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

---

AMENDED SUPPLEMENTAL 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

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

ISSUES PRESENTED

I. WHAT IS THE EFFECT, IF ANY, ON THE ISSUES IN THIS CASE, OF THE REPEAL OF 61.121 AND THE ENACTMENT OF CHAPTER 2008-61, SECTION 1, *ET SEQ.* AT 789, LAWS OF FLORIDA, WHICH TOOK EFFECT ON OCTOBER 1, 2008?

II. IF THIS COURT WERE TO REMAND TO THE TRIAL COURT TO RE-EVALUATE THE ISSUES REGARDING THE ARRANGEMENTS FOR THE CHILD, WHAT STATUTE WOULD THE TRIAL COURT APPLY IN MAKING ITS DECISION?

INTRODUCTION 1

SUMMARY OF ARGUMENT 3

ARGUMENT

I. THE ENACTMENT OF CHAPTER 2008-61, SECTION 1, *ET SEQ.* AT 789, LAWS OF FLORIDA, WHICH TOOK EFFECT ON OCTOBER 1, 2008, AND THE ENACTMENT OF CHAPTER 2009-180, WHICH TOOK EFFECT ON OCTOBER 1, 2009, DO NOT AFFECT THIS COURT'S DECISION BECAUSE ALL THREE VERSIONS OF THE STATUTE AUTHORIZE A COURT TO ORDER THE ALTERNATING WEEKS TIMESHARING SCHEDULE THE FATHER REQUESTED. THE 2008 AND 2009 REVISIONS TO CHAPTER 61 WHICH ARE SUBSTANTIVE AND NOT PROCEDURAL CHANGES IN THE LAW ARE NOT APPLIED RETROACTIVELY ABSENT CONTRARY STATUTORY LANGUAGE OR LEGISLATIVE INTENT WHICH ARE NOT PRESENT IN THE STATUTES 10

II. IF THIS COURT REMANDS TO THE TRIAL COURT TO RE-EVALUATE THE ISSUES REGARDING THE ARRANGEMENTS FOR THE CHILD, THE TRIAL COURT WOULD APPLY THE STATUTES IN EFFECT AT THE TIME THE PETITION FOR DISSOLUTION WAS FILED AND AT THE TIME THE FINAL JUDGMENT AND TIMESHARING ORDER WERE RENDERED

EVEN IF THIS COURT DETERMINES THAT THE CURRENT VERSION OF CHAPTER 61 APPLIES ON A REMAND TO THE TRIAL COURT, THE OUTCOME WILL BE THE SAME BECAUSE THE ALTERNATING WEEKS TIMESHARING SCHEDULE THE FATHER REQUESTED IS STAUTORILY AUTHORIZED UNDER ALL THREE VERSIONS OF CHAPTER 61, AND THE STANDARD FOR THE TRIAL COURT'S DETERMINATION OF THE FATHER'S REQUEST FOR AN ALTERNATING WEEKS SCHEDULE IS THE SAME (THE BEST INTEREST OF THE CHILD) UNDER ALL THREE VERSIONS OF THE STATUTE ………………………………………… 13

CERTIFICATE OF SERVICE ………………………………………… 18

CERTIFICATE OF COMPLIANCE ………………………………………… 18

TABLE OF CITATIONS

Cases Page(s)

Corey v. Corey,
29 So. 3d 315, 318 (Fla. 3rd DCA 2009) ………………………… 1, 2, 7, 9

Hassen v. State Farm Ins. Co.,
674 So. 2d 106, 109 (Fla. 1996) ……………………………………... 13

Menendez v. Progressive Express Insurance Co., Inc.,
35 So. 3d 873 (Fla. 2010) ……………..………………………………… 11

Metropolitan Dade County v. Chase Federal Housing Corporation,
737 So. 2d 494 (Fla. 1999) ………………………………….……..…… 12

Murthy v. N. Sinha Corp.,
644 So. 2d 983 (Fla. 1994) ………………………………………………. 5

Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Association One, Inc.,
986 So. 2d 1279 (Fla. 2008) ……………………………….………… 12

Smiley v. State of Florida,
966 So. 2d 330 (Fla. 2007) ……………..…………………………….. 10

Watson v. Holland,
20 So. 2d 388 (Fla. 1944), *cert. denied* 325 U.S. 839 (1945) ……………. 5

Statutes Page(s)

Chapter 61, Florida Statutes ……………………………..………………… *passim*

Chapter 2008-61, Laws of Fla. ………………………………….…1, 3, 5, 6, 10

Chapter 2009-180, Laws of Fla. ………………………………….… 2, 3, 10

Florida Statute Section 61.121 ………………………………………. 1, 4, 6, 11

Florida Statute Section 61.121 (1997) ……………………………………… *passim*

Florida Statute Section 61.13 …………………………….……… 3, 6, 7, 11, 13, 14

Florida Statute Section 61.13 (2006) ……………………………….. 1, 2, 10, 15

Florida Statute Section 61.13 (2009) …………………………………………… 16

Florida Statute Section 61.13(2)(a)(b)1 (2006) ………………………………….. 7

Florida Statute Section 61.13(2)(b)2.b. ………………………….………... 11

Florida Statute Section 61.13(2)(c) 1 …….…………………………………. 5, 16

Florida Statute Section 61.13(2)(c)1 (2008) ……………………………….… 7

Florida Statute Section 61.13(2)(c)1 (2009) …………………………..… 2, 5, 7, 11

Florida Statute Section 61.13(3)(d) ………………………………………… 1, 6, 9

Florida Statute Section 61.13(3)(m) …………………………………………1, 6, 9

Florida Statute Section 61.13001 ……………………………………..…… 12

Florida Statute Section 61.13001(11) …………………………………..…. 13

Other Page(s)

Florida Senate Bill Analysis and Fiscal
Impact Statement, April 21, 2009 ……………………....….….………….. 5, 11

Staff Analysis, HB 1075 (April 17, 2008) …………………………………… 4

Committee Substitute for Senate Bill No. 2532 ……………………….………… 4

INTRODUCTION[1]

At the time of the filing of the Petition for Dissolution of Marriage (December 15, 2004) through the date that the Final Judgment and the Timesharing Order were rendered by the Trial Court (May 1, 2008 and May 20, 2008, respectively), the governing Florida statutes relating to child custody and timesharing issues were Florida Statute §61.13 (2006) and Florida Statute §61.121 (1997). The same statutes were in effect on May 30, 2008, when the Father filed his appeal in the Third District Court of Appeal ("Third District") from the Final Judgment and Timesharing Order entered by the Trial Court. The Third District held oral argument on April 13, 2009, and the Third District's Opinion was rendered on December 30, 2009.[2]

Chapter 2008-61, section 1, *et seq* at 789, Laws of Fla., became effective on October 1, 2008, after the oral argument below and before the Third District's

---

[1] Petitioner, Erica Lynn Corey, is the mother and former wife, and is referred to in this Supplemental 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". The parties' son, Ethan James Corey, is referred to as "the 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.").

[2] The Third District held that there is no presumption against rotating custody under Section 61.121. The Third District also found that there was no competent, substantial evidence to support the Trial Court's two factual findings in favor of the Mother under Florida Statute §61.13(3)(d) and (m). *Corey v. Corey,* 29 So. 3d 315 (Fla. 3d DCA 2009).

Opinion was issued. Chapter 2009-180, Laws of Fla., which further revised Chapter 61, became law on October 1, 2009.

The Third District's Opinion was decided under Florida Statute §61.121 (1997) and Florida Statute §61.13 (2006). The Opinion did not take into account the changes to Chapter 61 made by the 2008 legislative action, and neither the Mother nor the Father argued that the revised statutes applied to the Third District's decision.[3] *Corey v. Corey,* 29 So. 3d 315 (Fla. 3d DCA 2009).

The 2009 statutory changes to Chapter 61 became law after the Third District's Opinion was filed. Among other things, the 2009 version of Chapter 61 clarified that there is no presumption for or against any specific timesharing schedule. Section 61.13(2)(c)1 (2009).

The Mother filed her Petition for Discretionary Review in this Court on January 28, 2010. The Third District issued its Mandate on April 9, 2010, following its disposition of the Mother's Motion for Rehearing on the Order on Attorney's Fees.

---

[3] This information is provided for background purposes only. The Father recognizes that the Court's determination as to the version of Chapter 61 that would apply to this case on any remand to the Trial Court is not dependent on whether the Parties raised the issue below.

SUMMARY OF ARGUMENT

Chapter 2008-61, effective October 1, 2008, and Chapter 2009-180, effective October 1, 2009, made substantive and non-substantive changes to the law with respect to time-sharing and access with minor children. The legislature did not express in the revisions to Section 61.13, whether the revisions applied retrospectively. There is a presumption that the substantive revisions do not apply retrospectively, and there is nothing in the language of the statute or the legislative history that evinces a contrary intent.

The 2008 and 2009 substantive revisions to Chapter 61 do not alter the result in this appeal because while they changed the nomenclature for the alternating weeks timesharing arrangement requested by the Father, they did not change the statutory authority of a court to order the alternating weeks timesharing schedule. The 2009 revisions clarified that there is not presumption for or against any specific timesharing schedule, which is consistent with the Third District's decision below. Thus, the outcome of this appeal, including the outcome if the Court remands to the Trial Court to re-evaluate the issues regarding the arrangements for the child, will be the same regardless of whether this Court holds that the 2008 and 2009 revisions to Chapter 61 of the Florida Statutes do not apply retrospectively or that the revisions do apply retrospectively.

The alternating weeks timesharing schedule the Father requested was statutorily authorized under all three versions of Chapter 61, Florida Statutes. Under every version, the "best interest of the child" standard applies to the Father's request in the Trial Court for an alternating weeks timesharing schedule for the child, and there is no presumption against this timesharing schedule under any one of the three versions of Chapter 61. The only differences between the three versions of Chapter 61 as they relate to an alternating weeks schedule is the nomenclature used to describe the arrangement. The version of Chapter 61 that was in effect in 2007 used the terminology "rotating custody" in Section 61.121. The Legislature removed the terms "custody" and repealed Section 61.121 in the 2008 revisions to Chapter 61 in favor of a statutory framework that fosters the involvement of both parents in the childrearing and in recognition of the increased involvement of fathers in the childrearing process. Staff Analysis, HB 1075 (April 17, 2008), and replaced outdated and negative nomenclature with terms such as "timesharing plans" and "parenting plans." The legislation removed the terms "custodial parent", "noncustodial parent", "custody order", and "visitation order" because the terms were outdated and negative.[4]

---

[4] The following excerpt of the title of the 2008 bill published in the Committee Substitute for Senate Bill No. 2532 provides a helpful summary of the 2008 legislation that are relevant to this appeal: "[a]n act relating to child custody and support; providing a directive to the Division of Statutory Revision to retitle ch. 61,

To the extent that there was *any* doubt that the judicially created presumption against rotating custody no longer existed after the legislature enacted statutes that authorized courts to order rotating custody under any nomenclature if it was in the best interest of a child, the doubt was forever removed by the legislature's express language in Section 61.13(2)(c)1, as amended effective October 1, 2009, when the legislature clarified that "[t]here is no presumption . . . for or against any specific time-sharing schedule when creating or modifying the parenting plan of the child." Fla. Stat. §61.13(2)(c)1 (2009).[5] This clarification sheds light on the legislative intent that no presumption against rotating custody applied to a court's determination on ordering such a timesharing arrangement under Section 61.121 (1997) and the 2008 revisions to Chapter 61. *See Murthy v. N. Sinha Corp.,* 644 So. 2d 983 (Fla. 1994); *Watson v. Holland,* 20 So. 2d 388 (Fla. 1944), *cert. denied* 325 U.S. 839 (1945).

F.S.; amending s. 61.046, F.S.; defining the terms "parenting plan," "parenting plan recommendation," and "time-sharing schedule"; deleting definitions of the terms "custodial parent" and "noncustodial parent"; amending ss. 61.052, 61.09, and 61.10, F.S.; conforming provisions to changes in terminology; repealing s. 61.121, F.S., relating to rotating custody; amending s. 61.122, F.S.; conforming provisions to changes in terminology; . . . revising provisions relating to development of a parenting plan; amending s. 61.13001, F.S.; conforming provisions to changes in terminology; deleting obsolete definitions; amending s. 61.13002, F.S.; . . . ."

[5] The legislative history to the 2009 changes to Chapter 61 explains that the bill "[a]lso clarifies that there is no presumption for or against a particular time-sharing schedule in a parenting plan, …". Florida Senate Bill Analysis and Fiscal Impact Statement, April 21, 2009 (Summary, p. 1).

Section 61.13, as amended, codifies the gradual shift in public policy away from concepts of "custody" and "visitation"; to having a "primary" and "secondary" residential parent; to now having parenting without labels. While the statutory revisions expand the criteria for consideration of best interests and the elimination of Section 61.121 shows an intent to eliminate any confusion of when rotating custody can be awarded, there was no presumption against rotating custody under Section 61.121 (1997) (which was repealed as part of the 2008 revisions to Chapter 61), and there is no presumption against rotating custody under the current version of Chapter 61.

All of the competent, substantial evidence at trial was that the child thrived in every respect and could not be doing better under the alternating weeks schedule the parents had in place for their child for the two plus year period of time prior to the Final Judgment. The evidence conclusively established that the alternating weeks timesharing schedule was in the best interest of the child, but the Trial Court denied the Father's request based upon the Court's belief that the long-standing presumption against rotating custody that developed in the case law in the absence of statutory authority to order rotating custody applied to Section 61.121. [6] There

[6] The Trial Court designated the Mother as the primary residential parent based on two findings the Court made in favor of the Mother under Florida Statute §§61.13(3)(d) and (m). The Third District Court of Appeal held that there was no competent, substantial evidence to support the two findings the Trial Court made in

was no competent, substantial evidence that any timesharing schedule other than the alternating weeks timesharing schedule was in the best interest of the child.[7]

---

favor of the Mother under *Corey v. Corey*, 29 So. 3d 315, 320 (Fla. 3rd DCA 2009). The Mother did not appeal that part of the Third District's decision.

[7] This footnote addresses the arguments in Petitioner's Supplemental Brief that are extraneous to the issues the Court directed the Parties to brief. Respondent feels that it is necessary to respond to them, and does so only in this footnote so that the main content of the brief is limited to the questions presented by the Court.

Contrary to the statement in footnote 1, page 3, of Petitioner's Supplemental Brief, the Father's counsel did not acknowledge to the Trial Court that the Timesharing Order granted the Father substantially expanded visitation rights. The excerpt cited by Petitioner is an incomplete sentence that was interrupted by the Petitioner's counsel at the hearing when the Father's attorney was attempting to explain to the Trial Court Judge that he had orally announced that he would order expanded timesharing but that the Order prepared by the Mother's attorney did not actually give the Father substantially expanded timesharing. R. Vol. III, p. 6, Lines 7-11. As the record reflects, when the Father's attorney was able to continue the statement, she explained that the timesharing schedule in the proposed Order submitted by the Mother's attorney was the exact number of overnights as a "traditional schedule" with an additional visit until 8:30 p.m. on a night during the interim week between his weekend visits (the short evening visit was subsequently changed to an overnight visit). R. Vol. III, p. 12; Line 10 through p. 15, Line 9.

Petitioner's belief that the loss of two days of "visitation" every two weeks is insignificant (Supplemental Brief of Petitioner, p. 3) reflects the Petitioner's lack of understanding of the importance of the roles of both parents in the care, education, and development of a child - - roles that are so fundamental and so important to the welfare of a child that the public policy of Florida specifically recognizes and seeks to protect them in Chapter 61, Florida Statutes. Each of the three versions of Section 61.13 that are the subject of the Supplemental Briefs requested by this Court provides that "[i]t is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after they separate or after the marriage of the parties is dissolved and to encourage parents to share the rights, responsibilities, and joys, of childrearing." Section 61.13(2)(a)(b)1 (2006); Section 61.13(2)(c)1 (2008); Section 61.13(2)(c)1 (2009).

Under each of the three versions of Chapter 61 that were in effect during the pendency of the Trial Court action and the appeals (2006 version, the 2008 version, and the 2009 version of Chapter 61), the primary consideration for determining a timesharing schedule is the "best interest of the child," and an alternating weeks timesharing schedule was authorized under all three versions of the statute if the court finds the arrangement to be in the best interest of the child. All of the competent, substantial evidence in the Trial Court demonstrated that the alternating weeks timesharing schedule that had been so very successful for the child for the two plus years prior to the Final Judgment was in his best interest, and the continuation of that timesharing schedule is appropriate under all three versions of

---

[footnote 7 continued]
Two days every two weeks is 54 days per year, which is a significant amount of time for a child to lose with a parent. Moreover, the "visitation" schedule ordered by the Trial Court changed the child's orderly and stable one week schedule with each of his two dedicated parents to a fractured schedule which forces him to change homes every week during his school week in order to have "visitation" with his father, including a Thursday night "visit" in the middle of the week between the weekend visits when the child is with his father for one evening and then returns to school the next morning and then goes to the Mother's home for a full week before he spends time with his father again. Under the facts of this case and any other case in Florida, the termination of the successful alternating weeks schedule disserved the interests of the child and violated the public policy of the State of Florida causing additional unnecessary disruptions in the child's schedule in the middle of every week, and by relegating the role of the child's Father to a "visitor." This issue is addressed in the Reply Brief filed by the Father in the Third District appeal. R. Vol. 9, Tab C, pp. 1-4.

Chapter 61 that were in effect between the date the Petition for Dissolution was filed and the present date.

[footnote 7 continued]

Petitioner's argument that the fractured time schedule ordered by the Trial Court was appropriate because of the Trial Court's two findings in favor of the Mother under Section 61.13(d) and (m) is spurious because the Third District Court of Appeal found that there was no competent, substantial evidence to support either determination. *Corey v. Corey,* 29 So. 3d at 320.

Petitioner misstates in her Supplemental Brief that the Father was not available to pick up his son timely, referring to an arrangement under which the Mother would take the child home after school and the Father would pick him up from the Mother's home (Supp. Br. of Pet., p. 5); however, this schedule had *never* been in effect as of the time of trial. At all times prior to *and during* the trial, the Mother and Father each took care of the child during their respective weeks of timesharing. The child attended the after care program at his school, and each parent picked him up from the after care program. The alternating weeks timesharing schedule was, as the Trial Court found, stable. The simple transition once a week meant that the child had minimal adjustments to make. The Mother raised for the first time at trial that she would like to take Ethan out of the aftercare program and bring him to her home during the short period of time between the time she gets off work and the time the Father picks the child up at aftercare on school days during the weeks he is staying with his Father, which added new transitions the Mother wanted to interject. While the Father believed that it is in Ethan's best interest to enjoy the after care activities with his friends with the attendant benefits of socialization and supervised homework (the Mother also testified that Ethan enjoys after care, R. Vol. V, p. 154), the Father agreed to accommodate the Mother's request if she wanted to spend the extra time with the child. R. Vol. V, p. 77-79. It is not reasonable or fair for the Mother to attempt to use that accommodation as additional fluctuations that may cause instability that are not in a child's best interests. Most importantly, this schedule *had never been in effect* and there was no evidence that, if it was, it would have an adverse impact on the child. This issue is addressed in the Initial Brief and Reply Brief filed by the Father in the Third District Court of Appeal (R. Vol. 9, Tab A, pp. 46-50; R. Vol. 9, Tab C, pp. 1-4) and will not be further discussed here.

ARGUMENT

I. THE ENACTMENT OF CHAPTER 2008-61, SECTION 1, *ET. SEQ.* AT 789, LAWS OF FLORIDA, WHICH TOOK EFFECT ON OCTOBER 1, 2008, AND THE ENACTMENT OF CHAPTER 2009-180, WHICH TOOK EFFECT ON OCTOBER 1, 2009, DO NOT AFFECT THIS COURT'S DECISION BECAUSE ALL THREE VERSIONS OF THE STATUTE AUTHORIZE A COURT TO ORDER THE ALTERNATING WEEKS TIMESHARING SCHEDULE THE FATHER REQUESTED. THE 2008 AND 2009 REVISIONS TO CHAPTER 61 WHICH ARE SUBSTANTIVE CHANGES IN THE LAW WOULD NOT APPLY RETROACTIVELY ABSENT CONTRARY STATUTORY LANGUAGE OR LEGISLATIVE INTENT WHICH ARE NOT PRESENT IN THE STATUTES

Chapter 2008-61, effective October 1, 2008, and Chapter 2009-180, effective October 1, 2009, made substantive and non-substantive changes to Florida law on the time-sharing arrangements for a child and parental responsibility.[8] Among other things, the 2008 legislation expanded the arrangements a court was authorized to order from the limited alternatives of designating a primary residential parent under Fla. Stat. §61.13 (2006) *or* ordering rotating custody under §61.121 (1997), to giving the court authority to create or approve a "parenting plan" with no limitation on timesharing arrangements, with

[8] The threshold analysis of whether a change in a statute applies retrospectively or prospectively is whether the change is substantive or procedural or remedial. If the change is procedural or remedial, the general rule against retroactive application operation of the statute does not apply. *Smiley v. State of Florida*, 966 So. 2d 330 (Fla. 2007).

the court's decision to be based on the best interest of the child.[9] The legislature also deleted the terms "custodial parent", "non-custodial parent", and "primary residential parent", and replaced them with the terms and concepts of "parent", "obligor", "obligee", "parenting plan" and "timesharing schedule". The 2008 legislation repealed Section 61.121 because a rotating custody timesharing schedule was subsumed in the wide universe of timesharing schedules and parenting plans a court was now permitted to create (or approve in cases where both parents agree on a parenting plan) based upon the best interest of the child. The 2009 revisions to Chapter 61 added express language that "[t]here is no presumption . . . for or against any specific time-sharing schedule when creating or modifying the parenting plan of the child." Section 61.13(2)(c)1, Fla. Stat. (2009). The legislative history to the 2009 statutory changes to Chapter 61 explains that this language was added to "[*clarify]* that there is no presumption for or against a particular time-sharing arrangement." Florida Senate Bill Analysis and Fiscal Impact Statement, April 21, 2009 (Summary, p. 1)(emphasis added).

The 2008 and 2009 changes to Section 61.13 do not address whether the revisions apply retrospectively; therefore, the revisions which affect substantive rights are presumed to apply prospectively. *Menendez v. Progressive Express*

[9] The statute also gave courts the authority to give one parent "sole parental authority" if the circumstances of the case dictated it. Fla. Stat. §61.13(2)(b)2.b.

Insurance Co., Inc., 35 So. 3d 873 (Fla. 2010); *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Association One, Inc.*, 986 So. 2d 1279 (Fla. 2008); *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494 (Fla. 1999). As this Court has held in numerous cases, "[t]he general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." *Id.* at 499 (citations omitted). Stated differently, "[i]f a statute attaches new legal consequences to events completed before its enactment, the courts will not apply the statute to pending cases, absent clear legislative intent favoring retroactive application." *Id.* at 499 (citations omitted).

The presumption against retroactive application of a statute is rebuttable by a showing of clear evidence of legislative intent to the contrary, and such legislative intent is determined by an analysis of the terms of the statute and its purpose. *Metropolitan Dade County*, 737 So. 2d at 500. However, "[t]he mere fact that retroactive application would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity." *Id.*, 737 So. 2d at 500 (citations omitted). Nor does the effective date of the statute rebut the presumption against retroactivity. *Id.*

The Legislature *did* express its intention that the 2009 legislative changes to the section of Chapter 61 that addresses relocation with a child (Section 61.13001)

by including a sub-section entitled "Applicability" that specifically provides for its retroactive application in certain circumstances. *See* Section 61.13001(11), Fla. Stat. (2009). The fact that the legislature expressly stated its intent concerning the retroactive application of its 2009 revisions to a different section of Chapter 61 evidences an *absence* of legislative intent for the substantive changes to other section of Chapter 61, including Section 61.13, to apply retroactively. *See Hassen v. State Farm Ins. Co.,* 674 So. 2d 106, 109 (Fla. 1996).

II. IF THIS COURT REMANDS TO THE TRIAL COURT TO RE-EVALUATE THE ISSUES REGARDING THE ARRANGEMENTS FOR THE CHILD, THE TRIAL COURT WOULD APPLY THE STATUTES IN EFFECT AT THE TIME THE PETITION FOR DISSOLUTION WAS FILED AND AT THE TIME THE FINAL JUDGMENT AND TIMESHARING ORDER WERE RENDERED. EVEN IF THIS COURT DETERMINES THAT THE CURRENT VERSION OF CHAPTER 61 APPLIES ON A REMAND TO THE TRIAL COURT, THE OUTCOME WILL BE THE SAME BECAUSE THE ALTERNATING WEEKS TIMESHARING SCHEDULE THE FATHER REQUESTED IS STAUTORILY AUTHORIZED UNDER ALL THREE VERSIONS OF CHAPTER 61, AND THE STANDARD FOR THE TRIAL COURT'S DETERMINATION OF THE FATHER'S REQUEST FOR AN ALTERNATING WEEKS SCHEDULE IS THE SAME (THE BEST INTEREST OF THE CHILD) UNDER ALL THREE VERSIONS OF THE STATUTE

As a threshold matter, it is not necessary or warranted on the record presented for this Court to remand to the Trial Court to re-evaluate the issues

regarding the arrangements for the child. If this Court agrees with the Third District's judgment that there is no presumption against rotating custody as a matter of law, then the uncontroverted evidence and the Trial Court's remaining legally sufficient (and unchallenged) factual findings of record require remand for entry of a timesharing order that reinstates the parties' rotating custody arrangement that was in place prior to the Final Judgment. No further fact-finding or retrial is required, thus obviating the need to determine what statute would apply on remand. Under these circumstances, whether this Court affirms the Third District's judgment as a matter of law and remands for entry of judgment for rotating timesharing, or remands the case for reevaluation under any of the three versions of Section 61.13, the ultimate result is the same - - reinstatement of the alternating timesharing arrangement that was so successfully in effect for the child as acknowledged by the Trial Court until entry of the Trial Court's Final Judgment.

Although it does not necessarily obviate the need for the Court to address the issue of the applicability of the 2008 and 2009 legislative changes to Chapter 61, the Father believes that the result on remand to the Trial Court would be the same under the statutes that were in effect on the dates the Petition for Dissolution was filed and the Final Judgment and Timesharing Order and the current versions of the Statutes. As discussed above, although the substantive changes to Chapter 61 effected by the 2008 and 2009 statutory revisions do not apply retrospectively

because the legislature did not provide for retroactive application or otherwise evince an intention that the changes in the law apply retroactively, the statutory changes did not affect a trial court's authority to order the alternating weeks timesharing schedule the Father requested. It simply changed the nomenclature from "rotating custody" to a "timesharing schedule" and "parenting plan." The analysis follows:

- Section 61.121 (1997) and Section 61.13 (2006) require the Trial Court to make a timesharing determination that is in the best interest of the child under the evidence presented to the Court, including ordering rotating custody if the Court finds that rotating custody is in the child's best interest (and without the application of a presumption against rotating custody that does not exist in or apply to Section 61.121 (1997)). All of the substantial, competent evidence at trial was that the alternating weeks timesharing schedule that was in place for the two years and four months before the Final Judgment was entered was in the best interest of Ethan Corey. The fact that rotating custody is in the best interest of the child is not based on hypothetical schedules or facts - - it is based on the actual successful history of the alternating weeks schedule that was in place for over two years before the Final Judgment. The consistent and uncontroverted testimony of the Mother, the Father, the child's teacher, and the child's grandmother was

that the child was thriving in every respect and could not be doing better. In fact, the evidence was uncontroverted that the child had actually improved under the alternating weeks timesharing schedule.

- Section 61.13 (2009) requires the Trial Court to make a timesharing determination in accordance with the best interest of the child under the evidence presented to the Court, and provides, *inter alia*, that there is no presumption for or against any specific timesharing schedule or for or against the father or the mother. Fla. Stat. Section 61.13(2)(c)1. All of the competent, substantial evidence at trial was that the alternating weeks timesharing schedule that was in place for the two years and four months before the Final Judgment was entered was in the best interest of Ethan Corey. The fact that rotating custody is in the best interest of the child is not based on hypothetical schedules or facts - - it is based on the actual successful history of the alternating weeks schedule that was in place for over two years before the Final Judgment. The consistent and uncontroverted testimony of the Mother, the Father, the child's teacher, and the child's grandmother was that the child was thriving in every respect and could not be doing better. In fact, the evidence was uncontroverted that the child had actually improved under the alternating weeks timesharing schedule.

Therefore, if this Court remands to the Trial Court under either the version of Chapter 61 that was in effect at the time the Petition for Dissolution was filed through the date the Final Judgment and Timesharing Order were entered *or* the current version of Chapter 61, the Trial Court has statutory authorization to order the alternating weeks timesharing schedule, and that timesharing schedule is clearly and unequivocally in the best interest of Ethan Corey. The best interests of this minor child are best served by the continued expedited treatment of this appeal, and by a remand to the Trial Court to give the Court the opportunity to reinstate the minor child to the alternating weeks timesharing schedule under which he thrived, "could not be doing better", and even improved.

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 17th day of September, 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 Supplemental Brief was prepared using Times New Roman, 14 point font.

/s/ Kathy M. Klock
Kathy M. Klock