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 SUPPLEMENTAL BRIEF

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I.

THE REPEAL OF FLA. STAT. 61.121 BY SB 2532 AND THE ENACTMENT OF SB 2532 WOULD HAVE NO EFFECT ON THE OUTCOME IN THIS CASE

The repeal of Fla. Stat. 61.121 by SB 2532 in October, 2008 and the enactment of Fla. Stat. 61.13(3) had two legal effects. The first effect was to remove Fla. Stat. 61.121 from Florida law and to treat it as if it had never existed, except with regard to dissolution judgments containing time sharing and parental responsibility provisions that were entered while Fla. Stat. 61.121 was in effect. The second legal effect of the repeal of Fla. Stat. 61.121 and the enactment of Fla. Stat. 61.13(3) was to do away with the concept of designating a "primary residential parent" having "custody" of the child and a "non-custodial parent" having "visitation" rights which had been the law in Florida ever since the enactment of the Shared Parental Responsibility Act in 1982. Instead the courts were given the authority to devise "parenting plans" containing "time sharing schedules" where "the best interests of the child shall be the primary consideration".

The new statute mandates that "parental responsibility for a minor child shall be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child" in which case the court shall order "sole parental responsibility for a minor child to one parent, with or without time-sharing with the

other parent". Fla. Stat. 61.13(2)(c). In the vast majority of cases, where "shared parental responsibility" applies, the court has wide latitude in devising a "parenting plan". It "*may* consider the expressed desires of the parents" but may also "grant to one party the ultimate responsibility over specific areas of the child's welfare or may divide those responsibilities between the parties based on the best interests of the child".

In "establishing parental responsibility" and "creating a parenting plan, including a time-sharing schedule" the court is asked in Fla. Stat. 61.13(3) to evaluate an amended set of factors "affecting the welfare and interests of the minor child". These factors incorporate many of the factors which already existed in the previous statute while adding or rewording some other factors.

The application of factors listed in the 2008 legislation would result in exactly the same outcome as the trial judge reached in the case below. That is to say, an order granting both parents shared parental responsibility with a time sharing plan providing for the child to spend a couple more days with the mother than with the father. This is because the new Fla. Stat. 61.13(3) re-incorporates the two factors which favored the Mother below while including three new factors which would tend to show that it is in the best interests of Ethan to spend a little more time with his mother than with his father.

The Judgment entered by the court in this case gave the parents shared parental responsibility for the child. In addition, the time sharing order did NOT contain a traditional visitation schedule but granted the father *substantially expanded* visitation rights[1]. In Miami-Dade County a traditional visitation schedule typically granted the non-custodial parent the right to visit with the child every other weekend from Friday night to Sunday night or Monday morning (i.e. 2 to 3 nights out of 14 over a two week period). The expanded visitation order entered by the judge in this case allowed the father to visit every other weekend from Thursday after school to Monday morning and on Thursday overnight during the week when he does not have weekend visitation (i.e. 5 out of 14 nights over a two week period). The order also provided for both parents to spend equal amounts of time with Ethan over the holidays. R. Vol. II p. 250-255. Amazingly, this appeal is all about trying to get an extra two nights of visitation every two weeks for the Father. Not because it is in Ethan's best interests, but because it is what the Father wants.

In its judgment the court found that ten of the factors listed in Fla. Stat. 61.13 at the time did not favor either one of the parents. *See paras*

[1] This was acknowledged by counsel for the Father ("Your Honor, at the hearing on December 14th you made an announcement at the end that the Father was to have substantially expanded time sharing") R.Vol. VIII p.6.

2(a),(b),(c),(e),(f),(g),(h),(i),(k) and (l) of Final Judgment R. Vol. II p. 250-255. It listed absolutely no factors which favored the Father and listed two factors which favored the Mother. *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 days a 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.

In making this part of its ruling the court relied on the factors listed in Fla. Stat. 61.13(3)(d) and (m) which provided that the court was to consider "(d) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity" and "(m) Any other fact considered by the court to be relevant". Those factors are re-incorporated into the new Fla. Stat. 61.13 as sub-sections (d) and (t) respectively. However the new Fla. Stat. 61.13 goes on to incorporate three new factors which are relevant to the facts at bar:

> "(c) The demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child as opposed to the needs or desires of the parent.
>
> (e) The geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan. This factor does not create a presumption for or against relocation of either parent with a child.
>
> (f) The demonstrated capacity and disposition of each parent to participate and be involved in the child's school and extracurricular activities."

The evidence presented at trial revealed that Ethan attends Key Biscayne Elementary School where his mother is employed as a teacher. Ethan's father was employed as a trial attorney with the State Attorney's Office at the time of trial. Both the Father and Mother lived on Key Biscayne. The Father's extended family lived in the South Miami/Kendall area. Ethan's school day ends at 2:00 p.m. After school care ends at 3:30 p.m. Ethan attends soccer practice at 3:30 p.m. for an hour two days a week. The Father would arrive on Key Biscayne from his job in downtown Miami at 5:30 p.m./6:00 p.m. at the earliest. R. Vol. V 60-80. Ethan's mother was always available to pick Ethan up from after school care at 3:30 p.m. and take him to soccer practice at 3:30 p.m. and then pick him up from soccer practice at 4:30 p.m. The Father, on the other hand, was not available to do so and initially suggested that a neighbor pick Ethan up and take him to soccer practice and pick him up after soccer

practice and keep him until the Father arrived on Key Biscayne one and a half hours later. The Father continued to insist on a rotating custody schedule. The Father finally agreed to allow the Mother to pick Ethan up from after school care two days a week during his rotating week, take Ethan to soccer practice, pick him up from soccer practice, take him to her home on Key Biscayne, presumably feed him and have him ready to be picked up by his Father at 6 p.m.

The court, unsurprisingly, found that this was not conducive to the child's stability under the factors then in force. Under the new factors, the court would have referred to Fla. Stat. 61.13(3)(c),(e) and (f) to find that a rotating custody schedule was not in Ethan's best interests. How could it be in Ethan's best interests to be compelled to split time between his Mother and Father's home two evenings a week during his Father's rotating week? Essentially Ethan's mother would have to pick him up from school during the week when Ethan was residing with his Father, take him to soccer practice, pick him up from soccer practice, take him to her home, bathe and feed him and then have his Father pick him up to take him to his home to go to bed. Based on the evidence presented, any court applying the new factors would conclude that a rotating custody schedule is not in the child's best interests but is simply an attempt to satisfy the desire of the Father to have numerically equal time sharing with the Mother

irrespective of how inconvenient and disruptive this schedule would be for the child.[2] The court would also be able to look at the Mother's availability and the Father's unavailability to participate in extracurricular activities during the week with Ethan as another relevant factor.

Furthermore any court applying the new factors would take into consideration the fact that the Father had been unable to pick up Ethan on at least one occasion when the Father was preparing for trial and presumably working late. This incident was referred to by the Father in his Answer Brief. p. 14 fn. 11. R. Vol. VI. pp. 102-103. This contradicts the statement of the Third District Court of Appeals that "[t]here was no evidence that the father had ever been unable to pick up his son from the after-care program on time". pg. 11 The majority in the Third District made this statement in the section of its opinion finding that there was no competent substantial evidence to support the trial court's decision to have Ethan spend a couple of days more with his

[2] The Third District's statement at pg. 11 that "the parties amendment to the time sharing order provides that if the father cannot pick up the child, the mother will be entitled to pick up the child from school and the father will then pick up the child from her residence" in support of its holding that there was no competent substantial evidence to support the court's designation of the Mother as primary residential parent seems oblivious to the fact that under a rotating custody schedule this case scenario would not be a one off occurrence but a twice weekly event during the Father's rotating week. To suggest that this arrangement would be in Ethan's best interests strains credulity.

Mother than with his Father to promote stability.

The court's time sharing order was in Ethan's best interests under the factors in force when the judgement was entered in 2007 and would be in Ethan's best interests under the factors now in force.

II.

IF THIS CASE WERE TO BE REMANDED TO THE TRIAL COURT TO RE-EVALUATE THE ISSUES REGARDING THE ARRANGEMENTS FOR THE CHILD THE COURT WOULD APPLY THE LAW IN EFFECT AT THE TIME JUDGMENT WAS ENTERED.

The case was tried in October, 2007. Final Judgment was entered on February 25, 2008. R. Vol II. pp. 246-274. An order on the Mother's Motion for rehearing was entered on May 16, 2008. R. Vol II. pp. 275-281. SB 2532 came into effect on October 1, 2008. The new statute was not passed to address any alleged constitutional deficiencies in the then existing statute.

Florida follows the general rule that in the absence of a clear legislative expression to the contrary, a law is presumed to apply prospectively. *State v. Lavazzoli*, 434 So.2d 321 (Fla. 1983). This is in accordance with constitutional prohibition against the retroactive application of legislation. The 2008 law is silent concerning the prospective or retrospective operation of its provisions and therefore

the presumption is that the Legislature intended the 2008 law to apply to future time sharing arrangements and not arrangements that had already been reduced to judgment.

However, it is well established that while substantive statutes are subject to this constitutional prohibition, remedial or procedural statutes are not. *Village of El Portal v. City of Miami Shores,* 362 So.2d 275 (Fla. 1978). The question becomes whether the new statutory rules governing the time sharing rights of parents are substantive or procedural/remedial in nature. Substantive laws either establish new rules, rights or duties or change existing ones. Procedural or remedial statutes prescribe the method for enforcing a substantive right and relate to the form of proceeding or operation of laws, that is they describe enforcing, administering or determining rights, liabilities or status.

The question becomes whether the statute modifies, creates or destroys existing custody rights or whether it changes the means to be employed in enforcing those rights? *Serna v. Milanese Inc.,* 643 So.2d 36 (Fla. 3rd DCA 1994). Furthermore, an act designed to serve a remedial purpose will not be applied retroactively when it is clear that doing so "would attach new legal consequences to events completed before its enactment." *Arrow Air, Inc., v. Walsh,* 645 So.2d 422, 425 (Fla. 1994). This is because a statute that achieves a "remedial purpose by creating substantive new rights or imposing new legal burdens" is treated as a substantive change in the law. *Id @*

424; *Smiley v. State,* 966 So.2d 330 (Fla. 2007).

The entire dispute in this proceeding concerns the parents rights to custody, visitation and/or time-sharing with their minor child and as such those rights are substantive in nature. *See eg. Morris v. Swanson,* 940 So.2d 1256 (Fla. 1st DCA 2006)(statutory amendment limiting retroactive child support to 24 month period preceding filing of petition did not apply retroactively). Therefore in the absence of legislative intent to the contrary, the 2008 amendments to Fla. Stat. 61.13(3) and the repeal of Fla. Stat. 61.121 only apply prospectively and would not be applied by the trial court were this case to be remanded for further proceedings.

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 7th day of September, 2010.

Respectfully Submitted,

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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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