on issues of fact is subject to appellate review under

an abuse of discretion standard. Canakaris v. Canakaris, 382 So.2d 1197 (Fla.1980) These kinds of rulings include determinations of child custody and visitation issues, and consideration of requests for relocation of children in divorce cases. Fredman v. Fredman, 2D06-1674 (Fla. 2d DCA 2007), Botterbusch v. Botterbusch, 851 So.2d 903 (Fla. 4th DCA 2003)

Discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only when no reasonable man would take the view adopted by the trial judge. If reasonable men could differ as to the propriety of the action taken by the trial judge, it cannot be said that the trial court abused its discretion. Canakaris, supra.

If the decision of the court is supported by competent, substantial evidence, it should not be disturbed on appeal. DeHart v. DeHart, 360 So.2d 1285 (Fla. 2d DCA 1978)

All conflicts in the evidence, and all inferences which might be reasonably taken from that evidence, must be resolved in favor of the party not contesting the judgment under review. Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962)

On these and other issues of fact the appellate court cannot substitute its judgment for that of the trial court or re-weigh the evidence considered by the trier of fact. Prevatt v. Prevatt, 462 So.2d 604 (Fla. 2d DCA 1985)

Additionally, the reasons stated by the trial court in making its determinations are not controlling. Instead, the trial court's rulings will be upheld and must be affirmed if there is any reason or theory to support it. Vandergriff v. Vandergriff, 456 So.2d 464 (Fla.1984)

In the instant case, as indicated in the statement of the case and facts in this brief, the decision of the trial court was fully supported by the competent, substantial evidence at trial.

3. THE HUSBAND MISSTATES THE ISSUE BEFORE THE COURT.

The husband asserts that "The sole issue before this Court is whether a trial court may grant a custodial parent's request to permanently relocate with a minor child based on a prospective finding of best interests." This is not in fact the issue before this court.

In our case, the Second District Court of Appeals specifically found that the trial court's rulings favored immediate relocation. This was a factual determination which could not be reversed under the abuse of discretion standard below.

The Second District thoughtfully considered and rejected the husband's characterization of the trial court's ruling to have been a denial of immediate relocation and granting of prospective, future relocation by the wife. Yet he

repeatedly argues, even in his initial brief in this case, that the trial court granted only a right to a prospective relocation by the wife, despite the specific findings to the contrary in the lower opinion.

The findings of the trial court favored immediate relocation by the wife.

> "The trial court found relocation to be in the child's best interest, stating: 'The Husband seeks to prevent relocation for legitimate reasons, but in weighing the child's best interests, relocation is the favored outcome."

In Janousek, supra, by contrast, the trial court's findings prohibited immediate relocation by the wife. The appellate court in Janousek reversed the trial court's ruling that despite relocation not currently being in the child's best interests, the wife would be allowed to relocate after five years. The trial court there did in fact issue a future ruling which was contrary to the findings of current best interest.

The trial court here found that immediate relocation was appropriate in this case. Its determination to delay implementation of the relocation does not, contrary to husband's arguments, equate to a finding that immediate relocation is not in the child's best interests.

The husband's logic is faulty, and he is merely arguing semantics. As the Second District noted, the trial court could well have ordered the immediate implementation of the relocation, if it did not feel that it had the power to delay

implementation of the relocation for a reasonable period of time.

If a court orders a change of custody but provides that the change of custody will not take place until a child has finished the current school year to minimize disruption to the child's schedule, does that also violate the case law as set forth in Janousek? According to the husband's argument, the answer is yes.

The husband's assertion is that trial courts must have the power only to order immediate relief, without any authority to delay implementation of its orders. This is not a good reading of Janousek. Only future modifications which are based on unforeseen changes in circumstances are banned: that is and always has been the law in Florida. The court must rule on the evidence before it: it did here, and found that relocation would be allowed.

The husband's argument that this is tantamount to a prospective change in circumstances is solely and completely the result of arguing inferences in the final judgment and the opinion of the Second District, to the contrary of the explicit provisions therein. He claims that the trial court's ruling is a prospective change: both the trial court and the Second District have found as a matter of law and fact that it is not. He misstates the court's rulings, then attacks that misstatement. This is not intellectually honest or legally permissible. Del Vecchio, supra.

The husband's characterization of the sole issue to be determined as

"whether a trial court may grant a custodial parent's request to permanently relocate with a minor child based on a prospective change in circumstances" is therefore false. Likewise, his argument that the majority decision below "granting relocation, but delaying relocation until the child reached the age of three, approved what constitutes a prospective finding of best interests and is contrary to law" is false. Just because one refuses to accept a coherent finding does not render the finding unlawful.

A more accurate statement of the husband's argument is: if a trial court finds that relief should be granted, does it have the authority to delay implementation of the relief? But this argument has not been made either below or herein, and has therefore been waived in favor of an overreaching argument ignoring the rulings of the lower courts.

4. UNDER THE PROPER STANDARD OF REVIEW, THE COURT'S RULINGS ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND DO NOT VIOLATE ANY RULE OF LAW.

Requests for relocation are subject to the requirements of the Florida Statutes, currently Section 61.13001, Florida Statutes. The trial court must make findings as to each factor listed therein. Sanchez v. Sanchez, 1D07-1622 (Fla 1st DCA 2007)

Competent, substantial evidence must support the trial court's findings as to the factors that the trial court must consider in making its determination. Fredman, supra, See Berrebbi v. Clarke, 870 So.2d 172, 173 (Fla. 2d DCA 2004); Botterbusch, 851 So. 2d at 904. Here, the record reflects competent, substantial evidence to support the trial court's findings. The trial court therefore did not abuse its discretion in granting the wife's request to relocate to Michigan.

The rulings of the trial court under 61.13001(7) were, contrary to the husband's argument, fully supported by competent, substantial evidence.

The trial court made specific findings as to each factor as required under Section 61.13001(7), Florida Statutes. The trial court found that factors a, c, e, f, and g supported the move. Factor d did not apply. Factor h was found to be neutral and not to militate against the move, for the reasons stated in the final judgment. Only factor b caused some concern for the court, but it entered its order in such a way as to alleviate those concerns by permitting the relocation after the child reaches the age of three years.

As noted above, the evidence of the husband's involvement with the minor child was contested at best. He was sporadic in exercising visitation and in paying child support. He did not participate in any doctor's visits after the parties separated. He let his anger and frustration prevent him from having visitation

with the child for a period of three weeks, when he refused a court ordered home inspection. He has, according to the uncontroverted testimony of the wife, not been emotionally or physically supportive of the child. The wife offered to share transportation to and from Ohio to facilitate visitation there, where the husband's family could provide him with a place to stay.

The trial court's ruling was fully supported by competent, substantial evidence, even if the husband does not want to admit it. The order under appeal should be affirmed.

The wife does not argue against the husband's proposition that an order addressing a custodial parent's right to relocate with a child cannot be based on a prospective change in circumstances. This is a correct statement of the law. And the trial court here properly applied the law by ruling on the wife's request to relocate with the child based on the facts and circumstances presented at the time of trial, not based on any prospective changes in circumstances. The trial court ruled that immediate relocation is in the best interests of the child. Both the trial court and the District Court of Appeals have confirmed this from their review of the evidence and the record.

The husband's arguments that lower court here failed to rule on the existing and present evidence is not well taken. His statement that "The trial court's clear

yet unspoken factual finding that the relocation was not in the child's best interest as of the date of trial" is argument against the proper inferences on appeal and against the specific findings to the contrary of the trial and District courts.

His argument that the lower court's ruling therefore is inconsistent with the cases of Martinez v. Martinez, 573 So.2d 37 (Fla. 1st DCA 1990), Janousek, and Sylvester he cites is therefore not well taken. As the Second District ruled, the instant case is distinguishable from those cases and therefore is not inconsistent with them.

For these reasons, the order appealed from is in full conformance with the requirements of the law and should be affirmed.

5. THE TRIAL COURT'S ORDER DOES NOT CHANGE THE BURDEN OF PROOF IN THE EVENT OF FUTURE RELOCATION LITIGATION.

Contrary to the husband's argument, the court is always free to examine requests for relocation when they happen. Echezarreta v. Echezarreta, 944 So.2d 1169 (Fla 3d DCA 2006) If there is a substantial change in circumstances between the date of the trial and the date of the relocation, the husband will be free to raise it at that time. He will not be entitled to reargue the merits of the trial, but is free to show at that time that some new and intervening event or condition has

arisen such that relocation should not be approved.

His argument that the final judgment will impermissibly act as a presumption in the future is disingenious. There was no presumption at the time of trial. The wife has met her burden of proving that relocation is in the child's best interests, based on current conditions.

It would be up to the husband to prove, if the wife determines to relocate in the future and the husband wishes to contest the move, that there has been a substantial change in circumstances since the trial, and that the change was not foreseeable. This is certainly not an unreasonable burden of proof, as it is the same one that applies to all requests for modification of custody, visitation, alimony, etc. in the area of divorce law.

The husband's argument that a change in the burden of proof has been taken place is also false. He argues that since the existing order grants the wife leave to relocate at a set time, he would have the burden of proving a substantial change in circumstances if he wishes to contest her relocation in the future.

But consider two scenarios. First, what if the court grants a party the immediate right to relocate, but for economic or other reasons they fail to do so. Or consider where the parties stipulate to leave to relocate, but no relocation happens for a period of time, followed by a challenge to a subsequent move. In

each scenario, the existing order grants the right to relocate. In each scenario, the non-primary residential parent has the right to challenge the relocation if there has been a substantial change in circumstances. In each scenario, the existing order being challenged already contains a prior judicial approval of the right to relocate.

The party challenging relocation would have the normal burden of proving that a substantial change in circumstances has occurred, and that it would be in the best interests of the minor child for the relief requested to be granted. The existence of a prior order granting a right to relocate does not create a presumption in a later modification action, as argued by the husband.

Similarly, if the existing order provided that the child could not be relocated, would the husband argue that this creates an impermissible shift in the burden of proof in the event of future litigation? Or does the normal burden of proof to establish the need for a modification of an existing order govern? The husband's argument is not well taken.

It is submitted that the language in the statute does not address the situation where there is a prior order as to relocation or non-relocation, in the manner argued by the husband. And therefore there is no error in the trial court having ruled that relocation would be granted, but with a delay in implementation.

The husband's argument that the effect of the lower court's order is to place

on him an extraordinary burden in seeking to contest relocation is also overstated. The husband cites the burden required under the case law for changes of custody, not for modifications of relocation provisions. The burden of proof in challenging a relocation is not an "extraordinary" one, and the husband cites no relocation cases in support of his allegation.

Neither the trial court nor the Second District Court of Appeals allowed a prospective finding of best interests, and each court specifically ruled that it was not doing so. The husband's argument to the contrary is without basis.

CONCLUSION

The trial court's rulings, reviewed under the proper standard of review, were all based on competent, substantial evidence and therefore did not constitute an abuse of discretion. The trial court made a just and equitable series of rulings as to custody and relocation, and did not base its order on impermissible future events as alleged by the husband. The final judgment appealed from should be affirmed, with an award of appellate fees and costs.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the above initial brief is in compliance with the font requirements of Rule 9.210 (a)(2), Florida Rules of Appellate Procedure.

_____
Mark A. Neumaier, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by U. S. Mail on William S. Chambers IV, Esq., P. O. Box 3, Lakeland, FL 33802-0003 on April 13, 2009.

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