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Carolyn R. Wade v. Michael D. Hirschman

THE LAST CASE ON THIS MORNING'S D O CKET IS WADE VERSUS HIRSCHMAN. ,,

MA Y IT PLEA SE THE COURT. MY NAME IS TR ACI CA RLIN , AND I AM HERE FOR THE PETITIONER. I AM GO ING TO REFER TO THEM AS THE MOTHER AND FATHER .

RAT HER THAN TO REFER TO THEM AS THE WARRING PARTIES?

YES . BASICALLY WE ARE ASKING THECOURT TO DO THREE THINGS , THE FIRST TO RESOLVE THE CONFLICT BETWEEN THIS CASE BEL OW AND THE COOPER CASE, IN FAVOR OF THE COO PER'S REASONING, WHERE YOU HAVE A ROTATING CUSTODY AGREEMENTTHAT WAS INCORPORATED INTO THE FINAL JU DGMET AND ONE PARTY OR BOTH PARTIESSEEKING A MODIFICATION , THAT WHAT WE HAVE CALLED THE CHANGE TEST, S H OULD APPLY.

IF WE DO THAT , SHO ULDN'T WE JUST SI MPLY REMAND AFTER THAT, TO THE TRIAL COURT?

WELL , WE WOULD ARGUE, YOUR HONOR, THAT , BECAUSE THE EVIDENCE SHOWS AND THAT YOU ARE AUTHORIZED TO REVIEW ANY ISSUES THAT COME U P IN ADDITION T O THIS CONFLICT , THAT YOU SHOULD, ALSO , DETERMINE THAT THE FATHER FAILED TO MEET THAT CHANGE TEST, BECAUSE HE FA ILED TO DEMONSTRATE THAT THERE WAS A SUBSTANTIAL OR MATERIAL CHANGE POST-JUDGMENT OR THATTHERE WAS ANY

THAT WASN'T THE STANDARD BELOW , WAS IT? I MEAN , THAT WASN'T THE STANDARD THAT THE TRIAL COURT APPL IED AND THAT THE PARTIES UNDERSTOOD THAT T HEY WERE OPER ATING UNDER?

THAT IS WHAT THE PARTIES UNDERSTOOD THAT THEY WERE OPERATING UNDER BUT THE TRIAL COURT N EVER MADE THE FINDING ON THE SE COND PRONGOF THE TEST, WHICH IS THAT THE CHILD WOULD BE PROMOTED BY THE CHANGE OR WOULDUFFER ANY DETRIMENT IF WE MAINTAINED THE ST ATUS Q U O. WHAT THE COURT DID FIND WAS THAT IT WOULD BE IN THE BEST INTERESTS OF THE CH ILD, JUST BASED ON THE BEST INTERESTS OF THE CHILD , JUST BASED ON 61.93

WE COULD BE HERE ALL DAYON THE MERITS , BUT I THOUGHT THE JUDGE RULE D IT WAS NO LONGER IN THE CHILD'S BEST INTEREST TO HAVE THIS ROTATING CUSTODY AGREEMENT.

YES , BO W THE ANALYSIS OF THE 61 SUBSECTION 93 FACTORS.

BUT GOING BACK TO JUSTICE CANTERO , IT IS PR ETTY DIFFICULT, IN READING THIS JUDGE'S ORDER , TO CO ME TO ACONCLUSION THAT THIS JUDGE DIDN'T THINK THAT THERE WERE SUBSTANTIAL PROBLEMS WITH THE TYPE OF DYSFUNCTION AND ALIENATION ON THE PART OF THE MOTHER THAT MANDATED THAT THERE BE SOME CHANGE.

BUT WHEN WE WE NT TO THE FIFTH DISTRI CT COURT OF APPEAL AND THE FIFTH DISTRICT COURT OF APPEAL WAS LOOKING AT WHETHER THE TRIAL COURT FOUND THAT THE FATHER SATISFIED THE TE ST, THE FIFTH DISTRICT SPECIFICALLY CONCLUDED THAT HE DID NOT SATISFY THE TEST , AND THEREASON THAT THE COURT REACHED THAT CONCLUSION WAS BECAUSE IT DETERMINED THAT HE HAD NOT DEMONSTRATED THAT THE FATHER HAD NOT DEMONSTRATED, AND THEN

THERECORD DID NOT SUPPORT , THE DETRIMENT TO THE CHILD'S STANDARD, AND IN THE FIFTH DISTRICT SPECIFICALLY STATED

BECAUSE THE COURT FOUND THAT UNDERMINED , ALIENATED , THE WIFE, REFUSED TO COOPERATE WITH PARENTING COORDINATORS AND PROCEEDED ON THIS, SO , A GAIN , GOING BACK TO THIS ISSUE, IT SEEMS TO ME THAT EVERYTHING THAT THE TRIAL COURT WAS STATING WAS THAT THIS TYPE OF BEHAVIOR ON THE PART OF ANOTHER, WHO IS , CANNOT BE TOLERATED , AND THAT, WHEN THIS OCCURS , THAT IT IS , OF COURSE, IS DETRIMENTAL, BUT WHETHER THERE HAS BEEN AN EXPLICIT FINDING , WE ARE NOT HERE TO REREVIEW THE EVIDENCE, BUT IT IS CERTAINLY APPROPRIATE FOR THE TRIAL JUDGE TO MAKE CLEAR WHAT MAY HAVE BEEN IMPLICIT IN WHAT HE WAS STATING .

BUT WAIT A MINUTE. THE FIFTH DISTRICT COURT OF APPEAL HAS SPECIFICALLY SAID IN THE HADLEY CASE, WHICH IS CITED ON PAGE 38 OF OUR BRIEF , THAT YOU CAN'T ASSUME THAT CERTAIN CONDUCT IS AFFECTING THE CHILD NEGATIVELY. IN THAT CASE IT WAS A VISITATION DECISION, BUT THE COURT HAD SAID, THE TRIAL COURT IN THAT CASE HAD CHANGED THE MOTHER'S VISITATION BECAUSE THE CHILD WAS VISITING WITH THE MOTHER AT HER HOME WHICH HAPPENED TO BE A NUDIST COLONY. THE FATHER ARGUED, THIS IS DETRIMENTAL TO THE CHILD, THAT THE CHILD WOULD GO TO THE NUDIST COLONY , BECAUSE A CHILD GETS RIDICULED OR THERE COULD BE RIDICULE AND THIS RIDICULE COULD BE HARMFUL . THE FIFTH DISTRICT IN THAT CASE SAID, NO , YOU CANNOT ASSUME THAT THERE IS DETRIMENT THOUGH THE CHILD. YOU HAVE TO DETERMINE A REQUIREMENT TO THE CHILD. YOU HAVE TO DETRIMENT. YOU HAVE TO MAKE A SPECIFIC FINDING OF DETRIMENT.

SO WHERE DOES THE ELEMENT OF DETRIMENT , AS OPPOSED TO THE STATUTORY SCHEME OR ALL THE WAY GOING BACK TO FRASIER, TALKS TO THE WELFARE OF THE CHILD. IS THAT REALLY NOT ADDING A THIRD ELEMENT, AS COE ARGUES?

NO, YOUR HONOR , AND PERET STATED THAT IT DID NOT ADD A THIRD ELEMENT OR IT MIGHT HAVE BEEN YOUNG , BECAUSE THE TWO-PART TEST THAT HAS BEEN ADOPTED BY EVERY DISTRICT COURT OF APPEAL IN THE STATES TO MODIFICATION, IS THAT YOU SHOW A SUBSTANTIAL CHANGE POST DISSOLUTION AND YOU SHOW THAT THE CHILD'S BEST INTERESTS WOULD BE PROMOTED BY THE CHANGE.

YOU STARTED OFF THIS PROCEEDING HERE BY SAYING PROMOTES THE WELFARE OF THE CHILD OR IS DETRIMENTAL . - - OR IS DETRIMENTAL.

WHAT IT IS THAT COURTS HAVE INTERFERPT INTERPRETED THAT "PROMOTED BY THE CHANGE "COTO, THE COURT WOULD FIND THAT PROMOTED BY THE CHANGE" , THE COURT WOULD FIND THAT NOT MAINTAINING THE STATUS QUO WOULD BE DETRIMENTAL TO THE CHILD. THAT IS FOUND IN YOUNG , PEREZ , ANY OTHER NUMBER OF CASES THAT WE HAVE CITED IN OUR BRIEF , INCLUDING THE HADLEY CASE , A FIFTH DISTRICT CASE , AND THE SCHWINEBERG CASE, ALL SAY THAT THE CHILD'S BEST INTEREST WOULD BE PROMOTED BY THE MODIFICATION. THERE HAS TO BE SOME DETERMINATE REPRESENT SOME DETRIMENT ELEMENT TO . THAT WHAT WE ARE FOCUSING ON IS THE BEST INTERESTS OF THE CHILD NOT THE PARENT.

I UNDERSTAND THAT. WHAT I THINK JUSTICE BELL IS ASKING, AND I DON'T KNOW IF WE ARE GOING BEYOND THE SCOPE OF THE CONFLICT. YOU HAVE YOUR FIRST POINT BEING THAT A, AND LET'S GET BACK HERE THAT THE VOTE EIGHTING THE ROTATING CUSTODY AGREEMENT THAT WAS ASSIGNED, DOESN'T HAVE A LESSER VALUE, IN TERMS OF THE MODIFICATION STANDARD, THAN OTHER TYPES OF AGREEMENTS, CORRECT? AND THAT IS REALLY THE ONLY CONFLICT ISSUE WE HAVE.

RIGHT. IS WHICH STANDARD WOULD APPLY WITH VOTE RATING WITH ROTATING CUSTODY.

BEYOND THAT, IF WE DECIDE THAT IN YOUR FAVOR, YOU WANT TO GO BEYOND THAT AND SAY THAT WE SHOULD BE ABLE TO LOOK AT THIS ALL AND DECIDE THAT THERE WAS NO, YOU KNOW, THAT THEY DIDN'T MEET EITHER OF THE CITE YEAR YEAH, AND ANY OF THE CRITERIA, AND I DON'T UNDERSTAND WHY IT WOULDN'T BE MORE APPROPRIATE FOR US TO REMAND IT, AS JUSTICE CANTERO SUGGESTED, BACK TO THE TRIAL COURT, TO SEE IF, UNDER THE STATE OF THE RECORD AT THAT TIME, WHETHER THOSE FINDINGS CAN BE MADE.

WELL, THAT WOULD BE ONE APPROACH. THE OTHER APPROACH WOULD BE TO SIMPLY REMAND IT TO THE FIFTH DISTRICT, BECAUSE THE FIFTH DISTRICT IN ITS OPINION, SPECIFICALLY STATED THAT, IF THE CHANGE TEST APPLIED, AS WE HAVE ARTICULATED IT, THE FATHER DID NOT MEET THAT TEST, AND IF YOU LOOK AT PAGE 954 OF THE OPINION AS TO THAT DETRIMENT PORTION, THE FIFTH DISTRICT STATED, QUOTE, THE RECORD INDICATES THAT THE CHILD WAS NOT NEGATIVELY IMPACTED BY WADES, IN THAT CASE THE MOTHER'S ACTIONS.

MS. CARLIN, SEE, THE PROBLEM I HAVE WITH THAT, IS IF WE ARE GOING TO GO AHEAD AND SAY THE FIFTH DISTRICT IS IN NO BETTER POSITION TO LOOK AT THIS RECORD AND DECIDE WHETHER THE MOTHER'S CONDUCT WAS LIKELY TO CAUSE HARM TO THE CHILD. AND SO I DON'T UNDERSTAND IF WE ARE GOING TO BELIEVING IT AND SAYING LET THE FIFTH DISTRICT LOOK AT THE RECORD AND DRAW CONCLUSIONS OF LAW ABOUT IT. WE CAN DO THAT, JUST AS WELL, AND GOING TO THAT, I THINK THAT THE DIFFICULTY I HAVE, AND IT MAY BE THE FRUSTRATION OF MANY APPELLATE COURTS AS I READ THESE DECISIONS LIKE NIFE AND OTHERS, IS LIKE KNIFE AND OTHERS, IS THAT WE CAN'T WAIT UNTIL A CHILD STARTS EXHIBITING NIGHTMARES OR OTHER TYPES OF PROBLEMS. WE CAN LOOK AT THE TYPE OF BEHAVIOR THAT IS BEING ENGAGED IN BY A PARENT, THAT IS SO ANTI-THREATENING TO GOOD PARENTING AND PROMOTING SOUND POST DIVORCE AGREEMENTS, WHICH IS WHAT THEY WERE SUPPOSED TO TRY TO DO, TO SAY THAT THIS CAN BE IN THE BEST INTERESTS OF THE CHILD BECAUSE THE CHILD HAS NOT YET, YOU KNOW, IS RESILIENT, WOULD MEAN THAT WE WOULD HAVE TO WAIT FOR A FEW YEARS TO SEE IF THE CHILD REALLY STARTED DEVELOPING SIGNIFICANT PROBLEMS, BEFORE THE TRIAL COURT WOULD HAVE THE ABILITY TO CHANGE THE ARRANGEMENT?

WELL, YES. I MEAN, THE PROBLEM IS THAT THE FOCUS NEEDS TO BE ON WHAT IS IN THE BEST INTEREST OF THE CHILD. IN PEREZ, THE THIRD DISTRICT HAS SAID, LOOK, WE HAVE GOT TO HAVE THIS DETRIMENT ELEMENT, BECAUSE IF WE DON'T HAVE THE DETRIMENT ELEMENT, YOU ARE GOING TO HAVE CONSTANT FIGHTS BETWEEN PARTIES THAT ARE OTHERWISE FIT PARENTS, ABOUT WHERE THE CHILD SHOULD RESIDE. IN THIS CASE, THE MOTHER'S ALLEGED, YOU KNOW, FAILURE TO COOPERATE WITH THE PARENTING COORDINATOR AND DO WHATEVER, YES, IS A PROBLEM AMONG THE PARENTS, AND MAYBE THE WAY YOU RESOLVE THAT IS YOU EFFECT SHARED PARENTAL RESPONSIBILITY, WHICH IS WHAT HAPPENED IN THE KNIFE CASE. THEY DIVIDED SHARED PARENTAL RESPONSIBILITY AND SAID PARENT A, MOM GETS TO DECIDE MEDICAL DENTAL STUFF AND PARENT B, THE FATHER GETS TO DECIDE EXTRACURRICULAR ACTIVITIES, SO WE STOP HAVING THIS CONTACT BETWEEN THE PARENTS, BUT IN THIS CASE THE KID WAS DOING FINE WITH THE ROTATING CUSTODY ARRANGEMENT.

CAN WE REALLY SAY THAT THE KID WAS DOING FINE WITH THE ROTATING CUSTODY? IT SEEMS TO ME THAT, IN THE TRIAL COURT'S ORDER, HE TALKS ABOUT THE CHILD NOT TURNING IN HOMEWORK ASSIGNMENTS. I MEAN, THERE ARE ANY NUMBER OF THINGS IN THE TRIAL COURT'S ORDER THAT CHILD WAS NOT REALLY PROSPERING UNDER THIS ROTATING CUSTODY.

LET ME ADDRESS THE SCHOOL ISSUE. THE SCHOOL ISSUE WAS THAT THE MOTHER DID NOT COOPERATE WITH THE SECOND GRADE TEACHER. THE SECOND GRADE TEACHER TESTIFIED AT THE TIME OF THE MODIFICATION HEARING, THE CHILD WAS GOING INTO THE FOURTH GRADE. NO TEACHER FROM HER THIRD GRADE YEAR EVEN TESTIFIED AT THE TRIAL. THE SECOND GRADE TEACHER SAID, YEAH, I HAD PROBLEMS WITH THE MOM DURING THE SCHOOL YEAR BUT THEY HAD IMPROVED BY THE END OF THE YEAR. IN THE KELLY AND THE GRUMNEY CASE, BOTH SAID

WHEN YOU HAVE GOT A PROBLEM AND IT HAS BEEN CURED BY THE TIME OF THE HEARING, WE DON'T PENALIZE THE CHILD BY THE FATHER'S OR MOTHER'S CONDUCT, BY MAKING THE CHILD HAVE OTHER PLACEMENT.

IS THIS TYPICAL TO THE SITUATION WHERE THE MOTHER WOULDN'T LET THE CHILD DO CERTAIN THINGS BECAUSE THE MOTHER WANTED THE CHILD TO BE CLOSE TO HER AND, I MEAN, THERE ARE ANY NUMBER OF THINGS THAT ARE VERY TROUBLING IN THIS ORDER ABOUT THE MOTHER'S CONDUCT.

RIGHT, BUT THE PROBLEM WITH THOSE FINDINGS WERE THAT THEY WERE PREJUDGMENT CONDUCT. THAT MAKES IT RES JUDICATA. THERE WAS AN ORIGINAL JUDGMENT THAT DETERMINED, BASED ON FLORIDA STATUTE 61.121, THAT ROTATING CUSTODY WAS IN THE CHILD'S BEST INTEREST.

LET ME ASK YOU ON THAT LINE, YOU MADE THE STATEMENT THAT THE FIFTH DISTRICT HELD THAT THERE WAS NOT AN INSUFFICIENT SHOWING AS TO A CHANGE OF CIRCUMSTANCES. WHERE IN THIS OPINION DOES IT SAY THAT?

I ACTUALLY, WHAT I WAS TALKING ABOUT EARLIER, WAS THAT THEY MADE A STATEMENT THAT THERE WAS AN INSUFFICIENT SHOWING OF DETRIMENT TO THE CHILD.

BUT THEY DIDN'T MAKE, BUT THERE IS NOTHING IN THIS OPINION THAT I HAVE FOUND, THAT SAYS THAT THEY MADE THE STATEMENT THAT THE FIFTH DISTRICT MADE THE STATEMENT, THAT THERE WAS AN INSUFFICIENT SHOWING OF A CHANGE OF CIRCUMSTANCES. IT ME RELY SAID THAT WE DO NOT NEED TO ADDRESS THE ISSUE OF WHETHER HIRSCHMAN SUFFICIENTLY ESTABLISHES A SUBSTANTIAL

JUSTICE WELLS, AT PAGE 954 OF THE FIFTH DISTRICT'S OPINION, IT SAYS THE RECORD, AND IT IS REFERRING TO THE SUBSTANTIAL OR MATERIAL CHANGE PORTION OF THE TEST, THAT THE RECORD BEARS OUT HER ARGUMENTS, AND IN THAT CASE THEY WERE REFERRING TO THE MOTHER'S ARGUMENT THAT THE FATHER FAILED TO SHOW A POST JUDGMENT SUBSTANTIAL OR MATERIAL CHANGE

WHAT LANGUAGE ARE YOU REFERRING TO HERE?

PAGE 9534 OF THE OPINION.

WHERE ON PAGE 954 OF THE OPINION.

WHERE ON THAT PAGE?

WHILE I AM LOOKING FOR THAT, YOUR HONOR WHILE I AM LOOKING FOR THAT, YOUR HONOR, WHILE I AM DIGGING THROUGH MY MANY CASES, THE OTHER ISSUE FOR US IS THAT YOU HAVE TO MEET BOTH ASPECTS OF THE TEST, SO EVEN IF THE COURT WERE TO CONCLUDE THAT THE FATHER DEMONSTRATED SOME SORT OF SUBSTANTIAL OR MATERIAL CHANGE, BECAUSE THEY DIDN'T DEMONSTRATE THAT THERE WAS A DETRIMENT TO THE CHILD, THAT

OKAY. I SEE THE SENTENCE THAT YOU ARE REFERRING TO. THE RECORD BEARS OUT HER ARGUMENT, REFERRING TO THE FACT THAT SHE WAS ARGUING THAT SHE HAD ALL OF THESE PROBLEMS, PRIOR TO THE ENTRY BY THE TRIAL JUDGE, OF THIS JOINT CUSTODY ORDER. CORRECT?

THAT'S CORRECT. RIGHT.

RIGHT. BUT THEN THE COURT DOESN'T SAY THAT THE POSITION THAT, SINCE THAT TIME, THE

PROBLEMS THAT WERE IDENTIFIED HAD BORNE OUT BY THE FACT THAT SHE WASN'T COMPLYING WITH THE ORDER THAT SHE WASN'T COOPERATING, THAT SHE WASN'T, THAT SHE WASN'T DEMONSTRATING THAT SHE COULD FULFILL THIS JOINT PARENTING. ISN'T THAT WHAT THE FIFTH DISTRICT IS SAYING? THIS RECORD DEMONSTRATE?

I THOUGHT WHAT THE FIFTH DISTRICT WAS SAYING WAS, IF THE CHANGE TEST APPLIED, IF YOU HAD TO MEET THAT TWO-PART TEST, THE FATHER DIDN'T MEET THE TEST, BUT WE DON'T THINK THAT IS THE TEST THAT APPLIES, BECAUSE WHERE YOU HAVE AN AGREED-TO ROTATING CUSTODY ARRANGEMENT, WE GET TO GO BACK AND DO A COMPLETE DO OVER, BASED ON THE BEST INTEREST ANALYSIS UNDER 61.13 SUBSECTION 3. IT IS OUR CONTENTION HOWEVER THAT, THE FATHER DIDN'T MEET THE TEST ON SHOWING A SUBSTANTIAL POST JUDGMENT CHANGE, BECAUSE THE FOCUS IS ON CHANGES POST DISSOLUTION.

IS IT YOUR POSITION THAT YOU CANNOT CONSIDER THE ACTIONS BEFORE JUDGMENT IN MAKING THAT DECISION?

ABSOLUTELY, YOUR HONOR, AND THAT

SO IF YOU HAVE A SITUATION WHERE YOU HAVE WARRING PARTIES AND THEY SAY, LOOK, THIS ISN'T IN THE BEST INTERESTS OF OUR KIDS. LET'S TRY THIS. LET'S TRY ROTATING CUSTODY AND SEE IF IT WORKS IN THING ITING ATMOSPHERE, YOU WOULD SAY THAT RES JUDICATA IS SO STRONG THAT WE HAVE TO PUT BLINDERS ON AND NOT CONSIDER THE IMPACT BEFOREHAND IN THE TOTALITY OF THE PICTURE. ISN'T THAT RATHER ARTIFICIAL, WHEN YOU ARE GOING BACK TO THE COURT EVERY SIX MONTHS OR A YEAR, BECAUSE THERE IS SO MUCH DISCORRUPTION DISRUPTION IN A CHILD'S LIFE?

NO. YOUR HONOR, THAT GOES TO THE CHANGE PORTION OF THE TEST. THE CHANGE PORTION OF THE TEST, IS THE WARRING PARTIES DETRIMENTAL TO THE CHILD? THERE WAS EVIDENCE IN THE RECORD THAT THIS CHILD WAS HAPPY GO LUCKY, DOING WELL IN SCHOOL, NOT NEEDING THERAPY, WAS NOT COMPLAINING ABOUT PROBLEMS.

IS IT YOUR POSITION THAT THE TRIAL COURT CANNOT CONSIDER WHAT HAPPENED BEFORE THE JUDGMENT AND HAS TO IN ESSENCE, PUT BLINDERS ON, IN MAKING THE DETERMINATION WHETHER THIS CONDUCT THAT HAS OCCURRED, BEEN OCCURRING FILING OF THE PETITION IN SIX MONTHS, I CAN LOOK AT THE SIX MONTHS BUT I CAN'T LOOK AT THE TWO YEARS THAT THEY ARE BATTLING BEFORE, IN TWO AND-A-HALF YEARS OF WARRING AND CONFLICT AND INTERRUPTION OF VISITATION?

YES, AND THAT IS WHAT THE FIFTH DISTRICT IN SWINEBERG HAS HELD AND IN COOPER HAS TOLD HELD.

THIS COURT HAS NEVER HELD THAT.

THIS COURT, TO MY KNOWLEDGE, HAS NOT EVER HELD THAT, OTHER THAN IN THE JIMINEZ CASE THAT SAYS, WHETHER YOU GET A JUDGMENT BY CONSENT OR CONTEST, IT IS THE JUDGMENT OF THE COURT, AND AS A RESULT, ANYTHING BEFORE THAT, IS HANDLED BY RES JUDICATA.

BUT THE DIFFERENCE, I GUESS, IS THAT, WHAT THIS COURT, WHAT THE TRIAL COURT, THE DIFFERENCE WAS TO APPROVE A ROTATING CUSTODY AGREEMENT WHERE THERE WOULD BE A PARENTING COORDINATOR, AND WHEN THE TRIAL COURT THEN FINDS THAT THE VERY BASIS FOR THE AGREEMENT THAT WAS APPROVED, DOESN'T WORK, IT CAN'T WORK, IT CAN'T WORK BECAUSE OF THE CONDUCT OF THE MOTHER, I AM HAVING DIFFICULTY UNDERSTANDING HOW THAT IS NOT A CHANGE OF CIRCUMSTANCES. THAT IS THAT THE AGREEMENT THAT WAS NOW ENTERED INTO, IS INCAPABLE OF BEING, OF BEING IN OPERATION. THAT, AND THAT THE AGREEMENT IS NOT, WHAT THE JUDGE FOUND, IS NOT IN THIS CHILD'S BEST INTEREST. THAT IS

WHAT THE JUDGE FOUND.

OKAY. WELL, THEN, I THINK THAT, EVEN IF I WERE TO CONCEDE THAT THAT A CHANGE IN CIRCUMSTANCES, WHICH I DON'T REALLY CONCEDE BUT FOR THE SAKE OF ARGUMENT I WILL CONCEDE. YES, THE TRIAL JUDGE IN THIS CASE FOUND THAT IT WAS IN THE BEST INTERESTS OF THE CHILD TO HAVE THE FATHER BE THE PRIMARY RESIDENTIAL PARENT. HE DID NOT FIND AND THE RECORD DOES NOT SUPPORT A FINDING THAT THE CHILD'S BEST INTERESTS WOULD BE PROMOTED BY THAT CHANGE OR THAT THE CHILD WAS SUFFERING DETRIMENT AS A RESULT OF THE ROTATING CUSTODY ARRANGEMENT.

IS THAT BECAUSE THE COURT RELIED ON 61.13-4-C-5 AND RELYING ON THAT SECTION SPECIFICALLY WHICH SAYS THAT IF THERE IS AN INTERUPTION IN VISITATION UPON THE REQUEST OF THE NONCUSTODIAL PARENT, IF THE AWARD IS IN THE BEST INTERESTS OF THE CHILD. IT DOESN'T PROMOTE THE BEST INTEREST OR DETRIMENT

THAT'S RIGHT. I THINK HE DID RELY ON THAT TO SOME DEGREE BUT I THINK WE PERSUADED HIM IN THE FIFTH DISTRICT THAT THAT STATUTE DOESN'T APPLY, WHERE YOU HAVE A ONE-TIME VIOLATION OF THE VISITATION RIGHTS AND THAT WAS HANDLED THROUGH A CONTEMPT MPT TO A CONTEMPT PROCEEDING.

CHIEF JUSTICE: I WANT TO REMIND YOU OF HOW MUCH TIME YOU HAVE LEFT.

I REALIZE I AM RUNNING INTO MY REBUTTAL TIME, AND I GUESS ILL SAVE THE REMAINDER OF MY AND I GUESS I WILL SAVE THE REMAINDER OF MY TIME FOR REBUTTAL. THANK YOU.

GOOD MORNING, I THINK, STILL, YOUR HONORS, AND MAY IT PLEASE THE COURT. I AM LINDA BRYAN, AND I REPRESENT THE FATHER, THE RESPONDENT IN THIS MODIFICATION PROCEEDING. WE HAVE ADDRESSED THE ISSUES IN OUR BRIEFS, BUT I WANT TO BEGIN WITH THE STANDARD ISSUE, WHICH I THINK IS WHY WE ARE HERE BEFORE THIS COURT. AND IT OUR POSITION THAT THE STANDARD ANNOUNCED BY THE FIFTH DISTRICT, WHICH VERY SUCCINCTLY STATED IS, IF YOU HAVE A ROTATING CUSTODY PLAN AND NO PRIMARY RESIDENTIAL PARENT, AND THERE IS COMPETENT SUBSTANTIAL PROOF THAT THAT PLAN HAS FAILED, THEN, THE TRIAL COURT SHOULD BE ABLE TO RETURN TO THE 61.13 SUB3-3 FACTORS.

SO WHY, IN A ROTATING CUSTODY, SHOULD WE HAVE A DIFFERENT STANDARD THAN FROM ANY OTHER KIND OF CUSTODY ARRANGEMENT? BECAUSE A TRIAL JUDGE COULD EASILY FIND, IN ANY KIND OF CUSTODY ARRANGEMENT, THAT IT IS JUST NOT WORKING OUT, AND SO UNDER THOSE CIRCUMSTANCES, SHOULD YOU GO BACK, INSTEAD OF USING THE STANDARD FOR MODIFICATIONS, GO BACK TO THE ORIGINAL STANDARD UNDER 61.13 PAREN 3?

I THINK IT IS A PARTICULARLY GOOD FIT IN THIS CIRCUMSTANCE. I THINK IT IS A GOOD FIT ON THE POLICY OF THE STATE, NUMBER ONE.

THE POLICY

THE POLICY OF THE STATE AS ANNOUNCED, OF COURSE, IN THE VARIOUS CASES, ALL OF THE CASES, IS THE BEST INTEREST OF THE CHILD, BUT SPECIFICALLY IN SECTION 61.13 SUB -2 SUB- B, IS THAT THE TRIAL COURT SHALL PRESCRIBE CUSTODY IN THE BEST INTERESTS OF THE CHILD AND IT IS THE POLICY OF THE STATE TO ALLOW PARENTS EQUAL ACCESS TO THE CHILDREN. NOW, ROTATING CUSTODY IS, IT FITS THAT BILL.

BUT THE TWO-PRONG STANDARD THAT IS BEING APPROVED APPLIED THROUGH ALL APPLIED THROUGH ALL OF THE DCA'S CAME OUT OF PHRASE YES, DO YOU AGREE?

YES.

AND FRASIER WAS A ROTATING CUSTODY CASE.

RIGHT.

SO WE WOULD HAVE TO RECEDE FROM FRASIER.

YES . YES. THE COURT WOULD HAVE TO RECEDE FROM THE POSITION THAT IT APPLIES , THAT ALL ROTATING CUSTODY DECISIONS MUST HAVE THE SUBSTANTIAL CHANGE, AS I CALL IT , TEST.

WHY WOULD THIS BE , YOUKNOW , MOST , WE HAVE IN THE STATE A PRESUMPTION IN FAVOR OF SHARED PARENTAL RESPONSIBILITY, AND WHAT STRIKES ME ABOUT THIS CASE , IS THAT THE PROBLEM , REALLY , WASN'T WITH THE SHAFERD , THE ROTATING WITH THE SHARED , THE ROTATING CUSTODY , BUT WAS WITH THE INABILITY OF THESE PARENTS TO COMMUNICATE AND COOPERATE ABOUT THE DECISIONS IN THIS CHILD'S LIFE , YET THE TRIAL JUDGE CHANGES PRIMARY RESIDENTIAL CUSTODY TO THE FATHER , BUT KEEPS SHARED PARENTAL RESPONSIBILITY, THEREBY STILL KEEPING THE POTENTIAL FOR THIS LEVEL OF AC MONEY TO CONTINUE , SO OF ACRY MONEY , TO CONTINUE, SO I AM HAVING A HARD TIME UNDERSTANDING WHY WOULDNT TAKE, OF ALL OF THE TYPES OF AGREEMENTS THAT COULD BE ENTERED , A ROTATING CUSTODY AGREEMENT, AND PUT THOSE ON A LESSER BASIS THAN ANY OTHER KIND OF AGREEMENT THAT IS MEDIATED AND IS APPROVED BY THE COURT , AND I AM NOT SURE YOU HAVE GIVEN A REASON , YET , THAT WOULD PERSUADE ME THAT THERE SHOULD BE A DIFFERENT STANDARD.NOW , WHAT THE STANDARD SHOULD BE , MAY BE OPEN FOR DEBATE, BUT THAT

I THINK THE REASON IS THIS, AND I WILL ADDRESS IT FROM A LEGAL PERSPECTIVE, AND I WILL USE THE GIBBS CASE OUT OF THE SECOND DISTRICT. THE GIBBS CASE HAS BEEN CITED IN BOTH BRIEFS , AND RECITES AN EXCELLENT HISTORY OF HOW THE MATERIAL CHANGE STANDARD CAME ABOUT. AND IT TALKS ABOUT THE MATERIAL CHANGE STANDARD ARISING OUT OF THE RES JUDICATA CONCEPT AND THE PRESUMPTION IN FAVOR OF THE CUSTODIAL PARENT , AND THE RES JUDICATA CONCEPT , IN THAT THESE ISSUES HAVE BEEN LITIGATED , YOU KNOW, THERE SHOULD BE FINALITY TO JUDGMENT. THEREFORE RATHER THAN IMPUGN THIS ABILITY OF THE JUDGMENT , WE SHOULD APPLY THIS TEST . NOW , WHEN YOU MOVE THAT SAME TEST TO A ROTATING CUSTODY PLAN , IN WHICH THE PRIMARY RESIDENTIAL PARENT HAS NOT BEEN ADJUDICATED , WHEN THERE IS NO BRUMTION IN FAVOR OF PRESUMPTION IN FAVOR OF A CUSTODIAL PARENT, THEN THE LEGAL UNDERPINNING FOR THE TEST FAILS , AND AND ROTATING CUSTODY , AS I THINK EVERYONE WOULD ADMIT, AND THIS IS NOT A GOOD OR BAD COMMENT ON IT , IS A DELICATE BALANCE, A DELICATE SITUATION.

MAYBE YOU HAVEN'T RESPONDED, THEN , TO THE SECOND PART OF THE QUESTION, WHICH IS ASSUMING IT IS A DELICATE BALANCE , THE THING THAT CREATED THE IMBALANCE, WAS NOT PROBLEMS WITH HOW TO DO THE CHANGE IN THE RESIDENCE BUT WAS ABOUT THE SPORTS, WAS ABOUT WHAT WAS GOING ON IN SCHOOL , HOW THE MOTHER TOOK THE KID OUT OF , CHILD OUT OF , WANTED TO TRY TO TAKE THE CHILD OUT OF THE SCHOOL AND ALL OF THOSE , AND I DON'T SEE ANY OF THAT HAVING EVEN THE SLIGHTEST BIT TO DO. I DIDN'T SEE ONE PART OF THE EVIDENCE BEING THAT SOMEHOW HAVING THIS CHILD GO BETWEEN TWO HOMES WAS , REALLY , THE THING THAT WAS CREATING THE PROBLEM. THAT PART SEEMED TO BE WORKING , OTHER THAN THOSE TWO DAYS WHERE SHE DIDN'T EXCHANGE BRYAN PRETTY WELL.

I BELIEVE , YOUR HONOR , THAT EACH ROTATING CUSTODY ARRANGEMENT , AS THIS COURT , THE FIFTH DISTRICT CALLED IT, HAS TO STAND ON ITS OWN , AND IN THIS PARTICULAR INSTANCE , THE FAILURE OF THE ARRANGEMENT, OF COURSE , IS IF YOU LOOK AT IT FROM A CHANGE PERSPECTIVE, THE CHANGE, BUT HERE I BELIEVE IS THE KEY AND THE ANSWER TO YOUR QUESTION, IS THAT , IN THIS INSTANCE, IN THE CONSENT FINAL JUDGMENT , THIS TRIAL COURT , YOU KNOW , THE INITIAL ROTATING CUSTODY JUDGMENT TO WHICH THE PARTIES HAD AGREED , THE TRIAL COURT SPECIFICALLY FOUND THAT THE ROTATING CUSTODY WITHOUT THE

PRIMARY RESIDENTIAL PARENT , WAS IN THE BEST INTERESTS OF THIS CHILD, TO PRO MOTE FLEXIBILITY AND COOPERATION . AND AL MOST FROM THE GET-GO , IF YOU WILL PARDON THAT LEGAL TERM , THIS PARTICULAR MOTHER DID EVERYTHING SHE COULD TO VI OLATE THE PLAN.

ALL RIGHT. SO LET'S JUST TAKE IT AND LET'S ASSUME THE ORIGINAL AGREED -TO THING SA ID THAT THE MOTHER, THE MOTHER WOULD HAVE PRIMARY CUSTODY, AND THAT AS TO EVERYT HING E LSE A BOUT DECISION-MAKING , THERE WOULD BE A PARENTING COORDINATOR, AND FROM THE GET-GO, EVERY SI NGLE THING OCCURRED THAT HAPPENED IN THIS CASE. W HY SHOULD THERE BE TWO DIFFERENT STANDARDS THAT APPLY , WHEN AN AGREEMENT THAT HAS BEEN MEDIATED DOESN'T WORK OUT? WHETHER IT B E BECAUSE THERE WAS A SHARED PARENTAL RESPONSIBILITY THAT IS NOT WORKING OUT, OR WHETHER IT WAS A ROTATING CUSTODY , AND I AM STILL NOT , YOU KNOW , IT SEEMS TO ME, AG AIN , THE MORE CRITICAL PART HERE FOR THE FATHER , WAS THAT THE MOTHER WAS INTERFERING IN DECISION-MAKING, NOT I N THE CUSTODY ISSUE .

I CANNOT SAY TO T HIS COURT THAT THE MOTHER WAS NOT INTERF ERING IN DECISION-MAKING. THIS IS NOT A PERFECT SITUATION. THIS WILL NEVER BE A PERF ECT SITUATION. BUT THIS TRIAL COURT , IN ITS JUDGMENT

LET ME JUST AGAIN ASK YOU , W AS THERE ANY DISPUTE THAT WAS SHOW N TO THE COURT , TO ARISE OUT OF THE CUSTODY, THE FACT THAT THE CHILD WAS GOING BETWEEN TWO HOM ES? WAS THERE SOMETHING THAT WAS THE SUBJECT OF THE PARENTING COORDINATOR 'S DISPUTES?

THIS CUSTODY PLAN WAS MORE THAN JUST BACK AND FORTH BETW EEN THE HOMES. THIS JUDGE , REMEMBER FACTUALLY , AND I KNOW YOU ARE WELL V ERSED IN THE FACTS , BUT REMEMBER FA CTUALLY THIS FATHER HAD HAD TEMPORARY CUSTODY OF THIS CHILD SINCE THE SEPARATION, BECAUSE THE MOTHER HAD ASKED THEM BOTH TO LE AVE, AND SO WHAT HE WAS FACED WITH AT THIS TIME , WAS HOW DO I ALLOW THIS MOTHER THAT WE RECOGNIZE MAY HAVE SOME EMOT IONAL ISSUES , OR CONTROL ISSUES, HOW DO I ALLOW HER E QUAL AC CESS TO A SEVEN-YEAR-OLD? THAT IS WHAT I WANT TO D O. SO THEY IM PLEMENT A ROTATING CUSTODY ARRANGEMENT, AND THAT WAS MY MINDFUL , TH AT WAS ON THIS TRIAL COURT'S MIND. THE ARRANGEMENT INVOLVED THE FIVE -NINE SPLIT OF TIME, FIVE DAYS , NINE DAYS. IT INVOLVED THE PARENTING COORDINATOR, AS THE ARE A BIT OR OF IF AS THE ARBITER , IF YOU WILL , OF THE DISPUTES , AND A PLAN ON WHICH THE PARTIES AGREED , AND IT IS OUR P O SITION THAT YOU CANNOT CONSIDER THIS ROTATING CUSTODY ARR ANGEMENT WITHOUT CONSIDERING THE P LAN. IT IS JUST NOT A QUESTION , SO THEN YOU HAVE TO LOOK AT, WELL, HOW DID THE , WE TALKED ABOUT THE MOTHER'S HO STILITY, BUT THE MOTHER , AS FO UND NOT ONLY BY THE TRIAL COURT BUT, ALSO, AS REPEATED BY THE FIFTH DISTRICT, THE MOTHER VIOLATED THIS PLAN REPEATEDLY POST-JUD GMENT.

OK AY. MAYBE WE ARE GO ING TO GO AROUND IN A CIRC LE. I DON'T THINK I HAVE HEARD YET AND MAYBE YOU HAVE GIVEN US YOUR BEST SHOT, AS TO WHY AN AGREEMENT THAT PROVIDES FOR ROTATING CUSTODY AND SHARED PARENTAL RESPONSIBILITY, SHOULD BE G IVEN LE SSER DEFERENCE THAN ONE THAT PLACED PRIMARY RESIDENTIAL CUSTODY WITH ONE PARENT AND HAD SHARED PARENTAL RESPONSIBILITY? SO WHAT IS YOUR POSITION ON ASSUMING THAT WE DISAGREE THAT THE CHANGE TEST APPLIES OR DOESN'T APPLY , THAT WE DISAGREE WITH THE FIFTH DISTRICT, WHAT IS YOUR P OSITION ON WHAT THE RECORD ESTABLISHES AS T O WHETHER THERE HAS BEEN A SUBSTANTIAL CHANGE OF CIRCUMSTANCES, AND MORE IMPORTANTLY, FOR ME , IS WHAT ABOUT THAT SECOND PRONG? DO YOU HAVE TO SHOW THAT WILL IS ACTUALLY , THAT THE CHILD IS GOING THROUGH SOME KIND OF TERRIBLE ME NTAL PROBLEMS BE FORE YOU CAN TRY TO SO LVE THIS PROBLEM ?

WITH THE COURT'S VERY , PERMISSION AND VERY BRIEFLY LET ME TAKE ONE MORE SHOT AND I WILL MOVE ON, BUT I WANT TO SAY THAT THERE IS A STABILITY ISSUE HERE , AND THIS PARTIC

ULAR PLAN , THE STABILITY OF IT WAS BASED ON THE PARENTING COORDINATOR AND THE COMPLIANCE , AND THE FIFTH DISTRICT HAD THE ROTATING CUSTODY PLAN BEFORE IT DID NOT HAVE THE PRIMARY RESIDENTIAL BEFORE IT . SO IT MADE A DECISION AS TO THE TEST HERE. IF YOU ARE ASKING ME, AND I UNDERSTAND THAT YOU ARE , WHY THIS TEST SHOULD BE LESSER THAN SUBSTANTIAL CHANGE , FRANKLY I THINK THE BEST INTERESTS OF THE CHILDREN AS THEY DO IT IN NEW YORK , SHOULD BE OUR PARAMOUNT CONCERN , BUT IN THIS INSTANCE THE ROTATING PLAN WAS BEFORE THE FIFTH DISTRICT , AND THE ROTATING PLAN DOESN'T HAVE THAT UNDERPINNING, IF YOU WILL , OF A PRESUMPTION IN FAVOR OF A PARENT, AND I BELIEVE THAT IS WHAT ALLOWED THEM TO GO THERE , BUT ADDRESSING THE SECOND ASPECT OF THIS , IT IS OUR POSITION, IT HAS BEEN OUR POSITION THAT THE SUBSTANTIAL CHANGE TEST , IF THIS COURT WERE TO DECIDE THAT THIS APPLY , THAT THIS TRIAL COURT , IN ITS EFFORT TO BRING RELIEF TO THIS SITUATION , , JUST AS THE FIFTH FOUND , APPLIED ALL STANDARDS. IT APPLIED THE SUBSTANTIAL CHANGE. IT APPLIED THE SITUATION , WHICH WE ALREADY BRIEFED BEFORE, AND IT APPLIED THE BEST INTERESTS, AND THE TRIAL COURT , CONTRARY TO WHAT HAS BEEN STATED , MADE A FINDING THAT THE SUBSTANTIAL CHANGE WAS THE FAILURE OF THIS PLAN , THAT THIS MOTHER HAD JUST BEEN TOO TALLY DISRUPTIVE AND HAD ERADICATED IT AND THEN MADE THE CONCLUSION THAT THE BEST INTERESTS OF THE CHILD WERE NOT SERVED BY THAT BUT WERE SERVED BY CHANGING CUSTODY . NOW , THE WORD DETRIMENT KEEPS COMING UP , AND , FIRST , BEFORE I ANSWER WHAT DEGREE OF DETRIMENT I BELIEVE THE CASES SUPPORT , I WOULD LIKE TO AGAIN TURN TO THE GIBBS CASE, AND THE GIBBS CASE TALKS ABOUT THE GAME OF TELEPHONE LIKE WE PLAY IN CHILDHOOD AND EVERYBODY HEARS SOMETHING DIFFERENT. WHETHER ONE PROMOTES WELFARE , ESSENTIAL TO WELFARE , DISCRETION BEST INTERESTS , IT GOES ON TO SAY AND THIS IS WHAT IS KEY HERE, WHILE ANY DECISION TO MODIFY WOULD AT ON MODIFY CUSTODY WOULD AT LEAST IMPLY THAT IT WOULD BE DETRIMENTAL TO THE CHILD TO CHANGE THE PARENT , WE SUPPORT THIS LEGAL CONCLUSION, SO LONG AS THE FACTUAL FINDINGS IN THE MODIFICATION ORDER OR THE CONTENT OF THE RECORD , DEMONSTRATE THAT THE PETITIONER HAS MET THE EXTRAORDINARY BURDEN . IT IS OUR POSITION AND HAS BEEN, AS WE HAVE ARGUED , THAT BOTH THE RECORD AND THE FINDINGS SUPPORT THE DETRIMENT , AND THE DETRIMENT THERE, IS THAT THIS SITUATION NEEDS SOME STABILITY . AND THE COURT HAD MADE A FINDING THAT WE CAN BRING STABILITY WITHOUT A RESIDENTIAL PARENT , BY IMPLEMENTING THE PLAN WHICH FAILED. NOW , IS THIS CHILD DIAGNOSEABLE, EMOTIONALLY DISTURBED? NO , THANK GOD. BUT IS THIS CHILD POST-JUDGMENT , HAVING PSYCHOSOMATIC SICK ISSUES WITH THE MOTHER? IS THIS CHILD BEING ASKED TO CALL THE THERAPIES OR THE THERAPIST OR THE COORDINATOR? IS THIS CHILD BEING INVOLVED IN THE MIDDLE OF THE DISPUTES BY THE MOTHER? YES , AND IS THE MOTHER'S FAILURE TO FOCUS AT THE COORDINATOR SESSIONS WHICH, BY THE WAY , WAS CURRENT UP UNTIL THE HEARING , IN THE TRIAL COURT , DO THOSE HAVE AN ADVERSE IMPACT ON THE CHILD? YES. DOES HE HAVE TO BE DIAGNOSEABLE? I HOPE NOT .

WE ARE HERE TO DETERMINE BROAD ISSUES OF LAW , MORE SPECIFIC MORE THAN SPECIFIC FINDINGS OF FACT . LET ME RETURN, I HOPE, FULL CIRCLE TO WHY WE ARE HERE IN THE CONFLICT AND JUSTICE QUINCE 'S PREVIOUS QUESTION, WHICH IS WHY SHOULD WE HAVE AN EXCEPTION HERE TO THE GENERAL RULE , OF SUBSTANTIAL CHANGE IN CIRCUMSTANCES , SIMPLY BECAUSE IT IS A ROTATING CUSTODY ARRANGEMENT ? WHAT IS SO DIFFERENT ABOUT A ROTATING CUSTODY ARRANGEMENT THAN EVERY OTHER TYPE OF ARRANGEMENT THAT NEEDS AN EXCEPTION , SO THAT YOU DON'T HAVE TO PROVE A SUBSTANTIAL CHANGE IN CIRCUMSTANCES?

A ROTATING CUSTODY ARRANGEMENT , TRADITIONALLY , HAS NO PRIMARY RESIDENTIAL PARENT, NO CUSTODIAL PARENT , AND I WOULD SUBMIT TO THIS COURT THAT THAT

WHY DOES THAT MAKE A LEGAL DIFFERENCE?

I THINK IT MAKES A LEGAL DIFFERENCE, BECAUSE THE SYSTEM IS SET UP TO SUBSTANTIATE STABILITY AND TO HAVE AN IN-CHARGE TYPE OF INDIVIDUAL, SOMEONE WHO IS LOOKED TO NOT

TO PREVENT THE OTHER ONE FROM SEEING THE CHILD AND BEING INVOLVED IN SHARED PARENTAL RESPONSIBILITY, BUT TO HAVE A BASE, A FOUNDATION FOR THE CHILD.

IF YOU WANTED TO HAVE ANOTHER STANDARD, COULDN'T YOU JUST PUT IN THE , DEGREE IN THE FINAL JUDGMENT AGREE IN THE FINAL JUDGMENT , STIPULATE, THAT THIS IS A PROVISIONAL TYPE OF ARRANGEMENT, AND THAT , IF THIS IS NOT WORKING OUT , IF IT, IF THE ARRANGEMENT FAILS AS THE DISTRICT COURT SAID IN THIS CASE, THEN THE COURT CAN GO BACK TO SQUARE ONE AND DETERMINE A MORE PERMANENT CUSTODY ARRANGEMENT . CAN'T YOU AGREE IN THE FINAL JUDGMENT TO DO THAT , RATHER THAN TO MAKE THAT AN ISSUE OF LAW FOR EVERY CASE ?

YOU COULD BUT I THINK THAT THE BETTER REASON DECISION WOULD BE CONSISTENCY , AND SINCE ALL ROTATING CUSTODY ARRANGEMENTS ARE NOT NECESSARILY MEDIATED AND STIPULATED, COURTS HAVE ENTERED THEM, AND I MIGHT MENTION RIGHT NOW , BECAUSE THIS IS MY OBLIGATION TO THE COURT THAT THERE IS, I JUST DISCOVERED PENDING , A , CERTIFIED AS IN CONFLICT WITH OUR INDICATES WITH OUR CASE, I THINK IT IS JOHNSON V ADAIR. I CAN GET THE NAME OF IT , BUT THAT WAS AN INSTANCE OF WHERE THE COURT HAD ENTERED THE ROTATING CUSTODY THAT WASN'T STIPULATED .

BUT THE COURT CAN ENTER THE ROTATING CUSTODY AND SAY IN THE ORDER THIS IS SUBJECT TO REVISITING IT IN SIX MONTHS OR A YEAR , AND IF THE ROTATING CUSTODY DOESN'T WORK OUT, THEN WE WILL HAVE A FULL HEARING TO DETERMINE THE BEST INTERESTS OF THE CHILD?

I THINK , YOUR HONOR , THAT THE BEST INTERESTS OF THE CHILD WOULD BE BETTER SERVED TO HAVE SOME CONSISTENCY AND SOME DIRECTION FROM THIS COURT. I DON'T THINK THAT PARENTS, WHEN THEY ARE TRYING TO MEDIATE CUSTODY , NEED ANY OTHER ISSUES . I THINK THEY SHALL BE ENCOURAGED TO OPEN AND EQUAL ACCESS, AND I THINK THAT , IF YOU PUT THE TEST ON THE TABLE, TOO, YOU KNOW , THERE IS AN OTHER NAIL , IF YOU WILL , IN THE AGREEMENT TYPE COFFIN , AND I THINK IT IS REAL IMPORTANT, JUST LIKE THE CASES OUTSIDE OF THIS STATE HAVE DONE, IS TO CONSIDER THE BEST INTERESTS OF THE CHILDREN FIRST, WHEN YOU HAVE A DYSFUNCTIONAL ROTATING CUSTODY ARRANGEMENT . IT SHOULD GIVE WAY TO THE POTENTIAL FOR MORE PROTECTED LITIGATION.

WHY WOULDN'T THAT ARGUMENT APPLY TO ANY CUSTODY ARRANGEMENT, ROTATING OR NOT? WHY SHOULDN'T YOUR ARGUMENT SAY, WELL , IN ANY CUSTODY ARRANGEMENT, IT SHOULD BE THE BEST INTERESTS OF THE CHILD AND WE SHOULD GET RID OF A SUBSTANTIAL CHANGE IN CIRCUMSTANCES STANDARD. TIME NOT MAKING THAT ARGUMENT, OF COURSE, BECAUSE IT WASN'T BEFORE THE COURT BELOW .

IT SEEMS TO ME WHAT IS INCONSISTENT IS TO HAVE DIFFERENT STANDARDS , DEPENDING ON THE TYPE OF CUSTODY.

I THINK THAT WE CAN TAKE A LESSON FROM THE LEGAL BASIS FOR THE TEST , AND THERE IS NOT A GOOD ROAD FOR DIFFERENTIATION. I THINK WHEN WE LOOK TO THE CASES OUT-OF-STATE TO THE CASES OUT-OF-STATE, EVEN THE KANSAS CASE WHICH WE CITED , AND EVEN THE COE CASE , I THINK THERE HAS TO BE A REASON FOR WHY YOU HAVE THAT PRIMARY RESIDENTIAL PARENT , AND TYPICALLY THAT PRIMARY PARENT SITUATION IS HEAVILY LITIGATED AND THE COURT LOOKS AT IT AND DETERMINES WHO IS BEST, AND SO THEREFORE THE LAW HAS DEVELOPED

SO HOW DO YOU DETERMINE? YOU KEEP SAYING HAD GONE THERE IS NO PRIMARY RESIDENTIAL PARENT, AND CERTAINLY THE ORDER DOES NOT SAY SO, BUT IN THIS PARTICULAR SITUATION , WE HAVE ONE PARENT WITH THE CHILD FOR NINE DAYS?

YES.

AND THE OTHER PARENT HAS THE CHILD FOR FIVE DAYS, AND THEN IT GOES BACK TO THE OTHER PARENT FOR NINE DAYS, SO IT SEEMS TO ME THERE IS A, CERTAINLY A SUBSTANTIAL DISPARITY IN THE NUMBER, IF YOU ARE JUST LOOKING AT THE NUMBER OF DAYS THAT THE CHILD IS WITH EACH PARENT, SO I AM NOT SURE THAT JUST BECAUSE YOU DON'T SAY THAT THE PARENT WHO HAS THE NINE DAYS IS THE PRIMARY RESIDENTIAL PARENT, THAT WE ARE TALKING ABOUT SOMETHING THAT IS SUBSTANTIALLY DIFFERENT.

WELL, I WOULD SAY TO YOUR HONOR THAT, IN THIS CASE, IN THE CONSSENT FINAL JUDGMENT THERE, IS A SPECIFIC FINDING BY THE TRIAL COURT, THAT THERE IS NO PRIMARY RESIDENTIAL PARENT, AND THE FIFTH DISTRICT INCLUDED THAT IN ITS TEST, AND I WILL SAY TO THE COURT THAT THAT FINDING IS PARAMOUNT, BECAUSE THE SYSTEM LOOKS TO A BASE, A BASIS OF STABILITY AND CONTROL FOR THE CHILD, AND WHEN YOU HAVEN'T ADJUDICATED THAT FACT, JUST LIKE THE FIFTH SAID, IT SEEMS VERY LOGICAL IN THIS INSTANCE, TO GO BACK TO SQUARE ONE. IT MAKES SENSE, AND MAY I, ALSO, QUICKLY ADD, I SEE I AM OUT OF TIME, BUT I DISAGREE STRENUOUSLY WITH THE FACT THAT THE FIFTH DISTRICT DECIDED THAT THERE WAS ANY SUBSTANTIAL CHANGE OR OTHERWISE AS WAS ARGUED BEFORE, THE FIFTH DISTRICT POINTED TO THE FACT THAT THERE WAS NO DIAGNOSEABLE MALADY IN THIS CHILD, BUT IT ALSO, RIGHT THERE AFTER, SAID WE SPECIFICALLY NEED NOT ADDRESS THE ISSUES OF SUFFICIENTLY ESTABLISHING CHANGE AND WHETHER THE CUSTODY PROMOTED THE CHILD'S BEST INTERESTS. THANK YOU VERY MUCH.

CHIEF JUSTICE: WE HAVE YOUR BRIEFS. WE HAVE GOT THE RECORD. AND WE CERTAINLY HAVE THE FIFTH DISTRICT OPINION TO ANALYZE.

THANK YOU, YOUR HONORS.

CHIEF JUSTICE: THANK YOU.

MAY IT PLEASE THE COURT. I THINK THE FIRST ISSUE IS, NO, THERE SHOULDN'T BE A DIFFERENT TEST, REGARDLESS OF WHETHER IT IS ROTATING CUSTODY OR THE PRIMARY RESIDENTIAL PARENT. THE ISSUE SHOULD BE THE CHANGE.

WHEN TALKING ABOUT A CHILD NOT BEING NEGATIVELY IMPACTED BECAUSE HE DIDN'T HAVE A DIAGNOSEABLE EMOTIONAL DISTRESS OR THAT THE CHILD NO LONGER NEEDED THERAPY, I SHUDDERED, IS THIS WHAT WE HAVE COME TO, THAT WE HAVE TO SHOW THAT A CHILD HAS SUFFERED TO THAT EXTENT AND GETTING INVOLVED IN THESE WORDS OF DETRIMENT, BEFORE WE START LOOKING AT WHAT IS HAPPENING TO OUR CHILDREN INVOLVED IN THESE KINDS OF CIRCUMSTANCES?

ABSOLUTELY NOT, YOUR HONOR, BECAUSE WHAT THE EXPERTS ALSO SAID

WHAT I HEAR THIS MORNING IS A VERY STERILE, LAWYER ARGUMENT TO A HUMAN PROBLEM. I AM VERY DISTURBED BY IT, I MUST TELL YOU.

I UNDERSTAND. I UNDERSTAND THE PROBLEM. BUT IN THIS PARTICULAR CASE, THERE WAS AN EXPERT WHO TESTIFIED THAT JUST SIX MONTHS BEFORE THE HEARING, BOTH THE CHILD'S TEACHERS DESCRIBED THE CHILD AS WELL ADJUSTED. THE CHILD WAS IN GOOD SPIRITS, JUST SIX MONTHS BEFORE THE HEARING, DR. HOSA SAID THAT SHE DIDN'T THINK THE CHILD NEEDED THERAPY ANYMORE, DESCRIBED HIM AS HAPPY GO LUCKY, THAT HE DIDN'T COMPLAIN ABOUT ANY PROBLEMS RELATING IT TO HIS PARENTS.

ARE YOU SUGGESTING THAT COMMON SENSE GOES OUT THE WINDOW AND THAT WE ARE GOING TO DETERMINE ALL CUSTODY BY EXPERTS? ARE WE GOING TO DETERMINE THE CUSTODY SITUATION DEALING WITH OUR CHILDREN INTO A BATTLE LIKE TO RTS IN A COURTROOM AND DEFINED ON WHAT EXPERTS ARE SAYING. IS THAT WHAT YOU ARE SAYING?

I HOPE THAT PARENTS ARE GOING TO BE MORE ABLE TO HANDLE THE SITUATION THAN THESE PARENTS, AND I THINK JUSTICE PARIENTE'S POINT IS EXACTLY RIGHT, WHICH IS THAT THE ISSUE HERE SHOULD HAVE BEEN RESOLVED BY MODIFYING SHARED MODIFYING SHARED PRESENT AT PARENTAL RESPONSIBILITY NOT CHANGE THE ROTATING CUSTODY ARRANGEMENT. IT WAS DETERMINED BY CUSTODY DISPUTES, AND IN FACT THE FATHER ASKED TO BE MODIFIED BUT INSTEAD OF DOING, IT THE COURT CHANGED CUSTODY HERE, AND I THINK THAT IS THE DISTINCTION.

CHIEF JUSTICE: JUSTICE BELL HAS A QUESTION.

SO IS IT YOUR POSITION THAT THE COURT COULD HAVE MODIFIED THE CUSTODY, I.E. DESIGNATING THE PRIMARY RESIDENTIAL PARENT. IT WAS LATITUDE ALL THE WAY UP TO MODIFYING WHAT THE TRIAL COURT THOUGHT OR IS YOUR ATTITUDE INVOLVING MATERIAL CHANGES CIRCUMSTANCES DETRIMENTAL TO THE CHILD, THAT THE JUDGE COULD DO NOTHING. HOW FAR DOES THE STANDARD APPLY?

IT DEPENDS ON THE PETITIONS OF THE PARTIES, AND IN THIS CASE THE PETITION OF THE PARTY, THE FATHER ORIGINALLY SAID I WANT YOU TO CHANGE CUSTODY TO ME AND MAKE ME THE PRIMARY PARENT AND GIVE THE MOTHER VISITATION, AND THEN HE FILED A PETITION AND IS HE IF YOU ARE NOT GOING TO DO THAT, THEN PLEASE DIVIDE UP PARENTAL RESPONSIBILITY AND LET ME DECIDE THESE ISSUES AND THE MOTHER DECIDE THOSE ISSUES.

IS IT CUSTODY DETERMINATION AS OPPOSED TO CHANGES THE SHARED? -.

I THINK THAT THE COURT WOULD HAVE, I THINK HE WOULD HAVE HAD TO IN ESSENCE MAKE THE SAME TEST BASE BUT YOU LOOK BACK TO THOSE 61.03 FACTORS AND QUITE FRANKLY I AM NOT WELL VERSED ON SHARED PARENTAL RESPONSIBILITY, BUT IF I MAY HAVE

CHIEF JUSTICE: I AM GOING TO HAVE A COMMENT.

OKAY. SIMPLY WE ARE ASKING THAT THE COURT DETERMINE THAT THE CHANGE TEST APPLY, THAT THE FATHER DIDN'T MEAN IT, OR ALTERNATIVELY IF YOU DECIDE TO GO WITH THE BEST INTEREST TEST, THEN WE ARE ASKING THAT THE COURT STILL REVERSE THE ORDER CHANGING CUSTODY AND REMAND FOR A NEW HEARING TO THE TRIAL COURT, TO BE ABLE TO APPLY THE FACTORS UTILIZING ALL THE EVIDENCE.

CHIEF JUSTICE: MY COMMENT IS, THANK YOU VERY MUCH, IS THAT YOU ARE BOTH VERY, VERY FINE LAWYERS, AND I REALIZE THAT YOU WERE NOT THE ORIGINAL LAWYERS ON THIS CASE, AND I JUST URGE THAT YOU SPEAK TO YOUR CLIENTS AND HOWEVER THE LEGAL ISSUES ARE RESOLVED IN THIS CASE, THAT YOU TALK TO YOUR CLIENTS ABOUT, THAT THE EFFECT OF THEIR CONDUCT IN THE LONG-RUN, IF NOT THE SHORT RUN, IS GOING TO BE TO SERIOUSLY HARM THIS CHILD. WE KNOW IT FROM THE LITERATURE. AND WE JUST CAN NOT HAVE THIS IN OUR COURTROOMS. EVERYBODY ON THIS COURT IS COMMITTED TO THE PRINCIPLES OF THE UNIFIED FAMILY COURT, AND WE CANNOT HAVE A PARENTING COORDINATOR RUNNING THESE PARENTS' LIVES. THEY HAVE GOT TO GET THE HELP THAT THEY NEED IN ORDER TO DEAL WITH ONE ANOTHER.

JUSTICE PARIENTE, I AM SURE ON BEHALF OF MS. BRYAN, I CAN SAY THAT WE WILL DEFINITELY DO THAT AND HAVE TRIED TO DO THAT, AND WE HOPE THAT, IN THE FUTURE, THEY WILL BE MORE RESPONSIBLE IN THIS SITUATION.

CAN I ASK ONE MORE QUESTION?

CHIEF JUSTICE: SURE.

COULD YOU SHARE WITH ME , I WAS ALSO TROUBLED SOMEONE HAS TO TR AVEL 130 M ILES TO DEAL WITH A PARENTING COORDINATOR.HELP US UN DERSTAND WHAT IS HAPPENING ON THE GROUND.

WELL , ON THE GR OUND R IGH T NOW , THERE IS NO PARENTING COORDINATOR , BECAUSE THEPHAT E RR IS THE THE FATHER IS THE PRIMARY RESIDENTIAL PARENT, AND EVEN THOUGH THE COURT MAINTAINS SHARED PARENTAL RESPONSIBILITY, HE TERMINATED THE USE OF THE PARENTING COORDINATOR, ANDAS FAR AS I UNDERSTAND IT, IT IS NOT IN THE RECORD , THE PARENTS ARE STILL HAVING TROUBLE AGR EEING ABOUT EXTRACURRICULAR

BUT IS 130 MILES , IS THAT STANDARD? IS THAT HAPPENING TO FAMILIES?

I DON'T BELIEVE THAT IS. I CAN'T REALLY SPEAK TO THAT. I AM AN APPELLATE LAWYER NOT A FAMILY LAWYER , BUT I DON'T THINK THAT THEY DO . DO THAT AS A MATTER OF COURSE. I THINK IT WAS JUST DIFFICULTY IN FI NING SOME ONE IN A S MALL TO WN LIKE ST. AUGUSTINE , IS, I THINK , THE ISSUE THERE. THANK YOU.

CHIEF JUSTICE: THANK YOU. THE COURT WILL BE IN RE CESS.

MARSHAL: PLEASE RISE.