IN THE SUPREME COURT OF FLORIDA

Case No. SC10-164
L.T. Case No.: 3D08-1461

ERICA LYNN COREY,

Petitioner,

v.

MICHAEL JAMES COREY,

Respondent.

On Discretionary Review from The District Court
of Appeal, Third District of Florida

PETITIONER'S INITIAL BRIEF

Roger J. Schindler Esq.
Anthony V. Falzon Esq.
Simon, Schindler & Sandberg LLP
2650 Biscayne Boulevard
Miami, FL 33137
Tel: (305) 576 1300
Fax: (305) 576 1331
E-Mail: afalzon@miami-law.net
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Others

Florida Legislative History

PRELIMINARY STATEMENT

In this brief, Petitioner Erica Lynn Corey will be referred to by name or as "the Mother", and Respondent Michael James Corey will be referred to by name or as "the Father". The Record on Appeal for the proceedings in the Third District Court of Appeals will be referred to as "R", followed by the volume number ("Vol") and page number ("p") of the Record. The Appendix filed with this Initial Brief will be referred to as "App.", followed by the page number ("p").

STANDARD OF REVIEW

The central issue presented for resolution by this court involves the interpretation of Fla. Stat. 61.121 enacted in 1997 and repealed in 2008. Fla. Stat. 61.121 read as follows:

> "The court may order rotating custody if the court finds that rotating custody will be in the best interest of the child."

The First, Second and Fourth District Courts of Appeal have held that Fla. Stat. 61.121 simply codified the existing common law in Florida that a court has the option of ordering rotating custody. These three District Courts of Appeal found, however, that Fla. Stat. 61.121 did not repeal the common law presumption against a trial court awarding rotating custody in the absence of a showing of exceptional circumstances justifying such an award. The Third District Court of Appeals has held the opposite in

the case at bar, reasoning that the enactment of Fla. Stat. 61.121 implicitly repealed the presumption against a trial court awarding rotating custody. The interpretation of a statute is a purely legal matter and therefore is subject to the *de novo* standard of review in this court. *Kasischke v. State of Florida*, 991 So.2d 803, 807 (Fla. 2008).

STATEMENT OF THE CASE AND FACTS

- **The trial court proceedings.**

Erica and Michael Corey were married in August, 2000. Their son, Ethan Corey, was born on January 11, 2001. R. Vol. IV p.4; Vol II, p.247. Erica, Michael and Ethan lived in Michael's parents' home until January of 2002 when they moved to Gainesville, Florida and enrolled as full-time students at the University of Florida. R. Vol. IV, p.6; Vol. VI, p.54.

Michael graduated from the University of Florida undergraduate program in December of 2003 and began law school in January, 2004. R. Vol. VI, p.3; R. Vol. VI, p. 55. Erica graduated in April of 2004. R.Vol. VI, p.3. The couple were experiencing marital problems by the time Erica graduated. R. Vol. IV, pp. 9-10. After graduating, Erica sought work as a teacher. In about July of 2004, Erica 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. By this time the marriage had irretrievably broken down and Erica left Gainesville with three year old Ethan and moved in with her

parents on Key Biscayne. R. Vol. IV, pp. 9, 17. Michael continued his law school studies in Gainesville.

Back in Miami-Dade County, Erica secured a teaching position at the Centennial Middle School in South Miami. R. Vol. IV, pp.21-22. Erica enrolled Ethan in a pre-kindergarten program at the Hamel School in Miami in September, 2004. R. Vol. V, pp. 81-82; R. Vol. IV. pp. 22-25, 100. Erica filed a Petition for Dissolution of Marriage in December, 2004. R. Vol. I, pp. 2-4. Michael filed an Answer and Counterclaim in April, 2005. R. Vol. I, pp. 11-14. Erica and Michael both requested that they be designated the primary residential parent. Michael requested in the alternative that the Court order rotating custody. At trial Michael changed his position asking the court to award rotating custody, and designate him as primary residential parent only in the alternative. R. Vol. VII, pp. 47-48; Vol. V, pp. 13-15.

In July of 2005 Michael moved to South Miami and rented an apartment near the Hamel School. R. Vol. IV, pp. 23-24. In the fall of 2005 Michael began attending law school at Florida International University School of Law in South Miami-Dade County. R. Vol. IV, pp. 18-21. During the time that Michael attended law school he had no gainful employment while Erica worked as a teacher in South Miami. During the period 2004 through 2007 Michael failed to pay Erica any support for Ethan. R. Vol. IV. p. 36. Nor did the Father pay for health or dental insurance for his son. R.

Vol. IV. p. 35; 43-44; Vol. V. p. 86, 91. Michael also failed to contribute toward Ethan's tuition fees at the Hamel School. R. Vol. VI. p. 37; Vol. V. p. 81.

Beginning in November, 2005 Michael imposed an informal rotating custody schedule on Erica. R. Vol. V. p. 43-45; R. Vol. V. p. 43.[1] The rotating custody schedule worked for the two year period that it took Michael to complete law school because Erica was employed as a full time teacher while Michael had classes in the morning and had his afternoons free. R. Vol. V. p. 48.

In the fall of 2006, Erica sought to enroll Ethan in elementary school in Key Biscayne, Florida. Erica had moved to Key Biscayne and had obtained a teaching job at Key Biscayne Elementary School. R. Vol. V. Pp. 52-53; 57; 117; R. Vol. IV. Pp. 26, 46; Vol. V. p. 47. Michael strenuously objected preferring to have his six year old son travel to and from South Miami to attend school close to where Michael lived. R. Vol. IV. p. 31; Vol. V. p. 55. The General Magistrate refused to make the six year old travel three hours a day to school in South Miami and ordered that the child attend

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[1]At trial Erica testified that:

Q: Before that, September or October, November, maybe December, what was the schedule for Michael seeing his son?

A: We had begun with the alternating weekends, and then I don't remember exactly what it was, but he just decided that, you know, he was going to pick Ethan up and he was going to keep Ethan for a week. And I definitely opposed that, but there was absolutely nothing I could do about that because I was working full-time and could not. He would just go and pick Ethan up before I got there.

elementary school on Key Biscayne where Erica worked. As soon as the General Magistrate made this ruling, Michael immediately moved to Key Biscayne even although he had testified at the hearing before the General Magistrate that he was bound by a lease on a home in South Miami and that he could not afford to move to Key Biscayne. R. Vol. IV p. 31; Vol. V p. 61; 126.

At the time of trial in 2007, Michael had graduated law school and had taken a job as a prosecutor with the Miami-Dade County State Attorney's Office. Erica continued to work as a teacher at Key Biscayne Elementary School. Michael faced an uphill battle at trial trying to convince the presiding judge that special circumstances existed to justify the imposition of a rotating custody arrangement. The trial judge was particularly concerned about which parent was best placed to care for young Ethan immediately after he was let out of elementary school in the early afternoon. Erica, would finish her job as a teacher at Key Biscayne Elementary School at the same time as Ethan was let out of school. Michael, on the other hand, was a busy young prosecutor and was clearly not available to pick up young Ethan when he was let out of school.

At trial, Michael tried to convince the trial judge, who spent many years presiding over trials in the Criminal Division, that as an entry level prosecutor he would always be available to pick up his son from after school care on Key Biscayne at

5:30 p.m. even if he was trying a case before a jury in downtown Miami or one of the satellite courthouses scattered throughout Miami-Dade County. Michael also testified that he would prefer Ethan to attend summer camp every other week rather than being with Erica, who as a Miami-Dade County school teacher, does not have to work over the summer months. R. Vol. IV. p. 119; Vol. V. p. 72. Furthermore, Michael initially took the position that he would prefer his son to stay in after school care rather than with Erica during his rotating week in the event that the court agreed to a rotating custody schedule. R. Vol. V. p.66. Furthermore, Michael wanted unidentified neighbors to pick up Ethan from after school care if he had to work late during his week rather than have Erica pick up her son. R. Vol. V. p. 68.

The trial court's final judgment of dissolution incorporating the Child Time Sharing and Parental Responsibility Order entered on February 25, 2008 awarded primary residential custody of the child to Erica and entered an expanded Time Sharing Order providing Michael with timesharing every other weekend from Thursday after school to Monday morning and on Thursday overnight during the week when Michael does not have weekend timesharing. The trial court denied Michael's request that the court enter an order establishing a rotating custody schedule. While the trial court acknowledged that it clearly had the power to order rotating custody it found that Michael has failed to show that exceptional circumstances existed which overcame the

long standing presumption that rotating custody was not in the minor child's best interests. R. Vol. II, pp. 246-258; R. Vol. II, pp. 259-274.

The court's final judgment awarding primary residential custody of Ethan to Erica made various findings in support of its ruling based on the factors listed in Fla. Stat. 61.3(3). R. Vol. II. p. 250-255. The court listed ten factors that it found did not favor either one of the parents. *See paras 2 (a),(b),(c),(e),(f),(g),(h),(i),(k) and (l)* of Final Judgment. R. Vol. II. p. 250-255. The final judgment listed absolutely no factors which favored Michael and then listed two factors that favored Erica. *See paras 2(d) and (m).* Among other findings of fact, the court found that:

> (1) there was competent substantial evidence that living in the same household would be in the child's best interests and would provide the continuity and residential stability which [Ethan] needs. The Court finds that greater stability and continuity would result from the Wife being the primary residential parent. R. Vol. II. p. 256.
>
> (2) the Wife, unlike the Husband, would never have problems picking Ethan up from after school care and that the Wife "would *always* be able to take the child home on a timely basis and not need to rely on the help of others". R.Vol. II p. 259.
>
> (3) the "child is beginning to participate in extracurricular activities on at least 2 day/week which ends at 4:30 p.m., a time which the Husband would rarely or never be available to pick him up, again requiring him to rely on neighbors, family or the Wife." R. Vol. II. p. 259.

Based on these findings the court concluded that Erica should be designated as

primary residential parent, noting that her availability after-school was a significant factor. The court also pointed out that while both parents had an extensive extended family support network, Michael's family resided in Kendall (South Miami-Dade County) while Erica's family resided on Key Biscayne close to Ethan's school. R. Vol. II p. 260.

- **The appeal to the Third District Court of Appeal.**

Michael filed an appeal from the Final Judgment with the Third District Court of Appeal arguing that the enactment of Fla. Stat. 61.121 in 1997 had implicitly repealed the long standing presumption that rotating custody was not in a child's best interests. Michael reasoned that the Trial Court had erred when it required him to show that exceptional circumstances existed in order to overcome the presumption that rotating custody is not in the best interest of the minor child.

Erica argued that the 1997 enactment of Fla. Stat. 61.121 simply codified the then existing case law which allowed a trial judge to enter an award of rotating custody but did nothing to repeal the common law presumption against an award of rotating custody. Erica referred to the decision of the Second District in *Mandell v. Mandell*, 741 So.2d 617 (Fla. 2d DCA 1999) in which the Second District Court of Appeals found that the common law presumption against awarding rotating custody absent a showing of exceptional circumstances had survived the enactment of Fla. Stat. 61.121.

The *Mandell* court reasoned that had the legislature wished to repeal the long standing common law presumption it would have done so explicitly. As support for this proposition, the *Mandell* court referred to House Bill 1421, which while enacting Fla. Stat. 61.121, also amended Fla. Stat. 61.13 to repeal the rebuttable presumption established by this court in *Mize v. Mize,* 621 So.2d 417, 420 (Fla. 1993) and *Russenberger v. Russenberger,* 669 So.2d 1044 (Fla. 1996)in favor of allowing a custodial parent to relocate upon a demonstration that the relocation was being made in good faith.

- **The decision of the Third District Court of Appeal.**

The Third District's draft opinion was originally authored by Schwartz, Senior Judge and found in favor of Erica holding that the enactment of Fla. Stat. 61.121 had not implicitly repealed the presumption against the award of rotating custody. After the court's draft opinion was finalized, the remaining two members of the panel disagreed with Judge Schwartz's reasoning and a majority opinion was authored by Lagoa J finding in favor of Michael with Judge Schwartz filing the court's original draft opinion as a dissenting opinion.

Judge Lagoa's majority opinion begins by recognizing that prior to the enactment of Fla. Stat. 61.121 in 1997, case law in all five districts established that rotating custody was presumptively disfavored. The majority goes on to recognize that

even subsequent to the enactment of Fla. Stat. 61.121 courts continued to apply the presumption against rotating custody. The majority goes on to explain that it could not reach the same conclusion as the other District Courts of Appeal that had found that the presumption survived the enactment of Fla. Stat. 61.121.[2] The majority explains that its decision is based on "the plain language of the statute". The majority reasoned that Fla. Stat. 61.121 had the effect of putting rotating custody on the same level playing field as other types of custody arrangements which simply require the court to look out for the best interests of the child. Without citing to any authority, the majority reasoned that "if the Legislature [had] intended to continue the long standing presumption against rotating custody, it would have stated so in the statute" essentially arguing that the presumption against rotating custody had been repealed *sub silentio.* The majority opinion fails to make any reference to or explain the inherent contradiction between its reading of Fla. Stat. 61.121 and the Legislature's actions in amending Fla. Stat. 61.13 to explicitly repeal a presumption in favor of allowing a custodial parent to relocate if acting in good faith. The majority's analysis ends there

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[2] In fact the majority glosses over the fact that the Third District Court of Appeal in *Bazan v. Gambone*, 924 So.2d 952, 956 (Fla. 3d DCA 2006) had already noted that a joint custody agreement is generally disfavored when making an initial custody determination. The *Bazan* opinion deals with the issue of rotating custody after the enactment of Fla. Stat. 61.121 in 1997.

on the presumption issue.

In his dissent, Judge Schwartz refers to the various District Court opinions entered after 1997 recognizing that the presumption against rotating custody had survived the enactment of Fla. Stat. 61.121. *Cooper v. Gress,* 854 So.2d 262, 266 (Fla. 1st DCA 2003)(Nothing in the plain statutory language of Fla. Stat. 61.121 indicates that the Florida legislature intended to eliminate the longstanding presumption that rotating custody is not in a minor child's best interests): *Mandell v. Mandell,* 741 So.2d 617, 618 (Fla. 2nd DCA 1999)(If, by this language, the legislature sought to set aside the presumption against rotating custody, it failed. Nothing in the plain language of the statute suggests that the legislature intended to abolish the presumption); *Bazan v. Gambone,* 924 So.2d 952, 956 (Fla. 3rd DCA 2006)(a joint custody agreement is generally disfavored when considering initial custody arrangement); *Mancuso v. Mancuso,* 789 So.2d 1249 (Fla. 4th DCA 2001)(holding that presumption required trial court to consider factors which may overcome the presumption); *Hosein v. Hosein,* 758 So.2d 703 (Fla. 4th DCA 2001)(same) *and Chapman v. Prevatt,* 845 So.2d 976 (Fla. 4th DCA 2003)(Nothing in Fla. Stat. 61.121 detracts from the long-standing presumption frowning upon a rotating custody arrangement).

Judge Schwartz refers in particular to the Second District decision in *Mandell* in which the District Court compared Fla. Stat. 61.121 to Fla. Stat. 61.13 which explicitly

set aside the presumption in favor of allowing a good faith custodial parent to relocate. Judge Schwartz reproduces the central holding of *Mandell verbatim.* In *Mandell* the Second District referred to the plain language of Fla. Stat. 61.13 to argue that the legislature understood how to set aside a previously established presumption and concluding that "The absence of such language in Fla. Stat. 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".

- **The Supreme Court proceedings.**

Erica filed a timely Notice invoking the Discretionary Jurisdiction of this court on January 22, 2010 claiming that the decision of the Third District Court of Appeal rendered December 30, 2009 expressly and directly conflicts with the decisions of the First, Second and Fourth District Courts of Appeal discussed above. The Supreme Court was fulled briefed on jurisdiction on May 19, 2010 and the court accepted jurisdiction on June 10, 2010 while also entering an order staying proceedings in the Third District Court of Appeal and in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida pending disposition of the pending petition.

SUMMARY OF THE ARGUMENT

A plain reading of Fla. Stat. 61.121, the legislative history of the statutory enactment showing that Fla. Stat. 61.121 simply codified existing law on rotating

custody and principles of statutory construction all support the view that the 1997 enactment of Fla. Stat. 61.121 simply codified the then existing case law which allowed a trial judge to enter an award of rotating custody but did nothing to repeal the common law presumption against an award of rotating custody.

Furthermore the trial court did not err when it found that Michael had failed to show exceptional circumstances justifying an award of rotating custody as being in Ethan's best interests.

ARGUMENT

I.

THE PLAIN LANGUAGE OF FLA. STAT. 61.121, THE LEGISLATIVE HISTORY OF HB 1421 WHICH ENACTED FLA. STAT. 61.121 AND PRINCIPLES OF STATUTORY CONSTRUCTION ALL SUPPORT THE VIEW THAT FLA. STAT. 61.121 DID NOT IMPLICITLY REPEAL THE COMMON LAW PRESUMPTION AGAINST AN AWARD OF ROTATING CUSTODY

"The interpretation of a statute is a purely legal matter and therefore subject to the *de novo* standard of review." *Kephart v.Hadi,* 932 So.2d 1086, 1089 (Fla. 2006), *cert. denied,* 549 U.S. 1216, 127 S.Ct. 1268, 167 L.Ed.2d 92 (2007). When construing a statute, a court strives to effectuate the Legislature's intent. *Kasischke v. State of Florida*, 991 So.2d 803, 807 (Fla. 2008). To determine that intent, a court will first look at the statute's plain language. If the statute's language is not clear or if the

language is ambiguous then a court must look behind the plain language of the statute for legislative intent or resort to rules of statutory construction to ascertain intent. *Borden v. East European Ins., Co.,* 921 So.2d 587, 595 (Fla. 2006).

Prior to the decision of the majority of the Third District Court of Appeal in *Corey v. Corey,* 29 So.3d 315 (Fla. 3d DCA 2009) it was undisputed and settled law in Florida that rotating custody orders, such as the one requested by Michael in the trial court below, were strongly disfavored and ordinarily could not be sustained. *Hurst v. Hurst*, 27 So.2d 749 (Fla. 1946). Florida courts in all five districts have consistently held that although rotating custody is presumptively not in the best interest of children, there may be special circumstances which justify rotating the physical residence of a child. *Wilking v. Reiford,* 582 So.2d 717 (Fla. 5th DCA 1991).

Such circumstances include:

(1) That the child was older and mature. *Bienvenu v. Bienvenu*, 380 So.2d 1164 (Fla. 3rd DCA 1980); *Gerscovich v. Gerscovich,* 406 So.2d 1150 (Fla. 5th DCA 1981).

(2) That the child was not yet in school. *Parker v. Parker*, 553 So.2d 309 (Fla. 1st DCA 1989); *Alexander v. Alexander*, 473 So.2d 236 (Fla. 2d DCA 1985); *Wilking v. Reiford*, 582 So.2d 717 (Fla. 5th DCA 1991).

(3) That the parents lived near each other. *Gerscovich, Parker, Bienvenu.*

(4) That the child preferred rotating custody. *Gerscovich.*

(5) That rotation would not have a disruptive effect on the child. *Gerscovich, Bienvenu.*

(6) That the periods of time spent with each parent were reasonable. *Gerscovich.*

(7) That the periods of custody were related to divisions in the child's life, such as the school year. *Bienvenu.*

In 1997 the legislature adopted House Bill 1421 which was entitled: "An act relating to child custody; amending s. 61.13, F.S.; providing that no presumption exists regarding relocation of parent with child under certain circumstances; providing factors for the court to consider in determining whether relocation of parent with child should be allowed; providing an effective date." App. p. 28.

The bill contained only two provisions. The first provision made amendments to Fla. Stat. 61.13 and the second provision made amendments to Fla. Stat. 61.121. App. p. 28-29. The amendment to Fla. Stat. 61.13(2)(d) provided in relevant part that:

> "No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent...."

The amendment to Fla. Stat. 61.121 read:

"The court may order rotating custody if the court finds that rotating

custody will be in the best interest of the child."

Fla. Stat. 61.13 clearly repealed the then existing common law presumption in favor of allowing a custodial parent to relocate outside the state. The rebuttable presumption in favor of allowing a custodial parent to relocate had been firmly recognized and established by the Florida Supreme Court in *Mize v. Mize*, 621 So.2d 417 (Fla. 1993) and clarified further in *Russenberger v. Russenberger,* 669 So.2d 1044 (Fla. 1996). This court had held that upon a demonstration of good faith, a custodial parent was entitled to a rebuttable presumption in favor of relocating. The amendment to Fla. Stat. 61.13 expressly repealed this rebuttable presumption by using clear and unambiguous language.

Fla. Stat. 61.121 on the other hand, makes no mention of repealing the common law rebuttable presumption that rotating custody is not in the child's best interests absent a showing of special circumstances. What Fla. Stat. 61.121 does by use of plain and unambiguous language is codify the then existing common law of Florida that a court may award rotating custody if it is in the child's best interests.

The two provisions contained in HB 1421 are clear and unambiguous when read together in *pari materia*. The amendment to Fla. Stat. 61.13(d)(2) explicitly repeals the rebuttable presumption in favor of allowing a custodial parent to relocate using plain and unequivocal language while Fla. Stat. 61.121 codifies the long standing

common law rule that a Florida court has the power to award rotating custody when it is in the child's best interests. It being understood (because no explicit and unequivocal repeal language is used) that it is in the child's best interests to award rotating custody when the parent seeking such an order can overcome the rebuttable presumption against rotating custody by showing that special circumstances exist for such an award to be entered.

This is the way the Second District read Fla. Stat. 61.121 contained in HB 1421 when it stated that "nothing in the plain language of [Fla. Stat. 61.121] suggests that the legislature intended to abolish the presumption." *Mandell v. Mandell,* 741 So.2d 617 (Fla. 2nd DCA 1999). The court reached this conclusion by reading the language of Fla. Stat. 61.121 and Fla. Stat. 61.13 in *pari materia* and noting that the legislature knew how to set aside a presumption by using clear and unambiguous language when it wanted to when it enacted Fla. Stat. 61.13(d)(2). The Second District noted that the absence of clear language setting aside the presumption against the award rotating custody absent exceptional circumstances in Fla. Stat. 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."

Ambiguity only arises in interpreting HB 1421 when one seeks to strain the language used in Fla. Stat. 61.121 to argue that somehow the Legislature intended to

repeal the rebuttable presumption against an award of rotating custody without using the sort of explicit and unambiguous language it clearly knew how to adopt when seeking to repeal the rebuttable presumption in favor of a custodial parent being able to relocate. In short the ambiguity is created not by the language of the statute, which is clear in both instances, but by the strained interpretation used by the majority of the Third District Court of Appeal which seeks to imply language into the statute to support its results oriented reasoning and conclusion.

The clear and unambiguous language contained in HB 1421 is supported by the legislative history. App. p.39-40. The only mention of Fla. Stat. 61.121 in the legislative history is in the HOUSE OF REPRESENTATIVES COMMITTEE ON FAMILY LAW AND CHILDREN - FINAL BILL RESEARCH AND ECONOMIC IMPACT STATEMENT where the Committee mentions in passing that "The bill also creates Fla. Stat. 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." The Committee goes on to explain that: "Although courts have allowed rotating custody in Florida, this practice is not presently statutorily recognized." The Committee appears to have understood that Fla. Stat. 61.121 simply codified existing law. There is absolutely no mention of repealing the presumption.

Principles of statutory construction also support the interpretation of the statute

advanced by the First, Second and Fourth District Courts of Appeal and by Senior Judge Schwartz in his dissenting opinion in the Third District Court of Appeal. It is a principle of statutory construction that when possible, statutes are to be construed so as to make them harmonize with existing law and not conflict with long settled principles. Therefore a statute modifying, limiting, restricting or abrogating the common law is to be strictly construed. *Kimball v. Jenkins* 11 Fla. 111(Fla. 1866) It should not displace the common law any further than clearly necessary. *Ex parte Amos,* 112 So. 289 (Fla. 1927) Therefore, a statute designed to change the common law must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. *Hialeah v. State,* 183 So. 745 (Fla. 1938). Thus, when it comes to derogations from the common law, inference and implication cannot be substituted for clear expression. Statutes will not be held to have changed well-settled common-law principles by implication unless the implication is clear or is necessary to give the express provisions of the statute, and the public policy thus established, full force and effect. *Dudley v. Harrison, McCready & Co.,* 173 So. 820 (Fla. 1937) *reh. Den.* 174 So. 729. Applying these principles of statutory construction to Fla. Stat. 61.121 it is clear that in the absence of clear and unambiguous language similar to the language used in Fla. Stat. 61.13(d)(2) the court cannot construe Fla. Stat. 61.121 as having abrogated the presumption against the

award of rotating custody absent the existence of special circumstances.

Because the presumption against the award of rotating custody absent a showing of special circumstances, survived the enactment of Fla. Stat. 61.121, the trial court did not abuse its discretion when it held that Michael had failed to make a showing of special circumstances justifying an award of rotating custody. The majority opinion in the Third District Court of Appeal, in fact, acknowledges that Michael failed to show exceptional circumstances justifying an award of rotating custody. The whole premise of the majority's argument is that no such showing of exceptional circumstances was required and that the trial court erred in requiring Michael to make such a showing.

This Court should reverse the decision of the Third District Court of Appeal and reinstate the judgment of the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County because Fla. Stat. 61.121 by its plain language as supported by the legislative history and rules of statutory construction did not repeal the common law presumption against awarding rotating custody in the absence of a showing of exceptional circumstances. This Court should also vacate the conditional award of Appellate attorneys fees and costs to Michael entered by a majority of the Third District Court of Appeal.

CONCLUSION

For the foregoing reasons, and based on the authorities and citations herein,

Petitioner Erica Corey, requests this Honorable Court to reverse the decision of the Third District Court of Appeal, reinstate and reaffirm the decision of the trial court of the Eleventh Judicial Circuit in and for Miami-Dade County Florida and vacate the award of attorneys fees and costs or for such other and further relief as this court deems to be necessary and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been first class mailed and emailed to Kathy M. Klock Esq., Fowler, White, Burnett P.A., 901 Phillips Point West, 777 South Flagler Drive, West Palm Beach, FL 33401 this 28th day of June, 2010.

Respectfully Submitted,

SIMON, SCHINDLER AND SANDBERG LLP
Attorneys for the Respondent
2650 Biscayne Boulevard
Miami, FL 33137
Tel: (305) 576 1300
Fax: (305) 576 1331
E-Mail: afalzon@miami-law.net

_____
ROGER SCHINDLER, ESQUIRE
Fla. Bar No. 12476
ANTHONY V. FALZON, ESQUIRE
Fla. Bar No. 69167

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the brief complies with the font requirements of Fla.R.App.P. 9.210.

_____

ANTHONY V. FALZON, ESQUIRE