IN THE SUPREME COURT OF FLORIDA

Case No.: SC08-1675

SHAWN M. ARTHUR,

Petitioner,

vs.

JOSETTE A. ARTHUR,

Respondent.

On Review from the District Court of Appeal
Second District, State of Florida
Case No.: 2D07-1455

JURISDICTIONAL BRIEF OF PETITIONER

MONTEREY CAMPBELL
Florida Bar No.: 0011387
KRISTIE HATCHER-BOLIN
Florida Bar No. 521388
GRAYROBINSON, P.A.
One Lake Morton Drive
Lakeland, FL 33801
Post Office Box 3
Lakeland, FL 33802
(863) 284-2251 Telephone
(863) 683-7462 Facsimile
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION ……1

STATEMENT OF THE CASE AND OF THE FACTS……...2

SUMMARY OF THE ARGUMENT……3

ARGUMENT……4

CONCLUSION……...10

CERTIFICATE OF SERVICE……11

CERTIFICATE OF COMPLIANCE……..12

APPENDIX……13

TABLE OF AUTHORITIES

FLORIDA DISTRICT COURTS OF APPEAL

Burley v. Burley,
438 So. 2d 1055 (Fla. 4th DCA 1983)……...5

Janousek v. Janousek,
616 So. 2d 131 (Fla. 1st DCA 1993)……passim

Martinez v. Martinez,
573 So. 2d 37 (Fla. 1st DCA 1990)……..passim

Zediker v. Zediker,
444 So. 2d 1034 (Fla. 1st DCA 1984)……..9

STATUTES

Fla. Stat. § 61.13……2

Fla. Stat. § 61.13001……..3, 5, 6

INTRODUCTION

Petitioner, SHAWN M. ARTHUR ("Petitioner" or "Husband"), seeks to invoke the jurisdiction of this Court to resolve a conflict between the decision below and those of the First District Court of Appeal. Petitioner and Respondent, JOSETTE A. ARTHUR ("Respondent" or "Wife"), were married on October 29, 1999 and together have one minor child, Dominique H. Arthur, born October 18, 2005. The parties were divorced by a Final Judgment of Dissolution of Marriage ("Final Judgment") entered on February 21, 2007, that found, among other things, that Wife, the primary residential parent, could relocate outside of the State of Florida, but only after the child reached three (3) years of age. At the time of the entry of the Final Judgment, the child was approximately sixteen (16) months old. The trial court therefore necessarily found that relocation at the time of trial was not in the best interest of the minor child. The question presented in this Petition is whether the trial court erred in granting Wife's relocation request based upon a prospective finding of best interests.

The district court, in a divided opinion on rehearing, affirmed the trial court's ruling on the relocation issue. As a basis for its decision, the district court accepted the trial court's "detailed findings in the final judgment supporting the Wife's relocation request" and found the trial court concluded relocation was in the best interest of the child at the time of trial, notwithstanding the fact that the trial

court would not permit Wife to relocate until the child turned three. The district court's majority decision conflicts with decisions of the First District Court of Appeal on at least one significant principle of law. That principle, articulated by the First District, is that in determining child custody matters and relocation in particular, the trial court is required to render a final determination on these matters as of the time the matters are addressed and relocation is sought, and may not base such a decision on a prospective finding of best interests. The dissent in the decision for which review is sought found the First District's decision "directly on point."

STATEMENT OF THE CASE AND OF THE FACTS

In this case, Husband and Wife were married on October 29, 1999 and during their marriage had one child who was born October 18, 2005. At trial, Husband conceded custody of the minor child, contingent upon Wife not being permitted to relocate from the State of Florida, and the Wife's desired relocation was contested. The trial court entered a Final Judgment in which it found, taking into consideration the statutory elements under section 61.13(3), Florida Statutes (2006), that it was in the child's best interest that the parties be granted shared parental responsibility with Wife designated as the primary residential parent, subject to reasonable visitation by Husband.

The trial court also considered the statutory elements contained in section 61.13001, Florida Statutes (2006), regarding Wife's request to relocate. Importantly, with regard to section 61.13001(7)(b), which concerns "[t]he child's age and development stage, needs of the child, and the likely impact that a relocation would have on the child's physical, educational and emotional development," the trial court noted "[t]he child is practically an infant (16 months old)" and that it was "cognizant that the children between infancy and approximately 3 years of age need more frequent contact with both parents in order to properly bond with the parents." The trial court further noted its "concern for the Husband's ability to bond with his son" and stated that but for this concern "the Wife's relocation would have been granted without further delay." As such, the trial court granted primary residential custody of the minor child to the Wife, denied the Wife the right to relocate at the time of trial but approved such relocation when the child turned three.

SUMMARY OF THE ARGUMENT

This Court should grant review and resolve the conflict created by this case. The district court's majority decision granting the Wife's relocation request when the child reaches the age of three constitutes a prospective finding of best interests. Such a decision, as noted by its dissenting Judge, is contrary to law and in direct conflict with decisions of the First District Court of Appeal in Janousek v.

Janousek, 616 So. 2d 131 (Fla. 1st DCA 1993) and Martinez v. Martinez, 573 So. 2d 37 (Fla. 1st DCA 1990).

As the First District has held, in causes involving child custody, "the trial court is required to make a final determination on that issue *at that time*." Martinez, 573 So. 2d at 40; Janousek, 616 So. 2d at 132. The trial court should have made the determination regarding relocation as of the date of trial instead of making a prospective determination of best interests. The Second District's majority, in its failure to apply this legal principle in its review of the trial court's Final Judgment, created a conflict justifying this Court's review.

ARGUMENT

The question before this Court is whether a determination of relocation can be based on a prospective finding of best interests. The district court's majority answered in the affirmative, affirming the trial court's grant of the Wife's relocation request that nevertheless delayed her right to relocate based upon a finding that allowing relocation as of the date of trial would negatively impact the child's ability to bond with his father, the Husband.

The district court's conclusion is erroneous and contrary to its own findings as well as the prior precedent of the First District, and its attempt to distinguish Janousek is patently flawed. The lower court's error is founded upon the improper acceptance of the trial court's unsupported opinion that between infancy and the

age of three it is important for the child to have frequent contact with both parents in order for them to form a proper bond, but that after the child reaches the age of three that need for frequent contact to facilitate bonding between father and child no longer exists. The result was a prospective finding that relocation would be in the best interest of the child when the child reached the age of three. Implicit in this decision, however, is the conclusion that relocation was not in the child's best interest as of the time of trial. If it were, the trial court would have not delayed the Wife's right to relocate.

The district court's opinion simply disregards the significant factual finding that allowing relocation as of the date of trial would negatively impact the child's ability to bond with the Husband, and therefore the right to immediately relocate was effectively denied. The trial court essentially made a determination of best interests that was put off for twenty (20) months after the entry of the Final Judgment.

Importantly, the Final Judgment and the Second District's affirmation of same effectively but improperly shifted the burden of proof from the Wife to the Husband should he be forced to seek to prevent relocation when the child reached the age of three. See, e.g., Burley v. Burley, 438 So. 2d 1055 (Fla. 4th DCA 1983)("One who seeks a change in the custody of minor children shoulders a heavy burden. First he must overcome the res judicata effect of the existing order

determining custody by showing a material change in circumstances . . ..").
Section 61.13001(8), Florida Statutes, clearly provides that "[t]he parent . . .
wishing to relocate has the burden of proof . . .." The burden, therefore, was on the
Wife, as the parent seeking to relocate, to establish that as of the time of trial,
relocation was in the child's best interest. Once that determination is made, the
burden shifts to the other parent to show changed circumstances on a motion to
modify. As such, given the res judicata effect of the Final Judgment, in any
subsequent effort to contest the Wife's relocation, the Final Judgment would act as
a presumption in favor of relocation, contrary to section 61.13001(7), which
provides that "[n]o presumption shall arise in favor of or against a request to
relocate with the minor child when a primary residential parent seeks to move the
child and the move will materially affect the current schedule of contact, access,
and time-sharing with the nonrelocating parent . . .."

More importantly, the district court's opinion, as expressly found by its
dissenting judge, conflicts with the authority of the First District in Janousek and
Martinez that matters regarding child custody must be made with finality as of the
time of trial. In Janousek, the final judgment entered by the trial court named the
wife as the primary residential parent of the parties' minor children and further
provided that for the five (5) years she was awarded rehabilitative alimony, "the
Wife is prohibited from relocating the children from Live Oak so that the Father's

right to frequent contact with his children will not be denied. After said five (5) year period the wife is prohibited from relocating more than 120 miles from Live Oak, Florida" 616 So. 2d at 131-32. The husband appealed the final judgment, arguing the trial court abused its discretion in allowing the wife to relocate after the five (5) year period.

The First District agreed, citing Martinez and explaining that in matters "involving child custody . . . 'the trial court is required to make a final determination on that issue *at that time*.'" Id. at 132 (emphasis in original). In so concluding, the First District noted that "[n]o evidence was presented which would support a determination that a substantial change in circumstances would occur at the end of his five-year period or that such a relocation would promote the welfare of the children." Id. As such, the First District vacated that provision allowing relocation after five years and remanded "with directions to award the wife primary residential responsibility, with the restriction that the children remain in Live Oak, subject to future modification in accordance with the general law of modification . . .." Id.

The First District's decision in Janousek followed the precedent previously set in Martinez. In that case, the trial court, noting the "significant life-style transformation" both parties were then undergoing, designated the husband as the children's "interim primary residential parent" and further ruled such designation

would stand for two (2) years, at which time the trial court would re-examine and render a "final and binding" decision. 573 So. 2d at 39-40. The First District reversed, explaining that in determining the child's best interests in custody matters, the trial court is "required to make a final determination on that issue *at that time*" and noting the absence of any "statutory or case authority for the proposition that the trial court can defer such decision for several years to see how the respective situations and conduct of the parents work out." Id. at 40. As such, the First District vacated the designation of the husband as the "interim" residential parent and remanded with directions to award the husband primary residential responsibility "subject to future modification in accordance with the general law of modification . . .." Id. at 41.

The Second District majority's attempt to distinguish the procedural facts of Janousek is fatally flawed as it is based upon an erroneous reading of Janousek. Specifically, the Second District's majority misreads Janousek, noting that in that case "the trial court's findings prohibited relocation by the wife." (Opinion at 4). A reading of Janousek, however, reveals just the opposite – that the trial court *permitted* relocation. 616 So. 2d at 132, n.1 (noting that "[d]uring oral argument, counsel for the parties agreed that this provision [of the final judgment] *permitted* the wife to relocate the children at the end of the five-year period based on the fact that she was named the primary residential parent." (emphasis added)). A proper

reading of Janousek reveals that the procedural facts and findings of the trial court are virtually the same as those in the instant case. In both Janousek and the matter now before this Court, relocation was permitted at some point in the future.

The majority's opinion likewise ignores the legal principle explicitly articulated in that Janousek and in Martinez – that matters involving child custody must be made not prospectively, but as of the time of trial – and the unspoken but clear factual finding of the trial court – that relocation as of the date of trial was not in the child's best interest.[1] Clearly, if relocation was in the child's best interest as of the date of trial, the trial court would not have prevented the Wife from relocating until some point in the future after the child reached three (3) years of age. As in Janousek, there was no evidence before the trial court to support a finding that a substantial change in circumstances would occur as of the child's third birthday. The court in Janousek, following its prior precedent in Martinez, explicitly rejected the trial court's prospective finding of best interests. The Second District's decision below approved the trial court's prospective determination of best interests, thus rendering a decision in conflict with that of the First District.

[1] Moreover, the Second District erroneously agreed with the Wife's reasoning that likened the trial court's delay in implementation of the relocation order until the minor child's third birthday "to other routine awards in dissolution cases that become effective in the future" such as "an award of rehabilitative alimony which terminates in the future and an award granting exclusive use of a marital residence for a set period of time." (Opinion at 3). As the First District noted in Zediker v. Zediker, "[u]nlike proceedings to modify awards of child support or alimony, the non-custodial parent seeking to modify a prior award of custody 'carries an *extraordinary burden*.'" 444 So. 2d 1034, 1036 (Fla. 1st DCA 1984)(emphasis in original)(internal citations omitted)).

CONCLUSION

It is necessary for this Court to exercise jurisdiction over this matter and resolve the conflict created by the court below. Such jurisdiction cannot be avoided by a district court maintaining deference to the trial court's factual findings while ignoring the court's delay in the implementation of its order allowing relocation and its implicit finding that relocation was not in the best interest of the child as of the date of trial. Moreover, in light of the legislature's recent revisions to the provisions of chapter 61 relating to shared parental responsibility, it is important for this Court to accept jurisdiction and confirm the bright-line rule that changes in those shared responsibilities will not be permitted absent a showing – at the time of hearing or trial – of the best interests of the child. This Court should therefore exercise its discretionary jurisdiction and resolve the conflict created by the district court on this important issue of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 4th day of September, 2008 to: Mark A. Neumaier, Esquire, 334 B West Bearss Avenue, Tampa, Florida 33613.

_____

MONTEREY CAMPBELL
Florida Bar No.: 0011387
KRISTIE HATCHER-BOLIN
Florida Bar No. 521388
GRAYROBINSON, P.A.
One Lake Morton Drive
Lakeland, FL 33801
Post Office Box 3
Lakeland, FL 33802
(863) 284-2251 Telephone
(863) 683-7462 Facsimile
Attorneys for Petitioner

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, Shawn M. Arthur, certifies that this *Jurisdictional Brief* is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

MONTEREY CAMPBELL
Florida Bar No.: 0011387
KRISTIE HATCHER-BOLIN, ESQ.
Florida Bar No.: 521388
Post Office Box 3
Lakeland, FL 33802
Phone: (863) 284-2251
Fax: (863) 683-7462
Attorneys for Petitioner

APPENDIX

July 25, 2008 Opinion of the Second District Court of Appeal in *Shawn M. Arthur v. Josette A. Arthur*, Appeal No. 2D07-1455