IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 08-1675

SHAWN M. ARTHUR,

Petitioner,

v.

JOSETTE A. ARTHUR,

Respondent.

REPLY BRIEF OF PETITIONER, SHAWN M. ARTHUR

ON APPEAL FROM
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA DISTRICT COURTS OF APPEAL

RULES

ARGUMENT

I. This Court properly exercised jurisdiction over this matter based on the Second District's conflict with decisions of the First District Court of Appeal.

Respondent continues in her Answer Brief on the Merits to assert that there is no basis for discretionary jurisdiction, arguing the Second District specifically found there was no conflict and that because neither the Second District in the matter below, or the First District in Sylvester v. Sylvester, 992 So.2d 296 (Fla. 1st DCA 2008), certified conflict, no conflict jurisdiction exists. This Court has already decided the matter of jurisdiction. Moreover, Petitioner is entitled to seek the discretionary review of this Court under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iii) regardless of whether the Second District certified conflict. Respectfully, the matter of jurisdiction has been determined and Respondent's Answer Brief on the merits is not the place to argue for rehearing on that matter or otherwise take issue with this Court's exercise of jurisdiction.

II. The trial court erred as a matter of law in making a prospective finding of best interests.

While Petitioner recognizes that a trial court's factually based ruling on relocation is generally reviewed for an abuse of discretion, where the trial court's order is based on a finding of *future* best interests, the trial court errs as a matter of law, and the reviewing court is not bound by the abuse of discretion standard. As such, in the present matter this Court must determine only whether the trial court

and the Second District applied the correct rule of law. See, e.g., Janousek v. Janousek, 616 So.2d 131 (Fla. 1st DCA 1993); Sylvester v. Sylvester, 992 So.2d 296 (Fla. 1st DCA 2008).

The trial court's ruling on relocation essentially relied upon a "crystal ball" determination that even though the Wife was prohibited from immediately relocating with the child, relocation would be appropriate twenty (20) months after the date of hearing. See, e.g., Sylvester, 992 So.2d at 298. Explicit in the trial court's ruling was its concern that immediate relocation would impede the development of the parent/child bond between the Husband and the minor child. Such concerns are not unique to the instant relocation dispute, and as Petitioner set forth in his Initial Brief, this Court's disposition of the instant case will – at least by implication if not expressly – determine whether there is or should be a clear prohibition on prospective determinations of best interest.

III. The trial court's finding of future best interest is without support in fact or law.

Respondent asserts that Petitioner "misstates the issue before this Court," maintaining there was no prospective determination of best interests, that "the trial court's ruling favored immediate relocation," and therefore the Second District's opinion affirming the trial court's relocation order is not in conflict with Janousek because in Janousek the trial Court's findings "prohibited immediate relocation by the wife." [Answer Brief at 14-15]. Clearly, however, if the trial court found

immediate relocation to be in the child's best interests, there would be no reason to delay implementation of its ruling for twenty (20) months. Rather, if the trial court found immediate relocation to be in the child's best interest its order would have allowed the Wife to relocate with the minor child without delay. The trial court, of course, did not allow such immediate relocation. Based on its concern for the child's ability to bond with the Husband, the trial court determined relocation would be in the child's best interests at a rather arbitrarily chosen point in time twenty (20) months into the future when the child reached three (3) years of age. Notably absent from the record, however, is any evidentiary support for this prospective finding of best interests. The very purpose for the rule prohibiting the determination of future best interests of a child is that evidence of future circumstances is not available in the present.

In defending the Second District's opinion, Respondent makes an inapposite comparison of the trial court's ruling in the present matter to an order granting change of custody, but delaying implementation of the ruling "until a child has finished the current school year to minimize disruption to the child's schedule . . .." [Answer Brief at 15]. In the example cited by Respondent, the delay in implementation is merely an accommodation, made for the convenience of the parties and the minor child. A delay for the purpose of convenience cannot be compared to a delay, such as that at issue in the present case, which amounts to a

deadline on the formation of the intangible bond between parent and child. In the present case the trial court did not delay the wife's relocation for the parties' or for the child's convenience, but based upon its concern regarding the effect of immediate relocation on the developing parent/child bond between the Husband and the minor child. While the concern was certainly justified, the trial court then proceeded to put an arbitrary time limit on the development of that bond, concluding – without any evidentiary support – that by the time the child turned three, relocation would no longer have an impact on the parent/child bond. Having expressed concern about the effect of relocation on the developing bond between the Husband and his very young child, the trial court arbitrarily and impermissibly chose a future date at which time it believed relocation would be in the child's best interest rather than denying the relocation request without prejudice to the Wife's ability to move for relocation again at some point in the future. In doing so, the trial court made a prospective finding of best interests that is contrary to law.

In her Answer Brief, Respondent argues "[o]nly future modifications which are based on unforeseen changes in circumstances are banned: that is and always has been the law in Florida." [Answer Brief at 16]. Despite such an acknowledgement, Respondent fails to see that the trial court's delayed implementation likewise is based on "unforeseen changes in circumstances" as it is based on the trial court's arbitrary and unsupported determination that when the

minor child turns three, the parent/child bond will no longer be affected by relocation. In addressing child custody matters, the trial court must render its decision based upon the evidence before it. See, e.g., Clark v. Clark, 825 So.2d 1016, 1017 (Fla. 2d DCA 2002). In this case, however, the trial court determined the impact of relocation on the parent/child militated against a ruling that allowed immediate relocation but then determined – without any evidence before it as to the child's best interests twenty (20) months into the future – that the parent/child bond would not be affected by a relocation occurring after the child turned three.

Contrary to Respondent's assertions, the development and maintenance of such familial bonds cannot be compared to the disruption of a child's school schedule. A child's school year can be measured in days, weeks, and months; the formation of a child's bond with his parent does not, however, develop on such a convenient and certain schedule. As the First District noted in Sylvester "[i]t is difficult enough to determine the present emotional and psychological needs of a child; it is impossible to speculate what those needs will be in two (2) years." 992 So.2d at 297. Petitioner respectfully maintains that a determination of best interests twenty (20) months in the future is likewise the result of mere speculation and conjecture, especially where the matter of concern is the parent/child bond.

IV. The trial court's order has the effect of shifting the burden to the Husband

Respondent asserts Petitioner's "argument that a change in the burden of proof has taken place is also false," but it cannot be denied – nor does Respondent appear to deny – that while the Wife bore the burden of proof when she moved for relocation, in the event the Husband, as the non-custodial parent, seeks a change in custody based upon the Wife's relocation, he would bear the burden of proving a material change in circumstances to overcome the res judicata effect of the relocation order. See, e.g., Burley v. Burley, 438 So.2d 1055 (Fla. 4th DCA 1983); Zediker v. Zediker, 444 So.2d 1034, 1036 (Fla. 1st DCA 1984). Thus, it is no stretch to state that once the Wife's relocation request was granted, the burden shifted to the Husband to prove a material change in circumstances if he were forced to seek to prevent relocation when the child reaches the age of three.

CONCLUSION

The Second District's majority decision affirming the trial court's final judgment granting relocation, but prohibiting the Wife from relocating until the child's third birthday due to concerns as to the child's ability to bond with the Husband constitutes a prospective finding of best interests. Such a decision is contrary to law and it conflicts with the decisions of the First District with respect to relocation determinations. As such, Petitioner respectfully requests that this Court reverse the decision of the Second District Court of Appeal and resolve the conflict between the Second and First Districts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this ____ day of May, 2009 to: Mark A. Neumaier, Esquire, 334 West Bearss Avenue, Tampa, Florida 33613

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CERTIFICATE OF COMPLIANCE

In accordance with the applicable Florida Rules of Appellate Procedure, Appellee has used 14 point Times New Roman throughout this Brief.

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