IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

CASE NO. SC 08-1675
DCA Case No.: 2D07-1455

SHAWN ARTHUR, v. **JOSETTE A. ARTHUR,**

Petitioner. **Respondent.**

PETITIONER'S INITIAL BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

Whether the Trial Court erred in granting Wife's relocation request based upon a prospective finding of best interests.

PRELIMINARY STATEMENT

In this Initial Brief, Petitioner, Shawn M. Arthur, will be referred to as "Husband" or "Mr. Arthur." Respondent, Josette A. Arthur, will be referred to as "Wife" or "Ms. Arthur."

Citations to the Record on Appeal will be cited as [R.: _____], indicating the record page number(s) referenced.

STATEMENT OF THE CASE AND OF THE FACTS

Husband and Wife were married on October 29, 1999 and during their marriage they had one child, Dominic H. Arthur, born October 18, 2005. [R.:5]. Prior to their separation, the parties lived together for approximately six and one-half (6½) years. [R.:290]. The Husband, in his Amended Petition for Dissolution of Marriage, requested an award of shared parental responsibility, designation as primary residential parent, award of reasonable and liberal visitation to Wife, award of reasonable child support, equitable distribution of the parties' assets and liabilities, and partition of the marital home. [R.:159-65]. In her Amended Verified Counter-Petition for Dissolution of Marriage, the Wife requested, among other things, an award of shared parental responsibility, designation as primary residential parent, reasonable visitation to the Husband, an award of guideline child support, that the Husband be required to maintain life insurance to secure child

support, an award of alimony, exclusive use and possession of the marital home pending its sale, equitable distribution of the parties' assets and liabilities, and contribution to her attorney's fees and costs. [R.:166-75].

At trial, the Husband agreed that the Wife have primary custody of the minor child, contingent upon the Wife not being permitted to relocate from the State of Florida; the Wife's desired relocation was contested. [T. at 4]. 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. In the final judgment, the trial court further set forth that

> After analyzing the statutory elements, the Court concludes as follows:
>
> * * * * *
>
> 2. The Wife is designated as the **primary residential custodian** with the Husband granted **secondary residential responsibility**. Until the child reached the age of three(3) years, the Husband shall have unsupervised visitation every other weekend from Friday at 7:00am to Sunday at 5:00pm. Except as spelled out in the following paragraph, the Husband shall have unsupervised visitation in the intervening, alternating weekend, from Friday at 7:00am to Saturday at 12:00pm (noon).

[R.: 292-93 (emphasis in original)].

However, the trial court then proceeded to prospectively authorize the Wife's permanent relocation with the minor child out of the State of Florida. In

doing so, the trial court stated it was considering 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." [R.: 292-93]. With regard to section 61.13001(7)(b), which addresses the "[f]easibility of preserving the relationship between Father and Son through substitute arrangements that take into account the logistics of contract, access, visitation, and timesharing, . . . and whether those factors are sufficient to foster a continuing meaningful relationship between the child and the Husband," the trial court ordered the Wife, in the event of her prospective relocation out of Florida, "to pay for at least two trips annually for herself and the child to return to Florida, in order that the Husband may have extended unsupervised visitation with the child." [R.:292-93].

The trial court noted its belief that such action "will be an adequate (although not perfect) substitute for requiring the Wife to remain in Florida." [R.:292-93(parenthetical in original)]. Moreover, 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." [R.: 292-93]. Accordingly, 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 prospectively approved such relocation when the child turned three.

Husband moved the trial court for rehearing or reconsideration [R.:300-305], but thereafter withdrew his motion and timely filed a Notice of Appeal to the Second District Court of Appeal on March 30, 2007. [R.:304, 312-21]. In his briefs to the Second District Court of Appeal, Husband argued, among other things, that the trial court's finding that relocation was not in the best interest of the minor child at the time of trial contradicted and failed to support its prospective grant of the Wife's relocation request.

The Second District, however, in a divided opinion, disagreed. Addressing what it termed "[t]he main controversy in this case," the district court majority affirmed the trial court's ruling on the relocation issue in its July 25, 2008 Opinion. The Second District determined "the trial court did not exceed its authority in granting the relocation request upon the child reaching the age of three," even though the child was only sixteen (16) months old at the time the Final Judgment was entered. In upholding the trial court's relocation decision, the Second District noted that "the Wife proposed to move to the area where she grew up and has

family and that the area [to which she planned to relocate] is close to the Husband's extended family in Ohio," and cited with approval the Wife's characterization of the trial court's "delayed implementation" of its relocation ruling as akin "to other routine awards" that take effect 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." [Second DCA Op. at 3].

The district court rejected the Husband's contention that the trial court ordered relocation while finding at that time that relocation was not in the child's best interest, citing other "detailed findings in the final judgment" and the trial court's statement that "in weighing the child's best interests, relocation is the favored outcome." [Second DCA Op. at 3].

The district court further rejected the application of Janousek v. Janousek, 616 So. 2d 131, 132 (Fla. 1st DCA 1993), the principle case upon which Husband relied, concluding Janousek was not controlling and was distinguishable on its facts. Specifically, the district court concluded that the trial court's findings in Janousek prohibited relocation, while the finding of the trial court below favored relocation. [Second DCA Op. at 4]. The district court further noted that in Janousek "[n]o evidence was presented which would support a determination that a substantial change in circumstances would occur at the end of this five-year period

[in which relocation was prohibited] or that such a relocation would promote the welfare of the children." [Second DCA Op. at 4 (quoting Janousek, 616 So. 2d at 132)]. Accordingly, the Second District, in its divided opinion, affirmed the trial court's ruling allowing the Wife to relocate to Michigan when the child reached the age of three.

SUMMARY OF THE ARGUMENT

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 upon a prospective finding of best interests. Petitioner respectfully submits that the trial court below erred as a matter of law in granting the Wife's relocation request but delaying implementation of its ruling until the child's third birthday, approximately twenty (20) months after the date of the final hearing, based upon the trial court's finding that allowing relocation as of the date of the final hearing would negatively impact the child's ability to bond with his father, the Husband.

The Second District's majority decision affirming the trial court's final judgment 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. See Janousek v. Janousek, 616 So. 2d 131 (Fla. 1st DCA 1993); Martinez v. Martinez, 573 So. 2d 37 (Fla. 1st DCA 1990); Sylvester v. Sylvester, 992 So. 2d 296 (Fla. 1st DCA 2008). Accordingly, Petitioner respectfully requests

that this Court resolve the conflict between the First and Second Districts and reverse the decision of the Second District Court of Appeal that affirmed the trial court's grant of relocation based upon a prospective finding of best interests.

ARGUMENT

I. Standard of Review

The issue presented by this Court's acceptance of conflict jurisdiction is whether the Second District failed to apply the correct rule of law in determining prospectively that a custodial parent may permanently relocate out of the State of Florida, but only after some twenty (20) months following the date that determination was made. Inherent in the Court's disposition of this issue is whether there is, or should be, a bright-line rule that prohibits such prospective determinations of a minor child's best interests. These issues come before the Court for de novo review.

II. An order addressing a custodial parent's right to relocate with a minor child cannot be based on a prospective finding of best interests.

Under section 61.13001(7), Florida Statutes "[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 non-relocating parent . . .." The parent seeking to relocate bears the burden of proof. Fla. Stat. §

61.13001(8). While section 61.13001(7) sets forth several factors, the primary consideration is the best interest of the child.

As he asserted before the district court, Husband maintains the trial court erred as a matter of law in granting Wife's request to relocate with the minor child to Michigan at a time approximately twenty (20) months after the date of the final hearing. The district court's majority decision upholding the circuit court's final judgment granting Wife's relocation request, but delaying implementation of that ruling until the child reaches the age of three, approved what constitutes a prospective finding of best interests. As the dissenting judge noted, the decision upholding the future finding of best interests is contrary to law. See also Janousek v. Janousek, 616 So. 2d 131 (Fla. 1st DCA 1993); Martinez v. Martinez, 573 So. 2d 37 (Fla. 1st DCA 1990); Sylvester v. Sylvester, 992 So. 2d 296 (Fla. 1st DCA 2008).

Notably, while the trial court granted the Wife's relocation request on the date of the final hearing, it delayed the implementation of its ruling until the child turned three, based primarily upon the trial court's 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 trial court thereby determined relocation was not in the child's best interest at that time – as of the date of the trial – because such

separation would have a detrimental effect on the development and maintenance of the parent-child bond between the child and Husband.

Had the trial court determined relocation was in the child's best interest as of the time of trial, there would be no reason to preclude Wife's relocation prior to the child reaching three years of age. Yet the trial court – without any evidentiary support – determined relocation would be in the best interest of the child approximately twenty (20) months in the future when the child turned three. The trial court's determination likewise fails to consider that the facts underlying the other factors considered by trial court might not be the same twenty (20) months beyond the hearing. Moreover, because the trial court made the implementation of its findings prospective, it thereby impermissibly shifted the burden of proof to the Husband in any attempt to readdress the best interest issue before the prospective date of relocation.

In matters addressing child custody, the trial court is required to consider the child's best interest and those findings must be based on the evidence presented to the trial court at trial or during the final hearing. See, e.g., Clark v. Clark, 825 So.2d 1016, 1017 (Fla. 2d DCA 2002)(applying Fla. Stat. §61.13(3) in addressing order on temporary custody, noting that during the hearing the parties failed to present any evidence addressing the child's best interests, and cautioning that to the extent the trial court relied upon the parties post-hearing briefs addressing best

interests, the trial court relied, in part, on matters outside the record, its findings were not based on evidence presented by the parties, and the trial court therefore acted beyond its authority); Allan v. Allan, 666 So.2d 170 (Fla. 2d DCA 1996) ("The function of the trial judge in a child custody proceeding is to determine what is in the best interest of the child"). In this case, there simply was no evidence presented to the trial court as to the child's best interests twenty (20) months after the final hearing, nor could there be any such evidence of 'future' best interests. The trial court therefore acted beyond its authority in making a prospective finding of the minor child's best interests.

The trial court's decision below has the similar effect of an order deferring a final custody decision for an extended period of time even though the matter is otherwise ripe for consideration. Such a determination should not be deferred but should be addressed as of the time of the trial or final hearing. See, e.g., Martinez v. Martinez, 573 So.2d 37, 40 (Fla. 1st DCA 1990); Gruner v. Westmark, 617 So.2d 420, 421 (Fla. 1st DCA 1993). In this case, the trial judge arrived at a conclusion that is erroneous, inconsistent with his determination that such relocation could not occur until twenty months after the final hearing, and contrary to his finding regarding the impact of relocation on the child's ability to bond with the Husband, the non-relocating parent. Without any evidentiary support, the trial judge opined that between infancy and the age of three it is crucial for the child to

have frequent contact with both parents for the formation of a proper-parent child bond, but that the need for such frequent contact evaporates on the child's third birthday. Significantly, the trial judge determined that allowing Wife to relocate with the child on the date of trial would negatively affect the child's ability to bond with Husband and therefore precluded Wife from relocating until the child turned three, effectively denying Wife the right to relocate as of the date of trial. This grant of relocation based upon a prospective finding of best interests was erroneous and seriously implicates the parties' respective burdens of proof should it become necessary to reconsider the issue prior to relocation.

The right to relocate concerns matters of custody and the corresponding right of visitation. In matters "involving child custody . . . the trial court is required to make a final determination on that issue *at that time*." Martinez, 573 So.2d at 39 (emphasis in original). In Martinez, the trial judge, in the final judgment, noted the parties were "presently undergoing a significant lifestyle transformation," that the trial court was "uncertain at this time" as to how to fashion a hard and fast final decision . . . to which parent should be designated as the children's 'final primary residential parent,'" and therefore designated the husband as the "interim primary residential parent" for two years. Id. at 39-40. The trial court further determined that at the conclusion of this interim, two-year period the trial court would "re-

examine" the custody arrangement and make a "final and binding" decision at that time. Id.

On appeal, the First District explained that the issue of primary residential custody "was ripe for decision" on the day the case was set for final hearing and the trial court was obligated to make a decision as to that issue "at that time." Id. at 40. In so holding, the First District noted that both parties presented evidence with regard to the children's best interests, and that while the trial court found it would be in the children's best interests to designate the husband as the primary residential parent, "[t]here was no evidence to support the court's decision to provide a two-year delay, as distinguished from some other period of time, in making that decision." Id. at 41. In the present matter, there was likewise no evidence to support the trial court's decision to grant relocation based upon a finding of the child's future best interests. If the trial court found it was not in the child's best interest for the Wife to relocate with the child at the time of the final hearing, in the absence of any evidence showing relocation would be in the child's best interest some twenty months in the future, the trial court was required to deny Wife's request to relocate at that time.

The First District reached a similar conclusion in Janousek v. Janousek, 616 So.2d 131 (Fla. 1st DCA 1993). In that case, 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 Second District erroneously distinguished the procedural facts of Janousek. Its unsupported distinction of Janousek is grounded in its misreading of Janousek, specifically the district court's conclusion that, in Janousek, "the trial

court's findings prohibited relocation by the wife." (Opinion at 4). To the contrary, the exact opposite is true: the trial court in Janousek *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)). As such, the procedural facts and findings of the trial court in Janousek are virtually the same as those in the instant case. In both Janousek and the present matter, relocation was permitted, but only at some point in the future.

Since the Second District issued its Opinion and Mandate in the instant case, the First District has issued another opinion that reflects its consistent approach to relocation determinations in a case with facts quite similar to those of the instant matter. Sylvester v. Sylvester, 992 So.2d 296 (Fla. 1st DCA 2008). In Sylvester, the trial court granted the former wife's relocation request but required that "the relocation not occur until the child reaches 5 years of age and/or starts kindergarten." Id. at 296. At the time of the hearing, the child was three (3) years old. See id. In granting the former wife's relocation request, the trial court noted its belief that it would not be in the child's best interest "to be separated from the Former Husband prior to entering kindergarten," but because the facts presented to the trial court did not support a determination "that relocation should be

permanently barred" the trial court provided that the former wife's relocation would not take place until approximately two years after the hearing, during which time the trial court contemplated "both parents will have the opportunity to get [the minor child] to emotionally and mentally adjust to the fact that he will relocate." Id. at 297 (alteration in original).

On review, the First District explained that the trial court erred in granting the relocation request two years after the hearing because, based on the trial court's factual findings, it "determined that *current* relocation was not in the best interest of the child." Id. (emphasis added). The appellate court then demonstrated the precarious consequence of the trial court's conclusion that while relocation was not currently in the child's best interest, it would be in his best interest when he turned five and/or entered kindergarten, stating "[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 years." Id. Citing Janousek and Kates v. Kates, 619 So.2d 413, 414 (Fla. 5th DCA 1993) as support, the district court held "the proper cause of action is to determine whether relocation is presently appropriate and consider future relocation based on the circumstances existing at that time." Id. at 298.

The Second District's decision did not go without notice from the First District in Sylvester. While the First District opined that "it can be argued" the

case before it was distinguishable from the decision now on review before this Court – noting the trial court's explicit statement in Sylvester that "present relocation" was not in the child's best interest – the First District disagreed with the decision of the Second District "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 interest in the future." Id.

While the First District in Sylvester attempted to soften its conflict with the Arthur decision, the procedural facts are alarmingly similar and the district court's analysis is applicable to the case now before this Court. In contrast, the Second District's majority decision below bluntly dismisses the apt legal principle expressly articulated by the First District in Martinez, Janousek, and Sylvester, particularly that matters involving child custody cannot be made prospectively but must be determined as of the time of trial. The purpose behind this principle could not be more evident: a child's emotional and psychological needs, especially those of a young child, are in a state of flux as they grow, and what is currently in that child’s best interest may not be months or years down the line. As the First District noted in Sylvester, while it is "difficult enough" to ascertain a child's present emotional and psychological needs, it is “impossible to speculate” what those needs might be twenty months into the future or beyond. 992 So.2d at 297.

Moreover, to the extent the trial court believed it was able to ascertain the child's present emotional and psychological needs, in particular the child's ability to bond with his father, the Husband, the clear factual finding of the trial court was that the child, whom the trial court characterized as "practically an infant," was at an age when there is a need for "more frequent contact with both parents in order to properly bond with the parents." [R.:292]. The trial court further cited its concern for "the Husband's ability to bond with his son" as the reason the Wife's relocation request was granted but with "delay." [R.292]. The trial court's clear yet unspoken factual finding was that relocation was not in the child's best interest as of the date of trial. All children do not progress or mature at the same rate and to make a prospective decision about a child's best interest in the future ignores that factor.

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. However, 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.

Furthermore, the Second District's adoption of 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" or "an award granting exclusive use of a marital residence for a set period of time" is patently flawed. [Opinion at 3]. First, the law imposes significantly different burdens on parties seeking modification of spousal or child support and those petitioning the court to modify a prior custody award. See, e.g., Zediker v. Zediker, 444 So.2d 1034, 1036 (Fla. 1st DCA 1984)("Unlike proceedings to modify awards of child support or alimony, the noncustodial parent seeking to modify a prior award of custody 'carries an *extraordinary* burden'")(emphasis in original)(internal citations omitted)). In this respect, the trial court's 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 reaches 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. The Husband must first overcome the res judicata effect of the existing order determining custody by showing a material change in circumstances . . .."). Under section 61.13001(8), Florida Statutes, "[t]he parent . . . wishing to relocate has the burden of proof . . .," and therefore the Wife, as the parent seeking to relocate, bore the burden of establishing 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. 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 . . .."

Second, on a more visceral level, the district court engaged in a proverbial "apples and oranges" comparison of an order that provides for a future termination of a spouse's right to exclusive use of the marital residence or rehabilitative alimony with an order that allows the custodial parent to relocate with the child to a destination several states away from the noncustodial parent sometime in the future. The first class of orders is directed to a spouse's living or financial arrangements while the second class deals with the more subjective and delicate subject of the parent-child bond. Comparing an order addressing alimony to one affecting such an intimate, familial bond completely misses the mark.

The trial court and Second District erred in allowing for a prospective finding of best interests. In the present matter, the district court improperly deferred to the trial court's factual findings while at the same time disregarding the trial court's delay in the implementation of its relocation order based on its implicit

finding that relocation was not in the child's best interest as of the date of trial. This Court should resolve the conflict by adopting the approach followed by the First District in Martinez, Janousek, and Sylvester, and remand this matter for further proceedings in conformity therewith.

CONCLUSION

The trial court erred as a matter of law in granting the Wife's relocation request but prohibiting relocation until the child's third birthday, nearly twenty (20) months after the date of the final hearing, based upon its finding that allowing immediate relocation would be detrimental to the parent-child between the minor child and his father, the Husband.

The Second District's majority decision affirming the trial court's final judgment granting relocation, but delaying relocation until the child reached the age of three, approved what constitutes a prospective finding of best interests, is contrary to law, and conflicts with the relocation jurisprudence of the First District. Petitioner therefore respectfully requests that this Court resolve the conflict between the First and Second Districts and reverse the decision of the Second District Court of Appeal that affirmed the trial court's grant of relocation based upon a prospective finding of best interests.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 5th day of March, 2009 to: Mark A. Neumaier, Esquire, 334 B 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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