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 BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Respondent Father, appealed a Final Judgment of Dissolution of Marriage and other Relief (the "Final Judgment"), and the Child Time Sharing and Parental Responsibility Order (the "Time Sharing Order") which was incorporated in the Judgment entered by the Trial Court on February 25, 2008. The Final Judgment awarded primary residential custody of the child to the Petitioner Mother and entered an expanded Time Sharing Order providing the Father with timesharing every other weekend from Thursday after school to Monday morning and on Thursday overnight during the week when he does not have weekend timesharing. The Trial Court denied the Father'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 the Father had 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.

The Father filed an appeal from the Final Judgment with the Third District Court of Appeal arguing that the enactment of Fla. Stat. 61.121[1] in 1997 had

[1] Fla. Stat. 61.121 as enacted in 1997 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 Stat. 61.121 was repealed on October 1, 2008.

implicitly repealed the long standing presumption that rotating custody was not in a child's best interests. The Father reasoned that the Trial Court had erred when it required the Father 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. The Mother 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. The Mother 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[2] to repeal the rebuttable presumption established by this court in *Mize v. Mize,* 621 So.2d 417, 420 (Fla. 1993) and *Russenberger v.*

[2] Fla. Stat. 61.13(2)(d) as amended in 1997 read:"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."

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 Third District's draft opinion was originally authored by Schwartz, Senior Judge and found in favor of the Mother 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 the Father 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.[3]

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[3] In fact the majority glosses over the fact that the Third District Court of Appeals 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.

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 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. 2d 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*, 785 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 that 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".

SUMMARY OF THE ARGUMENT

The decision of the Third District directly and expressly conflicts with decisions of other district courts of appeal.

The First, Second and Fourth District Courts of Appeal have all recognized that the presumption against rotating custody survived the enactment of Fla. Stat. 61.121 in 1997. Expressly conflicting with those decisions, and indeed with an earlier decision of the Third District, the majority opinion of the Third District below found that the common law presumption against granting rotating custody had been implicitly repealed because "if the Legislature ..intended to continue the long-standing presumption against rotating custody, it would have stated so in the statute."

This despite the fact that the Legislature, in the same House Bill, expressly repealed the presumption in favor of allowing a custodial parent to relocate.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEALS' DECISION HOLDING THAT THE ENACTMENT OF FLA. STAT. 61.121 IN 1997 REPEALED THE LONG STANDING PRESUMPTION AGAINST THE AWARD OF ROTATING CUSTODY EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS HOLDING THAT THE PRESUMPTION SURVIVED THE ENACTMENT OF FLA. STAT. 61.121.

It is well-settled law in Florida that rotating custody orders, such as the one requested by the Husband in this case, are strongly disfavored and ordinarily may not be sustained. *Hurst v. Hurst,* 27 So.2d 749 (Fla. 1946). The courts have 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). [4]

In 1997 the legislature adopted House Bill 1421. The Legislative history indicates that the bill's overriding concern was to amend Fla. Stat. 61.13 so as to repeal the then existing policy in favor of allowing a custodial parent to relocate outside the state. The pro-relocation policy had been established by this court in *Mize v. Mize,* 621 So.2d 417 (Fla. 1993) as clarified by its decision in *Russenberger v. Russenberger,* 669 So.2d 1044 (Fla. 1996) which held that upon a demonstration of good faith, a custodial parent is entitled to a rebuttable

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[4] 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. 2nd 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;* and; (7)That the periods of custody were related to divisions in the child's life, such as the school year. *Bienvenu.*

presumption in favor of relocating. The amendment to Fla. Stat. 61.13 went on to expressly repeal the rebuttable presumption in favor of relocation by using the following unequivocal language:

> "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 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.

Following the enactment of House Bill 1421 four of the five district courts in the State were called upon to consider the new Fla. Stat. 61.121. The Second District tackled the issue head on in *Mandell v. Mandell,* 741 So.2d 617 (Fla. 2nd DCA 1999) in which the court held that "nothing in the plain language of [Fla. Stat. 61.121] suggests that the legislature intended to abolish the presumption",

noting that "Our review of the limited legislative history offers little insight on the issue." The court did go on to note that House Bill 1421 had also amended Fla. Stat. 61.31 to set aside the previously established presumption in favor of a custodial parent being allowed to relocate. The Second District noted that the absence of clear language setting aside the presumption against rotating custody 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".

In the Fourth District case of *Hosein v. Hosein,* 785 So.2d 703(Fla. 4th DCA 2001) the court recognized that the enactment of Fla. Stat. 61.121 had codified the previous law allowing a court to award rotating custody but also noted that "there is a presumption that rotating the primary residence is not in the best interest of the child." The *Mandell* decision was followed by the Fourth District in *Mancuso v. Mancuso,* 789 So.2d 1249(Fla. 4th DCA 2001). In *Chapman v. Prevatt,* 845 So.2d 976 (Fla. 4th DCA 2003) the Fourth District referred to the *Mandell, Hosein* and *Mancuso* decisions in holding that "case law has established that rotating custody is presumptively not in the best interest of the child".

The First District addressed the issue in *Cooper v. Gress*, 854 So.2d 262 (Fla. 1st DCA 2003) noting that nothing in Fla. Stat. 61.121 "indicates the Florida legislature intended to eliminate the longstanding presumption that rotating

custody is not in a minor child's best interest". The Third District made an *orbiter dictum* statement in the case of *Bazan v. Gambone*, 924 So.2d 952, 956 (Fla. 3rd DCA 2006) that "this case involved a joint custody agreement, which is generally disfavored when considering initial custody determinations". The court went on to remark on "the existence of the presumption against rotating custody".

As noted by Judge Schwartz in his dissent in the case at bar, the opinion of the Third District is "obviously" in direct conflict with the decisions cited above.

CONCLUSION

The decision of the Third District expressly conflicts with decisions of other district courts of appeal. This court should exercise its discretionary jurisdiction to review this matter as these conflicts have far reaching implications for all parents involved in disputes relating to time sharing throughout the State.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Facsimile and U.S. Mail to Kathy M. Klock Esq., Fowler, White, Burnett P.A., 901 Phillips Point West, 777 South Flagler Drive, West Palm Beach, FL 33401 this 30th day of April, 2010.

Respectfully Submitted,

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CERTIFICATE OF TYPE SIZE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), this Brief has been prepared by using Times New Roman 14 point font.

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