SUPREME COURT OF FLORIDA

CASE NUMBER SC10-164
Lower Court Case Numbers: 3D08-1461; 06-10610 FC 16

ERICA LYNN COREY,

Petitioner,

v.

MICHAEL JAMES COREY,

Respondent.

On Petition for Discretionary Review from the District Court of Appeal,
Third District

ANSWER BRIEF OF RESPONDENT

Kathy M. Klock, Esquire
June G. Hoffman, Esquire
Greg A. Lewen, Esquire
FOWLER WHITE BURNETT P.A.
Attorneys for Respondent Michael James Corey
901 Phillips Point West
777 South Flagler Drive
West Palm Beach, Florida 33401
Telephone: (561) 472-2326

Facsimile: (561) 802-9976

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STATEMENT OF ISSUE ON APPEAL

WHETHER THE THIRD DISTRICT CORRECTLY HELD THAT THE BEST INTEREST OF THE CHILD STANDARD APPLIES TO ROTATING CUSTODY DETERMINATIONS UNDER FLORIDA STATUTE SECTION 61.121 AND THAT THE PRIOR COMMON LAW PRESUMPTION AGAINST ROTATING CUSTODY NO LONGER EXISTS

STANDARD OF REVIEW

The conflict issue before the Court is a question of law and thus subject to the *de novo* standard of review. *Wade v. Hirschman,* 903 So. 2d 928 (Fla. 2003). The conflict presented for resolution is whether the best interest of the child standard established by Florida Statute Section 61.121 requires an additional finding that the judicially-created presumption against rotating custody which developed in the case law in the absence of statutory authority to order rotating custody extends to rotating custody orders under Section 61.121, and requires a further finding that the presumption has been overcome.

STATEMENT OF THE CASE AND FACTS[1]

A. Statement of the Case

This appeal is before the Court to resolve the conflict between the decision

[1] Petitioner, Erica Lynn Corey, is the mother and former wife, and is referred to in this Brief as "the Mother" or "Erica". Respondent, Michael James Corey, is the father and former husband, and is referred to in this Brief as "the Father" or "Michael". The parties' son, Ethan James Corey, is referred to as "the minor child" or "Ethan". The Record on Appeal in the Third District Court of Appeal is cited as "R", followed by the volume number ("Vol.") and page number ("p."). Petitioner's Appendix is cited as "App." followed by the page number ("p.").

below in *Corey v. Corey*, 29 So. 3d 315 (Fla. 3d DCA 2009), which expressly and directly conflicts with the First District Court of Appeal's decision in *Cooper v. Gress*, 854 So. 2d 262 (Fla. 1st DCA 2003); the Second District Court of Appeal's decision in *Mandell v. Mandell*, 741 So. 2d 617 (Fla. 2d DCA 1999); and the Fourth District Court of Appeal's decisions in *Chapman v. Prevatt*, 845 So. 2d 976 (Fla. 4th DCA 2003), and *Mancuso v. Mancuso*, 789 So. 2d 1249 (Fla. 4th DCA 2001).

The standard for rotating custody orders under Florida Statute Section 61.121 is expressly and unambiguously stated as "the best interest of the child." Section 61.121 states that "[a] court may order rotating custody if the court finds that rotating custody will be in the best interest of the child." The Third District Court of Appeal held below that the standard for ordering rotating custody is "whether rotating custody will be in the best interest of the child." The Court also held that the new legislation in Section 61.121, enacted in 1997, changed the judicially-created presumption against rotating custody that had developed in the Florida courts. *Corey v. Corey*, 29 So. 3d at 319-320.

Cooper v. Gress, 854 So. 2d 262 (Fla. 1st DCA 2003), *Mandell v. Mandell*, 741 So. 2d 617 (Fla. 2d DCA 1999), *Chapman v. Prevatt*, 845 So. 2d 976 (Fla. 4th DCA 2003), and *Mancuso v. Mancuso*, 789 So. 2d 1249 (Fla. 4th DCA 2001) were decided after Section 61.121 was enacted. Those cases incorrectly extended the

judicially-created presumption against rotating custody which had developed in Florida case law before rotating custody orders were authorized by Section 61.121, to rotating custody determinations that were made after the effective date of Section 61.121.

In holding that the standard for ordering rotating custody under Section 61.121 is whether rotating custody is in the best interest of the child, the Third District recognized that the enactment of Section 61.121 changed the law. The Third District correctly held that Section 61.121 established for rotating custody orders the same standard of "best interest of the child" that applies to all other types of custody arrangements and, that after the legislation, "[n]o presumption – positive or negative – attaches to rotating custody in comparison to other permissible custody arrangements." *Corey v. Corey*, 29 So. 3d at 319-320.

The Third District reversed the trial court's Final Judgment of Dissolution that denied the Father's request for rotating custody based on its finding that long-standing Florida law established a presumption against ordering rotating custody and that the Father had not proven exceptional circumstances to overcome the presumption against rotating custody. The Third District also found that there was no competent, substantial evidence to support the trial court's findings in favor of the Mother under subsections 61.13 (3)(d) and (m). *Corey v. Corey*, 29 So. 3d at

320.[2] The Third District reversed the Child Timesharing and Parental Responsibility Order and the Amended Order, and reversed and remanded to the trial court to make a determination regarding timesharing and parental responsibility based upon the best interest of the child.

B. Statement of the Facts [3]

The Mother and Father had a rotating timesharing arrangement for Ethan for the two year and four month period before the Final Judgment and Time Sharing Orders were entered by the trial court Judge (R. Vol. II, pp. 275-276; R. Vol. IV, pp. 67-69, 109-110; R. Vol. V, pp. 128, 174; R. Vol. VI, p. 72; R. Vol VII, p. 47).[4]

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[2] The trial court found in the Final Judgment that 11 of the 13 factors established by Section 61.13(3) for a court to consider in designating a primary residential parent did not favor the Mother or the Father, but made findings in favor of the Mother under sub-sections 61.13(3)(d) and (m). Based on those findings, the trial court designated the Mother as the primary residential parent. The Third District found that these findings were not supported by competent, substantial evidence. *Id.* The Third District's finding on these points is not challenged in this Appeal.

[3] Respondent has restated parts of the Statement of Facts in order to provide the Court with a complete history of the successful rotating custody arrangement the parties had in place under which their child "thrived" and "could not be doing better," before it was changed by the trial court in the Final Judgment. Respondent has also restated certain facts in a manner Respondent believes states them in a more balanced and accurate manner. The facts may not be relevant to the Court's decision on the issue of law in this appeal; however, the facts of this case demonstrate why rotating custody orders promote the public policy of the State of Florida when that timesharing arrangement is found by the court to be in a child's best interest, and why a presumption against rotating custody impedes this public policy.

[4] The parties started sharing rotating custody in November of 2005 (R. Vol. VI, p. 48; IV, p. 89), and the Final Judgment was entered on February 25, 2008. R. Vol. II, pp. 275-276. The Final Judgment was subsequently rendered as amended on

The Third District observed in its decision that "[t]he testimony below unequivocally established that the child was thriving in all respects under the arrangement. In fact, certain health issues improved in this two-year period." *Corey v. Corey*, 29 So. 3d at 316. The Final Judgment entered by the trial court quoted the testimony of both the Mother and Father at the trial that Ethan was "thriving and 'couldn't be doing better' and his academic achievements are clearly shown by his 2007-08 Progress Report in evidence," and the "[t]estimony from an independent witness was that the child was an excellent student, well-prepared and both parents were very involved in his education." R. Vol. II, p. 252, ¶ F (2)(d). The trial court also made an express finding in the Final Judgment that the child's environment has been stable and satisfactory while the parties operated under a rotating custody schedule.

The Mother testified at the trial that Ethan could not be doing better. R. Vol. V, pp. 128-130; R. Vol. II, pp. 251, 253. The Father testified that "[t]hings have been wonderful for two years." R. Vol. IV, p. 68. In fact, all of the four witnesses who knew Ethan testified at the trial that Ethan is a wonderful little boy - - he is well adjusted, well behaved, happy, and an excellent student.[5] During the more than two year period that the parents had an equal time sharing arrangement for

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May 20, 2008, upon disposition of the Mother's Motion to Amend. R. Vol. II, pp. 277-281.

[5] The only witness who did not testify about Ethan's well-being was the Father's supervisor who did not have any knowledge about the issue.

Ethan, the Father and Mother would each pick Ethan up from school on alternating Fridays (this schedule later changed to Sundays). R. Vol. IV, pp. 29, 69; R. Vol. VII, p. 36. The Father took care of Ethan during the week Ethan stayed with him, and The Mother took care of Ethan during the week Ethan stayed with her. R. Vol. VI, p. 53. This schedule gave Ethan the opportunity to spend equal time with each parent, have the involvement of each parent in his homework and other school assignments; gave Ethan meaningful time with each parent, and gave Ethan the opportunity to adjust to the "custodial parent's" household for a stable period of time before he transitioned to the other parent's home. The Father testified that a rotating custody schedule is in Ethan's best interest. R. Vol. VII, pp. 36-37. He testified that the rotating schedule created stability in Ethan's life. He was excelling in school, he had friends, he was happy, his health had substantially improved, and he was well behaved. In fact, the Father testified that for the two years of the rotating schedule, Ethan had done nothing but improve in every aspect of his life. R. Vol. VII, p. 47.

The Father also testified that rotating custody is in Ethan's best interest because children learn from what they see - - and it is important for Ethan to spend time with both of his parents, as he sees how each of them interact with people, deal with work, school, career issues, and other normal life issues. R. Vol. VII, p. 44. Ethan also sees his Father spending time with him and taking care of him, which is important because the Father wants to instill in Ethan the importance of

these things in general. R. Vol. VII, p. 44. As the Father testified:

> [C]hildren learn from what they see, rather than what they hear. And Ethan spends time with both his mother, watching her, watching how she handles her daily stresses, watching how, . . . she handles life, how she interacts with people. And he learns from that. At the same time, he has that same intimate relationship with me, where he sees the stresses I have. He sees me deal with work, he sees me deal with trying to advance in school, or in my career. He sees me do that every single day. And then he sees me come home and make him dinner. He sees me come home and take him to the beach. He sees me come home and have time for him. And because he does that, my hope is that he grows up thinking that that's important, you know. And I can't take that away from him. R. Vol. VII, p. 44.

The Father testified that he cannot be a meaningful part of Ethan's life, meaningfully co-parent him, or make decisions for Ethan if he is not intimately involved with Ethan's life. R. Vol. IV, p. 76. He also testified about the importance of his participation in Ethan's education, including parent/teacher conferences, and anything else that impacts Ethan, including Ethan's medical care. R. Vol. VII, pp. 59-60.

Ethan's teacher testified that Ethan was an excellent student. R. Vol. V, p. 24. In fact, Ethan received "Excellent" in nearly every category, including reading, writing, math, and behavior, and satisfactory for the few classes for which he had not earned an "Excellent". Ethan also received an award for perfect attendance. R. Vol. V, pp. 27-30. Ethan's academic work and conduct were so excellent that he was awarded the "Honor Roll" which recognizes an "all around, .

. . well developed student" - - academically as well as for good conduct. R. Vol. V, p. 28. Most significantly, Ethan's teacher testified that during the time Ethan was in her class (which was during the time the rotating custody arrangement was in effect), she did not notice any difference in Ethan's behavior or preparation regardless of whether he was with his mother or his father. She testified that his development was consistent - - he was always well-behaved and well-prepared for school. Ethan's teacher also testified that the Father and Mother were both very involved in Ethan's life. R. Vol. V, p. 25. The Father's participation as a teacher's helper was so significant that he received the "Most Valuable Parent", which is granted to parents who have "gone the extra mile". R. Vol. V, p. 28; Exhibit E. At the time of the second day of the trial - - which was after Ethan had been rotating equally between his mother and father's homes for nearly two full years - - Ethan had just received his interim progress report for the first quarter of the 2007-2008 school year, and he had earned all "A's" on his report card. The grades were in reading, mathematics, science, and social studies, art and music, physical education, and Spanish as a Second Language. R. Vol. V, pp. 58-59; Exhibit G.

The evidence also showed that the rotating custody arrangement also worked with respect to Ethan's school because the parents' homes were within walking distance of each other's homes and Ethan's school. R. Vol. VII, p. 72; R. Vol. II, p. 252. The Father testified that the practical logistics of Ethan having two homes had been worked out in Ethan's best interest. He has similar belongings at both

homes, and has one neighborhood and one set of friends. R. Vol. VII, p. 34.[6] The Mother testified that "[i]t's wonderful since Michael was on [Key Biscayne]. [Ethan] has all his friends on the island." R. Vol. V, p. 129.

Ethan's grandmother testified that Ethan was a very happy little boy and well adjusted after his father moved back to Miami. She testified that Ethan not only thrived under the rotating custody and co-parenting arrangement that commenced in late 2005, he actually substantially improved as a result of it. R. Vol. VI, pp. 121-122. She testified that Ethan was timid and less courageous when he was separated from his father. Ethan also suffered from many health issues, including respiratory problems, and his health improved dramatically as a result of his Father's intervention. R. Vol. VI, pp. 119-121.

The Mother, Father, and the child's grandmother all testified that the child's health had significantly improved after the Father was given an opportunity to co-parent Ethan. Ethan had suffered from many health issues, including respiratory problems. When the Father moved back to Miami, Ethan was on several

[6] The Mother's attorney cross examined Michael in a pre-trial magistrate hearing regarding the Mother's enrollment of Ethan in an elementary school on Key Biscayne without consulting with Michael. The Father's opposition at that time was the Mother's failure to communicate with Michael about this important educational issue - - and because the new school was geographically remote from Ethan's current school and Michael's home. Because the magistrate allowed Ethan's registration on Key Biscayne, Michael moved to an apartment on Key Biscayne which involved higher rent and the payment of a penalty on his existing lease. R. Vol. VII, pp. 80-82. His commitment to parenting Ethan was and is his first priority.

prescription medications, including a nebulizer (inhaler). He was also on an extremely restrictive diet that prohibited him from eating eggs, dairy, wheat, and peanuts. R. Vol. IV, pp. 102-103; Vol. VI, pp. 119-121; Vol. VII, pp. 13-14. As soon as the Father could arrange it, he took Ethan to a specialist and, under the doctor's supervision, the Father was able to wean Ethan back on all of the food he was previously prohibited from eating, and off the medication he was taking. R. Vol. IV, pp. 102-103. In short, Ethan's healthy, normal childhood was restored to him. *Id.; see* also R. Vol. VI, pp. 119-121. The Mother also acknowledged in her testimony that Ethan's health problems have all gone away since the rotating custody schedule began. R. Vol. V, p. 131.

The Father and Mother both testified that the communications between them had improved substantially during the period they had an equal time sharing schedule for Ethan. R. Vol. V, p. 127; R. Vol. VI, pp. 65-67, 69; R. Vol. IV, pp. 103-104.[7]

The Father Made Career Decisions To Be Available to Take Care of Ethan

Petitioner's Statement of the Case and Facts incorrectly states that the

[7] The rotating custody schedule also alleviated some of the negative aspects of Michael and the Mother's co-parenting of Ethan before the regular rotating custody schedule was in effect. The Mother had withheld Ethan from Michael from time to time prior to that arrangement, including one occasion when she withheld a prescription medication from Michael in an effort to coerce him to give up his time with Ethan. R. Vol. VI, pp. 134-135. The relationship is subject to occasional instances of communication failures. The Mother testified that Michael became irate when he learned that the Mother had again taken Ethan to a doctor without advising Michael until after the appointment was over. R. Vol. V, p. 103.

rotating timesharing arrangement worked because the Father was a law student at the time (Pet. Brief, p. 4). The rotating timesharing schedule was in effect while the Father was employed by a private law firm starting in April 2007. R. Vol. IV, pp. 43, 49. The rotating timesharing arrangement continued - - and Ethan continued to thrive under it - - after the Father began his career as a lawyer. R. Vol. IV, pp. 43-44.

Petitioner's Statement of Facts also incorrectly states that the Father had an uphill battle trying to convince the trial court Judge that he would be able to pick up his son from after-care (Pet. Brief, p. 6). The evidence at trial was *uncontroverted* that the Father had made arrangements so that he would be able to pick Ethan up from his after-care program on the alternating weeks Ethan lived with him, and that he had a very large and committed family ready and willing to pick Ethan up in the unlikely event the Father was unable to do so on a given day. R. Vol. IV, pp. 62-64, 71-72. Moreover, as the Third District pointed out in its decision, there was no evidence that the Father had been unable to pick up his son from the after-care program on time. *Corey v. Corey*, 29 So. 3d. at 320 (Fla. 3d DCA 2009).

In every job interview, the Father explained that he was a single father and that he needed flexibility in his work schedule. R. Vol. IV, p. 55. He was hired by the Miami-Dade County State Attorney's Office and, after admission to The Florida Bar, he was sworn in as an Assistant State Attorney. R. Vol. IV, p. 43-44.

When he interviewed for the position with the State Attorney's Office, he explained his scheduling issue, and was assured that his needs could be accommodated. *Id.* The Father was so concerned about his scheduling needs that he spoke to a supervisor two levels up from his own who told the Father that he could leave the office at 5:00 or 5:30 p.m. R. Vol. IV, p. 79. The Chief of County Court for the State Attorney's Office and the Father's supervisor, Pat Trese,[8] testified at the final hearing that the Father has been allowed flexibility to be able to pick up and drop off his child. R. Vol. VI, p. 21; R. Vol. VI, p. 12; R. Vol. VI, pp. 10, 27-34. Mr. Trese also testified that he had specifically given a directive that provides the Father with flexibility to take care of Ethan, and that he was satisfied that the Father's work performance has not been impacted. R. Vol. VI, p. 37, lines 9-22.

The Father testified that in the unusual event he would not be able to leave work in time to pick Ethan up by 6:00 p.m., he has several family members, including relatives who work in and near downtown Miami as well as five or six people on Key Biscayne, who could pick Ethan up for him and take care of him until the Father gets there. R. Vol. IV, pp. 62–64; 71-72. He testified that he would first call The Mother and ask her if she preferred to pick Ethan up, because The Mother had expressed her preference that he do so. R. Vol. IV, p. 64. The

[8] Mr. Trese's name is incorrectly spelled as "Tracy" in the transcript. He is referred to by his correct proper name in this Brief.

Father's mother, Nancy Corey, testified that she is on call to pick Ethan up if she is ever needed, and that her seven siblings are all willing to help whenever needed.

The evidence was uncontroverted that the Father has a very large family that he can call on if needed, and that he is accustomed to making arrangements for Ethan if that is ever needed. Most importantly, the Father's testimony was uncontroverted that Ethan is his first priority and that he is ready to drop whatever he is doing if he needs to do so. R. Vol. IV, pp. 66-67.

The statement in Petitioner's Initial Brief (at page 5) that the Father "was clearly not available to pick up young Ethan when he was let out of school" is misleading. The Third District even noted in its decision that "[t]here was no evidence that the father had ever been unable to pick up his son from the after-care program on time." *Corey v. Corey*, 29 So. 3d at 320.[9] Petitioner's Statement of the Case and Facts also incorrectly represents that "Michael wanted unidentified neighbors to pick Ethan up from after school care if he had to work late" (Pet. Brief, p. 6). The record citation is to a question Petitioner's counsel posed to Petitioner which was not based on any facts.[10] R. Vol. V, p. 68.

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[9] The only time the Father was unable to pick up Ethan on time was one instance when the Father picked up Ethan from the Mother's home the evening before the first day of the trial below when the Father was meeting with his attorney to prepare for trial the next day. R. Vol. VI, pp. 102-103.

[10] The line of questioning related to who would pick Ethan up if his Father was not able to do so. The Mother's counsel asked the Mother, "[s]o what happens to Ethan - - I guess we have to go by the neighbors, the friends of the father who presumably could pick him up a *[sic]* 6:00 o'clock *[sic]*. Is that something you're

Evidence Regarding the Parties' Cooperation in Co-Parenting Ethan
Under the Rotating Timesharing Arrangement

The Mother testified that she and the Father communicate on a regular basis regarding issues surrounding Ethan and cooperated and communicated regarding child rearing decisions for him. R. Vol. VI, pp. 65-67. Examples included an agreement for Ethan to attend karate classes at his aunt and uncle's studio and a soccer program for Ethan. R. Vol. VI, pp. 24-25, 67-68; Vol. VI, pp. 65-66; Vol. VII, p. 109. During the summer prior to the trial, the Father and Mother agreed to a schedule under which Ethan spent the first few weeks of the summer with his father, the second three weeks with his mother, the next two weeks with his father, and the next three weeks with his mother, and the final two weeks with his father. They worked the schedule out in that manner so that they could make the appropriate arrangements for day camp. R. Vol. VI, p. 68. The parents' pickups and drop offs of Ethan were timely. R. Vol. VI, p. 72, lines 12-15.[11] The Mother

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comfortable with?" The Mother answered her attorney's question "no". The question, however, assumed facts that were contrary to the evidence that Michael had gone to great lengths to make arrangements to pick up Ethan on time; and that he had a large family ready and willing to pick up Ethan if Michael needed them to do so. In fact, the Mother's counsel directly asked Michael, "[w]hat happens if you're not available at 6:00 o'clock *[sic]* or before that to pick up Ethan?", and Michael answered: "[I] do what any other parent does and I call somebody to pick him up. I have five to six people on Key Biscayne. First on that list is Erica. And if none of those people are available, which has never been the case, then I will call one of my family members to come onto the island. I've been doing this ever since I've been working." R. Vol. IV., p. 62.

[11] The Mother testified to one occasion when Michael was unable to pick Ethan up on time, and it was the evening when Michael was meeting with his attorney to

and Father both testified that they have switched weekends with each other because of scheduling conflicts, including a wedding in New York that the Mother attended and several weekend workshops that the Mother had to attend for science programs for work. R. Vol. VI, pp. 96-97, 102. The Father testified that he and The Mother make arrangements; that is what co-parenting is. R. Vol. IV, p. 65. He testified that you have to have flexibility in connection with the schedule. He also testified that sometimes you just have to drop what you are doing and pick up your child. R. Vol. IV, p. 67.

The only evidence of failures in co-parenting between The Mother and the Father was related to The Mother's actions:

a. The Mother Moved Ethan from the Family's Home in Gainesville to Her Parents' Home in Key Biscayne, Florida, Without the Father's Permission. R. Vol. V, p. 113; Vol. VII, pp. 30-31.

The Father and the Mother lived in the home of the Father's parents in Kendall (Miami), Florida, following their marriage in August 2000. They continued to live in the Father's family home following the birth of their son, Ethan, in January 2001, through January of 2002, when they moved to Gainesville, Florida, and enrolled as full-time students at the University of Florida. R. Vol. IV, p. 4; R. Vol. II, p. 247; R. Vol. IV, p. 6; Vol. VI, p. 54. the Mother had planned to complete her undergraduate education and then attend Medical School and become a doctor. R. Vol. IV, p. 9; Vol. VII, p. 29. The Father planned to complete his

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prepare for court the next day. R. Vol. VI, pp. 102-103.

undergraduate education and then attend Law School. R. Vol. IV, p. 96; Vol. VI, p. 54; Vol. VII, p. 29.

The Father graduated from the University of Florida undergraduate program in December of 2003, and began Law School in January of 2004. R. Vol. VI, p. 3; R. Vol. VI, p. 55. The Mother graduated in April of 2004. R. Vol. VI, p. 3. The Mother had earlier abandoned her plans to go to Medical School, and had decided to seek a position as a teacher instead. The plan was for her to support the Father through Law School by teaching, and she applied for and obtained a high school chemistry teaching job in Gainesville for that reason.[12] R. Vol. VI, pp. 57-58; Vol. V, pp. 38-39. About a month prior to August of 2004, the Mother learned that the teaching job she had secured fell through due to budget cuts in the Alachua County School System. R. Vol. IV, p. 9. Shortly after - - while the Father was in his first year of law school - - the Mother abruptly left Gainesville with the parties' child for a visit to her parents in Key Biscayne, Florida. R. Vol. IV, pp. 9, 17. The Mother testified that she was very depressed at the time. R. Vol. V, p. 45. She was despondent over her failed Medical School plans and the loss of the teaching position, and she needed time to think. The couple had also been experiencing marital problems at the time. R. Vol. IV, pp. 9-10. The Father testified that the

[12] The Mother testified that she fully anticipated working after she earned her Bachelor's degree. She testified that "[t]here was no stay at home mom." R. Vol. VI, p. 57.

visit was supposed to be temporary. R. Vol. IV, pp. 8, 17. The couple continued to talk on the telephone on a daily or almost daily basis. R. Vol. IV, p. 18.

In November of 2004, the Mother drove to Gainesville and told the Father that she was not coming back, and that she was filing for a divorce. R. Vol. IV, p. 9. The Father offered to drop out of law school and move to Miami, but the couple decided that it was in Ethan's best interest for the Father to finish his law school education. The Father testified that the Mother agreed that she and the Father would have equal time sharing with Ethan. R. Vol. IV, pp. 17-18.[13] The Mother subsequently informed the Father that she had changed her mind and she did not think it was in Ethan's best interests that he spend time with the Father. R. Vol. IV, pp. 18-19.

b. The Mother removed Ethan from his pre-school in Gainesville without consulting with the Father or otherwise giving him any opportunity to participate in the parenting decision. R. Vol. V, p. 113; Vol. VII, pp. 30-31;

c. The Mother took the family's only car (and the Father's only form of transportation) when she left Gainesville for a visit to Miami. R. Vol. VII, p. 61; Vol. IV, p. 80;

[13] The Mother testified that she did not recall ever having said that to Michael. R. Vol. V, pp. 43-44. The only period of time the rotating timesharing schedule was not in place was during the time Michael was in Gainesville and transitioning to Miami, Michael testified that he and the Mother agreed that the rotating schedule would occur one he moved to Miami, and it did. R. Vol. IV, pp. 69-70. The Mother testified that she did not agree to the rotating custody arrangement and that it was "imposed on her"; however, she never brought the issue before the trial court. R. Vol. IV, pp. 67-68.

d. While the Father had to stay in Gainesville to complete the credits necessary to transfer to a law school in Miami, the Mother never brought Ethan to Gainesville for the sole purpose of visiting his father. R. Vol. V, p. 139;

e. The Mother unilaterally enrolled Ethan in pre-school in Miami without consulting with the Father or otherwise giving him any opportunity to participate in the parenting decision. She did not even tell the Father that she had enrolled Ethan in the school until a month after he was enrolled. R. Vol. V, p. 115; R. Vol. V, pp. 81-82; R. Vol. IV, pp. 21-25, 100;

f. After the Father moved to Miami and secured an apartment near Ethan's pre-school, the Mother enrolled Ethan in kindergarten on Key Biscayne, Florida, without consulting with the Father or otherwise giving him any opportunity to participate in the parenting decision. R. Vol. IV, pp. 26-28, 46-47, 100-101; Vol. V, 119-120.

Petitioner's Statement of the Case and Facts incorrectly states that the Mother was employed at Key Biscayne Elementary School at the time she enrolled Ethan in the school without consulting with the Father. The Mother was employed as a teacher *in South Dade* at the time; and Ethan had been attending pre-school in Kendall (the pre-school which the Mother had also unilaterally chosen). The Father was living in an apartment near Ethan's school. R. Vol. IV, pp. 24-25, 28-29, 100-101. Ethan had been commuting to his school in South Dade from Key Biscayne during the alternating weeks he lived with his mother. The Father was not asking for a school that would impose a burdensome commute on his child; he was asking for a school in the same geographic area of the child's pre-school so that the commutes of the entire family would stay the same. R. Vol. IV, pp. 24-25, 28-29, 100-101. The background follows.

In November of 2005, after the Father relocated to Miami and rented an

apartment near Ethan's pre-school, the Father and the Mother began the rotating custody schedule with Ethan. R. Vol. IV, p. 89; R. Vol. VI, p. 51. In the fall of 2006, the Mother enrolled Ethan in elementary school in Key Biscayne, Florida, without consulting the Father or giving him an opportunity to participate in the decision of where Ethan would attend first grade. R. Vol. V, pp. 52-53, 117; R. Vol. IV, pp. 26, 46; Vol. V, p. 47. Although the Father objected to the Mother's unilateral decision, her decision ultimately prevailed.[14] The Father then immediately moved to Key Biscayne so that he would be near Ethan and continue to be a good parent to him.[15] R. Vol. IV, pp. 31, 104**;** Vol. VII, p. 80; Vol. V, pp. 61-65, 117-120. the Mother obtained a teaching job at Key Biscayne Elementary the following January. R. Vol. V, p. 57.

g. The Mother failed and refused to allow the Father to participate in Ethan's medical and dental care. R. Vol. VI, pp. 62-65; Vol. VII, pp. 54-61; Vol. V, pp. 100-101, 103, 170-171.

The Mother demonstrated an unwillingness to include the Father in Ethan's medical care when she brought him to a doctor or dentist. She even refused to

[14] The Father brought this issue to the attention of the court, but the General Magistrate who presided over the hearing did not require the Mother to enroll Ethan in a school near Michael's residence and the Mother's employment. Sunset Park Elementary School was near the Hamel School and in the school district for Ethan and Michael's home. R. Vol. V. p. 117. This fact is provided as evidence of the Mother's unwillingness to include Michael in important decisions about Ethan. Once Michael looked into the school, he was satisfied that it is a good academic program and Ethan has done very well there.

[15] This move was also a financial setback. Rental rates in Key Biscayne are higher, and Michael incurred a $2,000 penalty on his existing lease. R. Vol. VII, pp. 80-81.

provide the Father with the name of the treating professional or the time of the appointment to prevent him from participating in Ethan's care. R. Vol. V, pp. 99-100, 170-172; VII, pp. 54-60. This refusal to include the Father in Ethan's health care even happened on a date between the first and second day of trial, the Mother took Ethan to the doctor and did not tell the Father until after she had left the doctor's appointment and was dropping off a prescription even though she knew at 7:00 a.m. that morning. The Mother did not call the Father in the morning to tell him that Ethan was ill; and she did not call the Father after she made the appointment with the doctor, or even while she was at the doctor's office. R. Vol. VI, pp. 62-63, 70-71.

h. The Mother also admitted that she made a negative comment to the Father in front of Ethan about the Father's display of affection for Ethan was "grotesque".

The Father testified that he kissed Ethan on the cheek several times when he dropped Ethan off. R. Vol. VI, pp. 72-74; R. Vol. VII, pp. 45-47. The Mother described it as "kiss[ing] him several dozen times with loud noises and a lot of sound effects" and she found it "grotesque and offensive", and she said so in front of the child. R. Vol. VI, pp. 73-74. The Father remembers that day because of Ethan's reaction: "I remember that day because Ethan didn't let go of me - - and he just turned his face towards his mother and he just - - I just don't know - - I just didn't - - I couldn't say anything." R. Vol. VII, pp. 45-47.

The Trial Court's Final Judgment

The trial court judge acknowledged in the Final Judgment that he could order rotating custody under Section 61.121; however, he denied rotating custody based on the "long standing presumption against it", and his belief that in order to award rotating custody, he would have to find that exceptional circumstances exist to justify it. R. Vol. II, p. 249.

The trial court judge then addressed the factors under Section 61.13(3) that a court must consider in designating a primary residential parent. The Judge did not make any findings in favor of the Father in connection with any of issues addressed in sections a through h above in the Final Judgment. The trial judge acknowledged some of the incidents where the Mother did not advise the Father of a dental or doctor's appointment and counseled that "[t]he Wife must be more vigilant in keeping the Husband apprised of such appointments so that he may attend," but dismissed them as being "not of such a serious nature as to be given significant weight in making a custody determination under the facts of this case. R. Vol. II, p. 253, paragraph j.[16] The trial court found that the factors in 11 of the 13 subsections of Section 61.13(3) favored neither parent, but found that the

[16] The uncontroverted evidence at trial, including the Mother's own testimony, established that the Mother's failure to advise the Father of Ethan's appointments was not the result of a lack of vigilance - - it was intentional. Not only did the Mother fail to advise Michael of appointments, she also refused to provide him the name of the treating professional or the time of the appointment to prevent him from participating in Ethan's care. R. Vol. V, pp. 99-100, 170-172; VII, pp. 54-60.

factors in subsections 61.13(3)(d) and (m) favored the Mother.[17] The trial court thus designated the Mother as the primary residential parent based upon its findings under Section 61.13(3)(d) and (m).

Contrary to Petitioner's statement in her Initial Brief, the Third District did not "acknowledge that the Father failed to show exceptional circumstances justifying an award of rotating custody." Petitioner's Brief, p. 20. The Third District did not even address the standard of evidence a parent would have to demonstrate to overcome a presumption against rotating custody. The Third District held that there is no need to overcome a presumption that no longer exists. *Corey v. Corey*, 29 So. 3d at 320.

SUMMARY OF ARGUMENT

The governing standard for ordering rotating custody under Florida Statute Section 61.121 is whether "rotating custody will be in the best interest of the child." The judicially-created presumption against rotating custody that developed in Florida case law prior to the enactment of Section 61.121, when there was no statutory authority for a court to order a rotating time sharing arrangement, no longer exists and does not apply to rotating custody determinations under Section 61.121.

[17] The Third District found that there was no competent, substantial evidence to support these findings in favor of the Mother. *Corey v. Corey*, 29 So. 3d at 320-321.

ARGUMENT

I. THE THIRD DISTRICT CORRECTLY HELD THAT THE BEST INTEREST OF THE CHILD STANDARD APPLIES TO ROTATING CUSTODY DETERMINATIONS UNDER FLORIDA STATUTE SECTION 61.121 AND THAT THE PRIOR COMMON LAW PRESUMPTION AGAINST ROTATING CUSTODY NO LONGER EXISTS

Florida Statute Section 61.121, effective July 1, 1997, authorizes courts to award rotating custody and establishes the single standard of "the best interest of the child" for a court to apply to rotating custody determinations. This standard is consistent with the long standing statutory scheme that all matters relating to child custody issues shall be determined in accordance with the best interest of the child, and the stated public policy of Florida to ensure that "each minor child has frequent and continuing contact with both parents after the parents separate or after the marriage of the parents is dissolved and to encourage parents to share the rights and responsibilities and joys of child rearing." Section 61.13(2)(b). *House of Representatives Committee on Family Law and Children Bill Research & Economic Impact Statement, April 18, 1997* (App. p. 30).

The standard is also clear and unambiguous. There is no language in Section 61.121, and no principle of statutory interpretation, that would justify a revision to the statute to add a judicially-created presumption against rotating custody that developed in case law before the Florida Legislature authorized a court to order rotating custody, and to require a party seeking rotating custody to

overcome that negative presumption. The language "the court may order rotating custody if the court finds that it would be in the best interest of the child" simply cannot be correctly interpreted to mean that a court may order rotating custody:

(1) if the court finds that it is in the best interest of the child,

but only if

(2) the court also finds that the presumption against rotating custody that is silently incorporated in the statute has also been overcome.

Section 61.121 was enacted to include rotating custody as one of the parenting arrangements Florida courts are permitted to order under Chapter 61 according to a child's best interest based upon the particular facts and circumstances presented in each individual family case. Prior to the effective date of Section 61.121, the only provision that addressed court authority for determining a child's residence was Section 61.13(3); however, Section 61.13(3) only addressed the factors a court is required to consider in determining *the primary residence* of the child. As the First District Court of Appeal explained in *Ruffridge v. Ruffridge*, 687 So. 2d 48 (Fla. 1st DCA 1997) (which was decided prior to the enactment of Section 61.121), the reason the presumption against rotating custody developed in the case law was that Section 61.13(3) did not include rotating custody among the methods of sharing parental responsibility a court was authorized to order. To the contrary, Section 61.13(3) specifically stated that each child should have a *primary residence* and, as a consequence, "[t]he Florida courts

have recognized that rotating child custody is presumptively not in the best interest of the child." *Ruffridge*, 689 So. 2d at 50. *See also Frey v. Wagner*, 433 So. 2d 60, 62 (Fla. 3d DCA 1983) (holding that the Shared Parental Responsibility Law embodied in Section 61.13, Florida Statutes, "envisions that there is to be a primary physical residence for the children . . . which is to be determined by reference to the non-exclusive factors enumerated in Section 61.13(3)").[18]

A "primary residence" is, by definition, in conflict with a rotating custody arrangement under which there is no primary residence; therefore, there was a logical basis for the judicially created presumption against rotating custody when primary residence was the only authorized timesharing arrangement standard under the existing legislation in Chapter 61, Florida Statutes, which governed timesharing arrangements. Indeed, in the absence of statutory authority to order a rotating timesharing arrangement, courts went so far as to refer to the long-standing presumption against it as "frowning" upon a rotating custody arrangement. *See Chapman v. Prevatt*, 845 So. 2d 976, 982 (Fla. 4th DCA 1982).

Section 61.121 changed the law in Florida by authorizing courts to order rotating custody if the court finds that rotating custody would be in the best interest of the child. After the effective date of Section 61.121, Chapter 61 of the Florida

[18] The Legislative History to Section 61.121 recognized that rotating custody was not presently statutorily recognized. *See House of Representatives Committee on Family Law and Children Final Bill Research and Economic Impact Statement*, June 13, 1997, p. 42 (App. 40, p. 42).

Statutes no longer limited the time sharing arrangements to determinations of a child's "primary residence". Section 61.121 was a new statute that *added* rotating custody as one of the timesharing arrangements a court is authorized to order if it was in "the best interest of the child." In enacting Section 61.121, and recognizing rotating custody as a permissible timesharing arrangement under Florida law, the Legislature "filled the void",[19] and with it, removed the rationale under which the presumption against rotating custody that had developed in Florida case law prior to its passage.

As the Third District Court of Appeal reasoned in its decision below, in enacting Section 61.121:

> [t]he Legislature chose to put rotating custody on the same level playing field as other types of custody arrangements - - all of which are evaluated through the lens of the best interest of the child. This legislative action changed the judicially-created presumption against rotating custody. If the Legislature had intended to continue the long-standing presumption against rotating custody, it would have stated so in the statute. Instead, the Legislature, in enacting section 61.121, expressly stated that the only standard for ordering rotating custody is whether it is in the best interest of the child.

Corey v. Corey, 29 So. 3d at 319.

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[19] The Legislative History to Section 61.121 specifically recognized this void. The House of Representatives Committee on Family Law and Children Final Bill Research and Economic Impact Statement dated June 13, 1997, explains that "[a]lthough courts have allowed rotating custody in Florida, *this practice is not presently statutorily recognized."* Page 42, subsection c (emphasis supplied). In the same report, the Committee reports that "[t]he bill also creates s. 61.121 F.S. to provide that the court may order rotating custody if the court finds that rotating custody will be in the best interest of the child." *Id*., page 40 (App. 40, p. 40).

The correct application of statutory interpretation principles to Section 61.121 results in the same conclusion. As the Third District concisely explained, "[t]he starting point for [the] interpretation of a statute is always its language,' so that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there."' *Corey v. Corey*, 29 So. 3d at 319 (citing *Vargas v. Enter. Leasing Co.*, 993 So. 2d 614, 618 (Fla. 4th DCA 2008); *see also Haskins v. City of Ft. Lauderdale*, 898 So. 2d 1120, 1123 (Fla. 4th DCA 2005) ("A basic canon of statutory interpretation requires us to 'presume that [the] legislature says in a statue what it means and means in a statute what it says there.'" (*quoting Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)).

The Third District correctly held that in enacting Section 61.121, the Legislature "expressly stated that the only standard for ordering rotating custody is whether it is in the best interest of the child." *Id*. The court stated its conclusion alternatively as follows:

> Put another way, after the 1997 Legislative action, no presumption – positive or negative attaches to rotating custody in comparison to other permissible custody arrangements.

Id.

The Florida Legislature could not have been more clear in the language or the intent of Section 61.121 - - the new law authorized a court to order rotating

custody if the court finds that it is in the best interest of the child. The statute establishes a single test for ordering rotating custody, and the "best interest of the child" test cannot be correctly interpreted to include a requirement that a court must also find that a party overcome a presumption against rotating custody that is not found in the statute's language.

Petitioner's argument that the absence of words in Section 61.121 expressly abolishing the presumption against rotating custody must be interpreted to mean that the Legislature did not intend to "repeal" the presumption against rotating custody is simply wrong. First, the Legislature had nothing to "repeal". There was no statute that permitted a court to order rotating custody under any standard prior to the enactment of Section 61.121; therefore, there was no statute to repeal. Second, the standard the Legislature established is clear and unambiguous, and there is no reason to resort to statutory interpretation in order to extract its intended meaning. Indeed, because the language and intent of the statute is so plain and so clear, application of statutory interpretation principles would lead to the conclusion that the Legislature would have been required to *include* language in the statute which provided for a presumption that rotating custody is not in a child's best interest (and the level of proof required to overcome it) in order for a court to interpret Section 61.121 as including such a presumption if the Legislature had

intended for it to be part of the standard.[20]

An interpretation of Section 61.121 that presumes the incorporation of a presumption against rotating custody also violates the doctrine of "*expressio unius est exclusio alterius*" (the mention of one thing implies the exclusion of another). *Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80 (Fla. 2000); *St. John v. Coisman*, 799 So. 2d 1110 (Fla. 5th DCA 2001). When a law expressly describes a situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. *Prewitt Management Corp. v. Nikolits*, 795 So. 2d 1001 (Fla. 4th DCA 2001); *Lowe v. Broward County*, 766 So. 2d 1199 (Fla. 4th DCA 2000). Similarly, where a statute expressly provides a particular remedy or remedies, the court must be wary of reading others into it. *Alphamed Pharmaceuticals Corp. v. Arriva Pharmaceuticals, Inc.*, 432 F. Supp. 2d 1319 (S.D. Fla. 2006).

Finally, *if* it was indeed the Legislature's intent to simply allow courts to order rotating custody *only if* the judicially-created presumption that rotating custody is not in a child's best interest is overcome, the passage of Section 61.121 was a meaningless act because that is what the case law was before the Legislature authorized courts to order rotating custody. It is a fundamental rule of construction that statutory language cannot be construed so as to render it potentially

[20] The Legislature would also have needed to establish the standard for "overcoming" the presumption because the case law is not consistent on that issue.

meaningless. *Reeves v. State*, 957 So. 2d 625 (Fla. 2007). The Legislature must be assumed to have expressed its intent through the use of the words in the statute. *Atlantis at Perdido Ass'n, Inc. v. Warner*, 932 So. 2d 1206 (Fla. 1st DCA 2006); *Dept. of Revenue v. Lockheed Martin Corp.*, 905 So. 2d 1017 (Fla. 1st DCA 2005).

The courts that have continued to apply the presumption against rotating custody standard after the legislature's adoption of Section 61.121 simply assumed incorrectly that the presumption continued to apply or, as in the case of *Mandell v. Mandell*, 741 So. 2d 617 (Fla. 2d DCA 1999), relied on a flawed analysis. *Mandell* stated that the legislative history of Section 61.121 offers little insight, and, then relying on the simple fact that the legislature had specifically addressed a presumption in a different statutory provision in Chapter 61, concluded that "the absence of such language in Section 61.121 leads us to conclude that either the legislature did not intend to set aside the presumption, or, if it did, it failed to appropriately implement its intent." *Id.* at 618. Respectfully, the *Mandell* court's analysis was flawed.

The Legislature's express removal of the presumption that developed in case law as a statutory interpretation of Section 61.13 in the reenactment of that statute does not apply to the enactment of the new statutory provision in Section 61.121. Section 61.121 was a new statutory provision. It was not a reenactment of an existing statute. For that reason, the statutory interpretation principle the *Mandell*

court relied on does not apply to Section 61.121. While the Legislature may be presumed to be aware of judicial construction of an existing law when it subsequently reenacts an existing statute, and may be presumed to have adopted it if a contrary intent is not expressed in the reenacted law (*see Malu v. Security Nat. Ins. Co.*, 898 So. 2d 69, *on remand* 904 So. 2d 501, *appeal after remand* 974 So. 2d 625, *on remand Padilla v. Liberty Mut.*, 934 So. 2d 511, *review denied* 926 So. 2d 1270), that principle does not apply to the enactment of a new statute, which is the case in the enactment of Section 61.121 in July 1997.

Respectfully, the Florida Legislature would not have adopted Section 61.121 unless it had intended to *add* rotating custody to the existing timesharing arrangements a court is permitted to order. In the absence of statutory authority for a court to order rotating custody, the case law "allowed" rotating custody but, because it was not authorized by Chapter 61 as a permissible timesharing arrangement, the courts applied a presumption that it is not in the best interest of the child and required a party seeking rotating custody to overcome the presumption.

Contrary to the *Mandell* court's view that the legislative history on Section 61.121 offers little insight, House Bill 1421 reflects the Legislature's awareness of the void regarding rotating custody in the statutory authority given to courts in ordering timesharing arrangements and its intent to authorize rotating custody if

the court finds that rotating custody is in the best interest of the child: "Although courts have allowed rotating custody in Florida, this practice is not presently statutorily recognized." *House of Representatives Committee on Family Law and Children Bill Research and Economic Impact Statement*, April 18, 1997, p. 42, subsection c (App. p. 42). The report explains that "[t]he bill also creates s. 61.121 to provide that the court may order rotating custody if the court finds that rotating custody will be in the best interest of the child." *Id*. at 40. The report also expresses that the bill was intended to promote the public policy of the State of Florida to ensure that children have "frequent and continuing contact with both parents after the parents separate or the marriage of the parents is dissolved" and ensuring that both parents are available to spend quality time with their children. *Id*.

Once the Florida Legislature enacted a statute that recognized rotating custody as a permissible timesharing arrangement for children of separated or divorced parents, the rationale for the presumption (the absence of authority to order rotating custody) was eliminated and rotating custody orders became subject to the same standard as the other timesharing arrangements that were statutorily authorized. As this Court has held, "when the reason for any rule of law ceases, the rule should be discarded." *Ripley v. Ewell*, 61 So. 2d 420 (Fla. 1952).

The Legislature's intent to put rotating custody on the same footing as other

timesharing arrangements a court is statutorily authorized to order could not be more clear. In enacting Section 61.121, the Legislature specifically recognized rotating custody as a timesharing arrangement a court was authorized to order, and established the standard for determining rotating custody to be whether it is in the best interest of the child. The Statute does not state that in determining the best interest of the child, the court is required to apply a presumption that rotating custody is *not* in the best interest of the child, and require a party (or both parties) seeking it to overcome such a presumption. Such an interpretation defies common logic and the Legislature's plain intent. It is also contrary to this Court's reasoning in the *Ripley v. Ewell* case:

> The statute preserves the common law only in those cases where it is 'not inconsistent' with the acts of the Legislature. It is not necessary that a statute be in direct *conflict* with the common law before the latter may be superseded, inconsistency being sufficient.

Ripley v. Ewell, 61 So. 2d at 421 (emphasis original).

Indeed, the presumption serves no purpose after Section 61.121 became law in Florida because once rotating custody was recognized by statutory law, the judicial rationale that gave rise to it no longer existed. After Section 61.121 became law, Florida courts were authorized to order timesharing arrangements the court finds to be in the best interest of the child in each case, which may be rotating custody under Section 61.121 if the court finds that rotating custody will be in the best interest of the child, or the designation of a primary residential parent

under Section 61.13(3) if the court finds that that timesharing arrangement is in the best interest of the minor child.

The Mother's argument that Section 61.121 is subject to the judicially-created presumption against rotating custody that is not even remotely mentioned in the statute and is contrary to the clear and unambiguous standard stated in the statute is simply incorrect. If the Legislature intended to "codify" the presumption against rotating custody in Section 61.121, it would have done so in plain language, and it would have established in the statute the standard of proof a party must show in order to overcome the presumption. [21]

Petitioner's citation to *Bazan v. Gambone*, 924 So. 2d 952 (Fla. 3d DCA 2006), as authority for her argument that the presumption against rotating custody survived the enactment of Section 61.121, and her criticism of the Third District's decision below as "glossing over" that case, are misplaced. *See* Initial Brief of Petitioner pp. 10-11 and p. 10, footnote 2. *Bazan* involved a modification of an existing custody order; however, the order under review had been entered in March of 1997, *before* Section 61.121 became law in Florida in July 1997. Accordingly, *Bazan* has no application to a rotating custody order entered after the passage of Section 61.121.[22]

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[21] The District Courts of Appeal have applied different standards a parent must prove to overcome the presumption, including "ameliorating circumstances" and "exceptional circumstances".

[22] Although Section 61.121 was in effect when this action was filed in the trial

Petitioner's reliance on the dissent below is also misplaced. As an initial matter, a dissenting opinion has no precedential effect. *See Greene v. Massey*, 384 So. 2d 24, 27 (Fla. 1980); *Munnerlyn v. Wingster*, 825 So. 2d 481, 483 (Fla. 5th DCA 2002). The dissenting opinion is also unpersuasive because it adopts the rationale of *Mandell v. Mandell*, *supra*, which, as discussed above, was decided based upon a misapplication of a statutory interpretation principle.

The Best Interest of the Child Standard of Section 61.121 Promotes the Public Policy of the State of Florida by Ensuring a Child's Frequent and Continuing Contact with *Both* Parents

The public policy of Florida on custody matters for minor children of separated or divorced parents is to "ensure that each minor child has frequent and continuing contact with both parents . . . and to encourage parents to share the rights and responsibilities, and joys, of childrearing." Section 61.13(2)(b)1, Florida Statutes. The Legislature has mandated that all matters relating to the custody of minor children of separated and divorced parents "shall be determined … in accordance with the best interest of the child . . . ." *Id*. Section 61.121 embodies this public policy by statutorily recognizing rotating custody as a permissible timesharing arrangement in cases where the court finds that rotating

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court, it is no longer the law after the Legislative amendments to Florida Statute Section 61.13, were effective on November 1, 2008. Those amendments completed revised the legislative intent on timesharing arrangements and superseded the prior statutes on the issue, including Section 61.121. Among other things, the amendments removed the terms "primary residential parent" and "secondary residential parent."

custody will be in the best interest of the child.

By enacting a law that expressly authorized courts to order rotating custody, the Legislature gave courts the authority to effectuate the public policy of Florida based upon the individual facts and circumstances of individual cases. The absence of statutory authority to order rotating custody before Section 61.121 became the law in Florida caused courts to struggle with the concept. Courts began to "judicially recognize" it as an option, but because rotating custody was not on the "legislative menu," the courts developed a presumption against it, and allowed it only if a parent was able to "overcome a presumption" that rotating custody is not in a child's best interest (under standards that varied among the District Courts of Appeal that addressed the issue).

After Section 61.121 became law, and the Legislature added rotating custody to the "menu", Florida courts were authorized to order timesharing arrangements the court finds to be in the best interest of the child in each case, which could be rotating custody under Section 61.121 if the court finds that rotating custody will be in the best interest of the child, or the designation of a primary residential parent under Section 61.13(3) if the court finds that that timesharing arrangement is in the best interest of the minor child.

The trial court's erroneous application of an invalid presumption against rotating custody resulted in a final judgment below that *changed* a long-standing,

successful rotating timesharing arrangement that was most certainly in the best interest of the child, and resulted in the designation of the Mother as the primary residential parent and the relegation of the Father to the status of "visitor." The incorrect application of a legislatively overruled presumption against rotating custody *disserved* the best interests of the child, and the result was contrary to the public policy of the State of Florida, the best interests of Ethan Corey, and the best interests of all children whose families are separated by divorce.

In practice, the presumption against rotating custody and the requirement of proving exceptional circumstances to overcome the presumption in order for a court to order a rotating timesharing arrangement actually prevents a court's meaningful ability to order a timesharing plan the court finds to be in the best interest of the child under the circumstances of each case, including the arrangements the parents themselves have operated successfully under, the adjustments they have made in their own lives in order to be able to co-parent their child, the terms of the proposed rotating schedule, and other evidence presented to the court. A "rotating custody" arrangement which involves rotating a child between cities on an annual basis (or even a monthly or weekly basis) is not comparable to the rotating schedule that Ethan had enjoyed: his parents live within a block of each other and the child maintains the same friends, extracurricular activities, and medical professionals; the weekly period coincided with Ethan's

school week and enabled him to spend a full school week and a full weekend with each of his parents on an alternating basis, which avoided disruption during Ethan's school week; the arrangement did not impact Ethan's school because the parents' homes were within walking distance of each other's homes and Ethan's school. R. Vol. VII, p. 72; Vol. II, p. 252. The practical logistics of Ethan having two homes had been worked out in Ethan's best interest - - he has similar belongings at both homes.

Despite the dramatic differences in these scenarios, both are currently subject to the same presumption, eliminating the trial court's ability to order the more natural one week rotating schedule in cases like this one when it was unquestionably in the best interest of the child. *Compare Corey v. Corey*, 29 So. 3d 315 (Fla. 3d DCA 2009) and *Chapman v. Prevatt*, 845 So. 2d 976 (Fla. 4th DCA 2003).

Under Florida Statute Section 61.121, the standard for awarding rotating custody is whether rotating custody is in the best interest of the child. The overwhelming evidence at the trial was Ethan thrived - - and even improved - - under the rotating custody schedule that had been in place for nearly two years at the time of the trial (and well over two years at the time the Final Judgment was entered). In virtually every way conceivable, the unrebutted evidence in the record showed that the continuation of rotating custody was best for Ethan.

It is difficult to conceive of facts that demonstrate more convincingly that rotating custody is in the best interest of a child. Rotating custody was working on all levels - - Ethan was excelling in school, thriving with both parents, enjoying the proximity to both homes, and avoiding disruption and conflict. His academic performance was perfect and his social skills were excellent. His parents agree to consistent rules and discipline. In fact, the parents' communications and co-parenting improved under it. If rotating custody is not in the best interest of the child under the facts of this case, then rotating custody is not appropriate in any case in Florida.

The Legislative amendments to Florida Statute Section 61.13, effective on November 1, 2008, changed the nomenclature, and in doing so, completely revised the legislative intent on timesharing arrangements and superseded the prior statutes on the issue, including Section 61.121. By removing the terms "primary residential parent" and "secondary residential parent," the legislature completely eliminated the old concepts of "custody" and "visitation" that served as the basis for Section 61.121 and the outdated presumption against rotating custody. The old policy suggested children needed a home base, and then a second home they merely visited. New psychological research, based largely on the Attachment Theory (*i.e.*, children of different ages require different contact with each parent), lead the legislature to radically rewrite the law to ensure parenting plans would be

specifically tailored for individual families and what worked for those families, given the enumerated statutory factors that were also revised and expanded.

THE TRIAL COURT'S FINDING THAT THE FATHER FAILED TO PROVE EXCEPTIONAL CIRCUMSTANCES JUSTIFYING AN AWARD OF ROTATING CUSTODY IS NOT AN ISSUE PROPERLY BEFORE THE COURT IN THIS APPEAL

The sole issue on review before this Court is the conflict issue regarding the standard for rotating custody orders under Section 61.121, Florida Statutes. That issue is the only issue included in the Petitioner's Notice to Invoke Discretionary Jurisdiction and the only issue addressed in the single argument in the Initial Brief of Petitioner.[23] Although the second paragraph of the Summary of the Argument in Petitioner's Initial Brief includes a sentence that "the trial court did not err when it found that the Father had failed to show exceptional circumstances justifying an award of rotating custody as being in Ethan's best interest," (Petitioner's Brief, p. 13), this issue is not briefed in the Initial Brief of Petitioner. The only other reference to the trial court's finding on this issue is the *incorrect* statement on page 20 of the Petitioner's Brief that the Third District "[acknowledged] that the Father failed to show exceptional circumstances justifying an award of rotating custody" followed by the Petitioner's bare conclusion that the trial court did not abuse its discretion.

[23] Similarly, Petitioner's statement of the Standard of Review only addresses the standard for resolving the conflict issue. It does not indicate that Petitioner seeks review of any of the trial court's findings.

The Father's appeal to the Third District included an assignment of error with respect to the trial court's application of an "exceptional circumstances" standard to overcoming the presumption against rotating custody (versus the "ameliorating circumstances" standard found in Third District cases decided before the 1997 enactment of Section 61.121). The Father also assigned an error with respect to the trial court's factual finding that the Father did not prove sufficient facts to overcome the presumption against rotating custody (Amended Initial Brief of Appellant, Argument II, pages 36-38). Significantly, however, the Third District did not rule on this issue in the decision under review. The Court did not reach the issue because of its holding that *there was no presumption to overcom*e:

> It necessarily follows that a parent seeking rotating custody need not establish "exceptional circumstances" to overcome a presumption that no longer exists. The standard is simply the best interest of the child as set forth in section 61.13, Florida Statutes (2007).

Corey v. Corey, 29 So. 3d at 320.

For these reasons, this issue is neither ripe nor appropriate for review by this Court. Moreover, since Petitioner did not include the issue in her Notice to Invoke Discretionary Jurisdiction; and the issue is not briefed in Petitioner's Initial Brief; and the issue is not dispositive of the case in this Court, the issue is not properly before the Court in this appeal.

This issue is moot if the Court affirms the Third District's holding that the standard for ordering rotating custody under Section 61.121 is

"the best interest of the child" without the addition of the two extra steps advocated by Petitioner (adding a presumption against rotating custody and requiring the party to *overcome* that presumption). However, even assuming *arguendo* that the issue had been properly raised in this appeal, and this Court elects to exercise its discretion to extend its discretionary conflict review to decide this supplemental, non-conflict issue, the parties would have to brief the standard or "burden" the party seeking rotating custody would have to prove in order to overcome the "presumption" (including the "exceptional circumstances" versus the "ameliorating circumstances standards) because the District Courts of Appeal have applied different levels of proof.

Moreover, absent the trial court's findings in favor of the Mother under the factors in subsections 61.13(d) and (m), Florida Statutes, which the District Court found were not supported by competent, substantial evidence, trial court's factual findings on the factors in Section 61.13 place the Mother and Father in equal standing. On remand, the trial court will have to readdress the timesharing order in the Final Judgment and Order on Timesharing and Parental Responsibility.

Even if the issue was properly before the Court, the Mother's argument must fail. This case differs from the rotating custody cases that found that the parent seeking rotating custody had not overcome the presumption against it. In this case, the trial court ended a two year and three month rotating custody arrangement that

was proven at trial to be in the best interest of the child. The trial court exacerbated the incorrect legal ruling on the presumption issue by ignoring the fact that unlike the cases relied on by the Court, the rotating custody arrangement for Ethan was not a judge-created rotating schedule, but rather a successful, long-standing timesharing arrangement under which the child was "thriving" and "could not be doing better." Even the Mother testified that the child could not be doing better. Thus, the trial judge chose to ignore an undisputed, two-year plus track record of very successful custody rotation in favor of the Mother's subjective *opinion* that the child would be better with her. The determination of the presumption upon the self-serving wishes of a litigant, particularly one that is contrary to the best interest of the child in a family law case, turns the law on its head, and neuters the role of the trial judge.

This case can be affirmed without even addressing the issue of the existence of a presumption under Section 61.121. The evidence presented at the trial was not speculation based on how the parents *believed* an alternating weeks rotating chedule *would* impact the child. The evidence was based on how the alternating weeks schedule *had worked so successfully for the child* for two years. Even without reference to Section 61.121, all of the competent, substantial evidence at trial was that rotating custody was in the best interest of this child, and any presumption against rotating custody had been rebutted as a matter of law by the very successful two year plus history of rotating custody which both parents

endorsed as beneficial to the child. That successful shared custody arrangement was upended by the by the trial court's final judgment. The trial court's finding that there was a lack of substantial, competent evidence to order rotating custody was an abuse of discretion.

The trial court did not make a determination of whether the evidence at trial supported a finding that rotating custody is in Ethan's best interest or whether the circumstances of this case ameliorate some of the perceived undesirable effects of a rotating custody arrangement. Instead, the trial court applied the "exceptional circumstances" standard to the Father's request for rotating custody, citing the Fourth District Court of Appeal's decision in *Mancuso v. Mancuso*, 789 So. 2d 1249 (Fla. 4th DCA 2001), as authority for that standard. The trial court then reviewed the factors identified by a 1995 decision of the Second District Court of Appeals in *Langford v. Ortiz*, 654 So. 2d 1237 (Fla. 2d DCA 1995), for a trial court to consider "in determining whether the particular circumstances of a case have overcome the presumption against rotating custody," and found that the only factor supporting rotating custody in this case is the fact that both parents live in close proximity to each other. The trial court then concluded that the Father "failed to prove by competent, substantial evidence the existence of special circumstances to overcome the presumption against rotating custody." R. Vol. II, pp. 249-250,

paragraph F (1).[24]

The standard applied by the trial court is contrary to the standard the Third District has applied to rotating custody orders. In *Quinn v. Settel*, 682 So. 2d 617 (Fla. 3d DCA 1996), which was decided prior to the enactment of Section 61.121, this Court recognized that rotating custody arrangements are strongly disfavored, but stated that "[t]he law is clear that certain particular circumstances will tend to ameliorate some of the perceived undesirable effects of such arrangements." *Quinn v. Settel*, 682 So. 2d at 619. The Third District also reiterated in that case that "[t]he only proper concern in a custody case is the child's best interests." *Id*.

Finally, even if this Court accepts the "exceptional circumstances" standard for rotating custody awards after the enactment of Section 61.121, the Father has proved beyond any doubt that the circumstances of this case present an exceptional case for rotating custody and that any perceived undesirable effects of such an arrangement were ameliorated by the successful alternating weeks schedule the child had thrived and excelled under for two years. The one week alternating schedule was also reasonable and coincided with the child's school weeks and the child liked the schedule, which were two additional factors identified by *Langford v. Ortiz, supra,* which have been found to overcome the presumption against

[24] The trial court found in the Final Judgment that the Father was to have "expanded time sharing", but then entered a Time Sharing Order that granted the Father a traditional time sharing schedule of alternating weekends with one overnight during the intervening week. R. Vol. II, p. 256; Vol. II, pp, 259-274; 277-281.

rotating custody, but which the trial court ignored. *See also Gerscovich v. Gerscovich*, 406 So. 2d 1150 (Fla. 5th DCA 1981). This case is the *perfect* case for a rotating custody arrangement.

CONCLUSION

Section 61.121, Florida Statutes, adopted in July 1997, statutorily recognized rotating custody as a timesharing arrangement a court is authorized to order if the court finds that rotating custody is in the best interest of the child. The presumption against rotating custody that developed in case law before rotating custody was statutorily permitted does not apply to rotating custody orders decided under Section 61.121. Accordingly, the Third District correctly held that the best interest of the child standard applies to rotating custody determinations under Florida Statute Section 61.121, and that the prior common law presumption against rotating custody no longer exists.

REQUEST FOR RELIEF

The Father, Michael James Corey, respectfully requests that this Court hold that Section 61.121, Florida Statutes, allows a court to order rotating custody if the court finds that rotating custody will be in the best interest of the child, and that the judicially–created presumption that rotating custody is not in the best interest of the child does not apply to Section 61.121; affirm the decision of the Third District Court of Appeal below; and reverse the conflicting decisions in *Cooper v. Gress*,

854 So. 2d 262 (Fla. 1st DCA 2003); *Mandell v. Mandell*, 741 So. 2d 617 (Fla. 2d DCA 1999); *Chapman v. Prevatt*, 845 So. 2d 976 (Fla. 4th DCA 2003); and *Mancuso v. Mancuso*, 789 So. 2d 1249 (Fla. 4th DCA 2001). The Father also requests that the Court remand this case to the trial court to make a determination regarding timesharing and parental responsibility based upon the best interest of the child in accordance with the Third District's decision.

Alternatively, in the unlikely event this Court holds that a presumption against rotating custody applies to Section 61.121, the Father requests that the Court hold that the substantial, competent evidence at trial was more than sufficient to overcome any presumption against rotating custody, and remand the case to the trial court to make a timesharing order consistent with that finding and the finding of the Third District Court of Appeal that there was no competent, substantial evidence to support the trial court's findings in favor of the Mother under subsections 61.13(3)(d) and (m), Florida Statutes.

If this Court holds that the presumption against rotating custody is included in Section 61.121, and that the competent, substantial evidence at trial does not establish that such presumption has been overcome, the Father requests that the Court remand the case to the trial court with instructions on the "weight of evidence" necessary to overcome the presumption, and direct the trial court to make a timesharing order consistent with that directive and the finding of the Third

District Court of Appeal that there was no competent, substantial evidence to support the trial court's findings in favor of the Mother under subsections 61.13(3)(d) and (m); or to remand the case to the Third District to determine the correct standard of evidence a parent must prove to overcome the presumption.

Respectfully submitted,

FOWLER WHITE BURNETT, P.A.
Attorneys for Michael James Corey
901 Phillips Point West
777 South Flagler Drive
West Palm Beach, Florida 33401
Telephone: (561) 472-2326
Facsimile: (561) 802-9976

By: */s/ Kathy M. Klock*
Kathy M. Klock
Florida Bar Number 348171
June G. Hoffman
Florida Bar Number 050120
Greg A. Lewen
Florida Bar Number 47422

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by mail and by electronic mail to Roger J. Schindler, Esquire, and Anthony Vincent Falzon, Esquire, Simon, Schindler & Sandberg, L.L.P., Attorneys for Petitioner Erica Lynn Corey, 2650 Biscayne Boulevard, Miami, Florida 33137, this 8th day of July, 2010.

/s/ Kathy M. Klock
Kathy M. Klock

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the format requirements of the Rules of Appellate Procedure. This Initial Brief was prepared using Times New Roman, 14 point font.

/s/ Kathy M. Klock
Kathy M. Klock