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 REPLY BRIEF

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I.

THE THIRD DISTRICT'S DECISION THAT FLA. STAT. 61.121 IMPLIEDLY REPEALED THE COMMON LAW PRESUMPTION AGAINST AN AWARD OF ROTATING CUSTODY, WHICH IS IN DIRECT CONFLICT WITH DECISIONS FROM THREE OTHER DISTRICT COURTS OF APPEAL, IS NOT SUPPORTED BY THE PLAIN LANGUAGE OF THE STATUTE, THE LEGISLATIVE HISTORY OR SETTLED RULES OF STATUTORY CONSTRUCTION.

Respondent's legal argument begins by misstating the historical development of rotating custody as a part of Florida law. The Respondent then constructs a legal argument based on this false historical premise that conflates rules of statutory construction to support his argument. Respondent seeks to convince the court to apply rules of statutory construction which are solely applicable to the construction of statutes purporting to repeal a pre-existing statute to the related but distinct issue of statutory repeal of the common law. In addition, the Respondent misrepresents the legislative history of Fla. Stat. 61.121. Respondent misapplies the legislative history repealing the presumption in favor of allowing a custodial parent to relocate to the codification of the existing common law rule on the entirely distinct issue of rotating custody represented by the enactment of Fla. Stat. 61.121.

Respondent essentially begins by stating that "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." Resp. Brf. p. 24. According to the Respondent the courts were forced to create this common law presumption against rotating custody in order to overcome the statutory rule in Fla.Stat. 61.13(3) mandating that a child have a primary residence.

The reality, however, is that the concept of "rotating custody" and the presumption against it predates the enactment of Fla. Stat. 61.13(3)[11] by at least thirty-nine years. In the case of *Phillips v. Phillips*, 13 So.2d 922, 923 (Fla. 1943) this court held that;

> "There can be no doubt that experience shows that it is detrimental to the best interest of a young child to have its custody and control shifted often from one household to another and to be changed often from the discipline and teachings which are attempted to be imparted by one custodian to that other discipline and teachings sought to be imparted by another custodian. The result is, in most cases, to confuse the child, cause it to doubt where constituted authority lies, and to largely disregard the precepts which either custodian attempts to exercise."

This court reiterated its opposition to "rotating custody" later that year in the case of *Hurst v. Hurst*, 27 So.2d 749, 750 (Fla. 1943) and linked its opposition to "rotating custody" with the tender years doctrine reasoning that the mother was best suited to act as custodial parent for a young child. The *Hurst* case was then used as authority for the proposition that split custody provisions (and not just rotating custody

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[1] The first time the legislature used the term "primary physical residence" in Fla. Stat. 61.13 was in HB 96 in 1982.

provisions) were to be disfavored generally. The prevailing view was that in the case of children of tender years the mother should be the sole custodial parent with the father having visitation rights. *See Lee v. Lee,* 43 So.2d 904, 905 (Fla. 1950); *Rudolph v. Rudolph*, 146 So.2d 397 (Fla. 3rd DCA 1962)(divided custody of minor children which involves periodic removal from familiar surroundings is not desirable or conducive to the child's welfare). The courts ruled in favor of granting sole custody of a young child to the mother where "no special circumstances or legally unequal facts necessary to support split custody were shown". *See eg. Wonsetler v. Wonsetler,* 240 So.2d 870 (Fla. 2nd DCA 1970). The "special circumstances" which would justify splitting the custody of the child (including entering a much rarer award of rotating custody) included such factors as: "for example, older and more mature children, parents who live near each other or are willing to cooperate in lessening the impact of the changes in custody, and a division of periods of custody which is related to actual events in the children's lives, such as between school and holiday periods" *Bienvenu v. Bienvenu,* 380 So.2d 1164, 1165-1166 (Fla. 3rd DCA 1980). *See also* Pet. Brf. p.14-15.

Courts have used the term "special circumstances", "appropriate circumstances"

and "particular circumstances" interchangeably to refer to the same legal burden that a parent must overcome to convince a court to enter an award of "rotating custody".[2]

In 1982 the Legislature passed the Shared Parental Responsibility Act which, as stated previously used the term "primary physical custody" for the first time. This Act provided for shared parental responsibility and provided for the same consideration to be given the father and the mother in determining custody of the child "regardless of the age of the child" while also recognizing split custody arrangements with a court designated parent having "primary physical custody" of a child.

In *Frey v. Wagner*, 433 So.2d 60 (Fla. 3rd DCA 1983) a trial court read the adoption of the Shared Parental Responsibility Act as requiring a court to not only order shared parental responsibility but also to rotate the residence of the child equally

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[2] There is therefore no issue of substance for this court or any other appellate court to decide on whether the term "exceptional circumstances" refers to a different legal standard from the term "ameliorating circumstances" as Respondent argues in his Answer Brief. Resp. Brf. p.41. These terms have been used interchangeably by the courts as have the terms "rotating custody", "alternating custody", "split custody", "joint custody" and "divided custody" as the Fifth District Court of Appeals took pains to point out in *Gerscovich v. Gercovich*, 406 So.2d 1150, 1151 (Fla. 5th DCA 1981).

See Parker v. Parker, 553 So.2d 309, 311 (1st DCA 1989)("special circumstances"); *Wonsetler supra* @ 870 (Second District)("special circumstances") *Bienvenu supra* @ 1165 (Third District)("particular circumstances"); *Chapman v. Prevatt*, 845 So.2d 976, 982 (Fla. 4th DCA 2003)("special" or "appropriate" circumstances); *Gersovich supra* @ 1150 (Fifth District)("special circumstances or legally unequal facts"; "particular circumstances").

between the parents. The Third District Court of Appeals acknowledged that the new statute mandated shared parental responsibility but clarified that it did "not mandate that the physical residence of the children is to be shifted back and forth between the parents" but rather that the court designate a "primary physical residence for the children" to be determined by reference to the non-exclusive factors enumerated in Fla. Stat. 61.13(3). *Id* @ 61. The court then went on to reiterate the common law rule that "rotating the physical residence of children remains presumptively not in their best interest" *Id* @ 62 and specifically noted that:

> "The Shared Parental Responsibility Act is not, as appellee contends, a legislative repeal of these cases or a declaration that rotating the residences of children is in their best interest."

In other words, the enactment of the Shared Parental Responsibility Act did not impliedly repeal the common law presumption against rotating custody. The appellee's implied repeal argument in the *Frey* case mirrors the implied repeal argument being made by the Respondent here and should be similarly rejected. Fla. Stat. 61.121, like the Shared Parental Responsibility Act, does not explicitly repeal the common law presumption against an award of rotating custody nor for that matter does it mandate that "rotating the residences of children is in their best interest". All it does is codify the common law of Florida that a court may award rotating custody if it is in the best interest of the child, it being understood that it is in the best interest of the child if the

moving parent can show that special, appropriate or particular circumstances exist to justify such an award.

Respondent's legal argument is clearly based on the false historical premise that the presumption against rotating custody was judicially created to overcome the 1982 Shared Parental Responsibility Act's use of the term "primary physical custody". Moreover, Respondent's reading of Fla. Stat. 61.13(3) and Fla. Stat. 61.121 together to argue that Fla. Stat. 61.121 simply subjected "rotating custody" to the same "best interests of the child" standard contained in Fla. Stat. 61.13(3) leads to more questions than it provides contrived answers. The immediate question that comes to mind is: What factors must the court consider when deciding whether to award rotating custody as being in the best interest of the child pursuant to Fla. Stat. 61.121? The Respondent never raises or answers this question and avoids pointing to the factors listed in Fla. Stat. 61.13(3).

Fla. Stat. 61.13(3) sets out a whole series of factors that a court must consider to determine the best interest of the child when evaluating which parent should have primary residential custody of the child. The first in the list of factors provides that the court should consider which parent is more likely to allow the child frequent and continuing contact with the non residential parent. The first factor and many of the others that follow are designed to assist the trial court in making a choice between the

two parents and are therefore inapplicable to determining what is in the best interest of the child for the purposes of awarding "rotating custody" under Fla. Stat. 61.121. The courts must turn elsewhere for guidance in making the determination of whether or not rotating custody is in the best interest of a child. That guidance is to be found in the existing caselaw and more specifically in the common law presumption against a court awarding rotating custody unless a parent can show certain enumerated "special circumstances" such as the fact (1) that the child is older and mature; (2) that the child is not yet in school; (3) that the parents live near each other;[3] (4) that the child prefers rotating custody; (5) that rotation will not have a disruptive effect on the child; (6) that periods of time spent with each parent are reasonable; and (7) that periods of custody are related to divisions in the child's life, such as the school year. *See Langford v. Ortiz*, 654 So.2d 1237 (Fla. 2nd DCA 1995).

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[3] The fact that the parents live close together in and of itself does not justify an award of rotating custody. *Ruffridge v. Ruffridge*, 687 So.2d 48 (Fla. 1st DCA1997).

Furthermore, contrary to the Respondent's representations, the legislative history for HB 1421 does not support Respondent's position. The SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT contains a detailed analysis of Fla. Stat. 61.13(3)'s repeal of the common law presumption favoring relocation by a parent having primary residential custody of a child but makes absolutely no mention of Fla. Stat. 61.121. This is why Respondent makes no reference to the Senate Staff Analysis of the bill in his brief. App. p. 21-29 The HOUSE OF REPRESENTATIVES COMMITTEE ON FAMILY LAW AND CHILDREN BILL RESEARCH & ECONOMIC IMPACT STATEMENT contains a detailed analysis of the statutory repeal of the common law presumption in favor of relocation but only mentions the proposed enactment of Fla. Stat. 61.121 in the final sentence of the final page of its Statement observing that "Fla. Stat. 61.121" will be enacted 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". App. p. 39. The HOUSE OF REPRESENTATIVES COMMITTEE ON FAMILY LAW AND CHILDREN FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT contains a one sentence description of Fla. Stat. 61.121 in its summary and then continues with a further lone sentence in its substantive research section which states that "although courts have allowed rotating custody in Florida, this practice is not presently *statutorily* recognized". When describing the proposed effect of the enactment of Fla. Stat. 61.121, the Committee simply notes that "the bill also provides for the statutory recognition of rotating child

custody when the court finds that rotating custody will be in the best interest of the child". App. p. 40, 42.[4] There is absolutely no mention in the legislative history of the Legislature's desire to repeal the common law presumption against awarding rotating custody absent special circumstances.

Finally the Respondent conflates the rules of statutory construction applicable to construing a statute purportedly repealing an earlier statute with the related but distinct rules of statutory construction applicable to construing a statute purportedly repealing a provision of the common law. Respondent argues, irrelevantly, that Fla. Stat. 61.121 was not seeking to repeal another statute and therefore the absence of language repealing the common law presumption against rotating custody means nothing. This argument is disingeniously circular and self serving and sidesteps having to deal with strict rules of statutory construction that apply to the repeal not of existing statutes but of the existing common law.

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[4] examination at trial and the Third District Court of Appeals had entered an order On page 39 of the Respondent's brief he misrepresents that "New psychological research, based largely on the Attachment Theory (i.e. children of different ages require different contact with each parent), lead (sic) the legislature to radically rewrite the law". This despite the fact that there is no mention of the Attachment Theory in the legislative history for HB 1421. This is simply a second attempt by Respondent to surreptitiously insert the controversial opinions of Jerome H. Poliacoff Ph.D. into the record. These opinions were not subjected to challenge and on December 31, 2009 striking the initial brief of the father because he had referred to the Attachment theory without it being properly a part of the trial court record.

In the recent case of *Shaun Olmstead v. Federal Trade Commission*, 35 Fla.L.Weekly S357 (Fla. 2010) this court reiterated its previous recognition of the existence of a specific presumption against the statutory abrogation by implication of an existing rule of common law. As Petitioner stated in her initial brief a statute modifying, limiting, restricting or abrogating the common law is to be strictly construed and must speak in clear, unequivocal terms. *Kimball v. Jenkins*, 183 So. 745 (Fla. 1938) The presumption is against implicit abrogation of the common law and in favor of the common law only being abrogated by clear expression. *Hialeah v. State*, 183 So. 745 (Fla. 1938). These rules of statutory construction all favor of the Petitioner's position, shared by three District Courts of Appeal and Senior Judge Schwartz in the Third District Court of Appeals, that the common law presumption against rotating custody survived the enactment of Fla. Stat. 61.121.[5] The history of the development of the common law presumption against rotating custody in Florida law, the plain language of Fla. Stat. 61.121, the legislative history and the correct rules of statutory construction all support the Petitioner's position, and the analysis of the

[5] Furthermore the statutory rule of construction *expressio unius est exclusio alterius* is used to determine whether a general law supercedes or repeals a special or local statute and does not apply to implied repeal of the common law. If anything this rule, even as misapplied by the Respondent, would favor the Petitioner's position in that it could be argued that because the statute does not mention the presumption against rotating custody then it must be presumed that the legislature did not intend to repeal it because it was excluded from the legislative provision and remained a part of the common law.

First, Second and Fourth District Courts of Appeal[6] that the common law presumption against awarding rotating custody absent a showing of special circumstances survived the enactment of Fla. Stat. 61.121.

II.

THIS COURT HAS THE AUTHORITY TO REVIEW AND SHOULD REVIEW THE ANCILLARY ISSUES RAISED BY THIS APPEAL - (I) THAT THE RESPONDENT IS UNABLE TO SHOW ANY SPECIAL CIRCUMSTANCES TO OVERCOME THE COMMON LAW PRESUMPTION AGAINST ROTATING CUSTODY; AND (II) THAT THE THIRD DISTRICT ERRED WHEN IT FOUND THAT THERE WAS NO COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S DESIGNATION OF THE MOTHER AS PRIMARY RESIDENTIAL PARENT.

Petitioner agrees with Respondent that this court has the discretion to consider issues ancillary to those certified to the court. *Trushin v. State*, 425 So.2d 1126, 1130

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[6] Petitioner stated in her Initial Brief on Jurisdiction that *Bazan v. Gambone,* 924 So.2d 952 (Fla. 3rd DCA 2006) is only *orbiter dictum* on the issue of whether the presumption against rotating custody survived the enactment of Fla. Stat. 61.121. Pet. Int. Brf. Jurd. p.10. The court in *Bazan* quoted to the First District decision in *Cooper v. Gress,* 854 So.2d 262 (Fla. 1st DCA 2003) which held that nothing in the plain statutory language of Fla. Stat. 61.121 indicated that the Florida legislature intended to eliminate the longstanding presumption against rotating custody.

(Fla. 1982)(Once the Supreme Court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case).

The Petitioner's Initial Brief pointed out that the Respondent was unable to identify any compelling "special circumstances" before either the trial court or the Third District Court of Appeals that would justify an award of rotating custody. *Langford supra* @ 1238. The Petitioner contends that consequently the trial court order finding that the Father was not entitled to an award of rotating custody because he could not identify any compelling special circumstances to overcome the presumption against rotating custody should be affirmed without further hearings on remand.

The only two "special circumstances" that Respondent identifies in his Answer Brief are (1) that the so called "informal" rotating custody schedule that Michael imposed on Erica when he was attending law school was beneficial for Ethan and (2) that the parents lived close to each other.

On the first point, Erica testified that the informal rotating custody schedule only worked while Michael was in law school full time attending classes in the morning with his afternoon free and did not work when Michael took up full time employment as a busy trial lawyer with the State Attorney's office. Moreover, all of the evidence presented to the trial court on the remaining *Langford* factors suggested that a rotating

custody arrangement was not in Ethan's best interest. The evidence presented also tipped the scales in favor of naming Erica as primary residential parent pursuant to Fla. Stat. 61.13(3)(d) and (m).

The court was presented with evidence to show that the father was unable to consistently be available to pick Ethan up after school from after school care or on the two weekday afternoons when the child had organized extracurricular activity which ended at 4 p.m. The mother, on the other hand, as a school teacher employed at the same school that Ethan attends was always available to care for him in the afternoons. Similarly the mother was available to care for Ethan over the summer holidays when, as a Miami-Dade school teacher, she would be on vacation. The father's back up posse of unidentified friends, neighbors and miscellaneous relatives living in far away South Miami willing to travel to Key Biscayne to pick up Ethan from school on Key Biscayne if Michael was unable to do so did not serve to convince the court in favor of the Father. Moreover, Respondent's brief admits that on at least one occasion when he was preparing for trial he failed to pick up his son or make any alternative arrangements. The trial court was therefore concerned that a rotating custody schedule was likely to inhibit the development of a stable living environment for Ethan. This evidence not only tipped the scales away from ordering rotating custody but also tilted

the scales in favor of appointing Erica as primary residential parent pursuant to Fla. Stat. 61.13(3)(d) and (m).

As the First District Court of Appeals pointed out in *Ruffridge supra* @ 50:

> "Although the weekly rotation plan is fair to the parents in the sense that it allows them equal time, it was not shown to be fair to the children.....Mr. Ruffridge argues that there is evidence that the children had adapted well to the weekly rotating custody arrangement by the time of the final hearing. Thankfully, that is correct. However, it does not follow that a particular living arrangement is in the best interest of the children merely because the children have adapted to it."

The *Ruffridge* court went on to deny rotating custody in a situation that was practically identical to the situation at bar for the same reasons as the trial court did below. In addition to the finding quoted above, the *Ruffridge* court also noted that the fact that the parents live close to each other might make the rotation less disruptive, but was not enough to justify an award of rotating custody.

The Petitioner would request that this court exercise its ancillary jurisdiction to affirm the trial court's judgment in its entirety in so far as the judgment denied the Father's prayer for an award of rotating custody. The Petitioner would also request that this court exercise its ancillary jurisdiction to overrule the Third District Court of Appeals finding that the Petitioner did not present competent substantial evidence in support of her claim to be made primary residential parent for Ethan.

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 in its entirety, 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 to Kathy M. Klock Esq., Fowler, White, Burnett P.A., 901 Phillips Point West, 777 South Flagler Drive, West Palm Beach, FL 33401 this 13th day of July, 2010.

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CERTIFICATE OF COMPLIANCE

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

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