>> THE NEXT CASE ON OUR DOCKET
WILL BE COREY V. COREY.
[INAUDIBLE CONVERSATIONS]
>> THE COURT WILL NOW PROCEED
WITH THE CONSIDERATION OF THE
SECOND CASE, COREY V. COREY.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, ROGER
SCHINDLER ON BEHALF OF THE
PETITIONER WHO IS, OBVIOUSLY,
THE MOTHER OF THE MINOR CHILD
WHO IS THE ISSUE BEFORE THE
COURT TODAY.
>> AM I CORRECT THAT RIGHT NOW
THE ARRANGEMENTS FOR THIS CHILD
FROM A POINT OF VIEW OF THE
COURT SYSTEM ARE ON HOLD BECAUSE
OF THIS COURT ISSUING A STAY?
>> THAT'S CORRECT.
THE EXSTAMP FINAL JUDGMENT IS IN
EFFECT WHICH PROVIDES FOR AN
EXPANDED TIME-SHARING OR
VISITATION SCHEDULE, AND
CANDIDLY, THE ISSUE BEFORE THE
COURT TODAY IS THE TRIAL COURT
WAS CHARGED WITH THE
RESPONSIBILITY IN THE FALL OF
2007 OF CONSIDERING THE ISSUES
BEFORE THE COURT WHICH WAS THE
FATHER'S REQUEST FOR ALTERNATING
WEEK -- WE CALLED IT CUSTODY IN
2007.
SUBSEQUENTLY, IN 2008 THE
LEGISLATURE, IN THE FALL,
CHANGED THAT TO TIME-SHARING.
BUT IN 2007 THE TRIAL COURT THIS

HEARING, THE FINAL HEARING IN
THE DISSOLUTION OF MARRIAGE OF
THESE PARTIES, HEARD THE
FATHER'S REQUEST THAT HE, ONE,
WANTED TO BE DECLARED THE
PRIMARY RESIDENTIAL PARENT, AND
HE WAS UNSUCCESSFUL.
HE THEN WANTED AN ALTERNATING
SCHEDULE OF THIS MINOR CHILD TO
THE PARTIES WHO WAS THEN
APPROXIMATELY 6 YEARS OLD.
>> WELL, LET'S -- WE'RE FAMILIAR
WITH THE FACTS AND WITH THE
THIRD DISTRICT OPINION.
LET ME, I HAVE A QUESTION FOR
YOU.
THE ISSUE REALLY BEFORE THE
THIRD DISTRICT WAS WHERE THE
PRESUMPTION AGAINST ROTATING
CUSTODY SURVIVED THE ENACTMENT
OF THE STATUTES --
>> 61131, 1997.
>> CORRECT.
THAT SAYS ROTATING CUSTODY CAN
BE AWARDED IF IT'S IN THE BEST
INTERESTS OF THE CHILD.
THE OTHER COURTS AS YOU WOULD
TELL US AND WE'VE LOOKED AT
SAID, NO, IT SHOULD HAVE
EXPRESSLY SAID IT.
HAS THE PRESUMPTION AGAINST
ROTATING CUSTODY SURVIVED THE
NEW AMENDMENTS, THE 2008 AND
2009 AMENDMENTS?
>> NO.
>> SO YOU, SO THIS -- IN TRYING

TO FIGURE OUT WHAT IS BEST IN
TERMS OF THIS COURT'S
CONSIDERATION, ANYTHING THAT WE
WOULD SAY IN THIS CASE WOULD
ONLY BE APPLICABLE TO CASES THAT
PRECEDED 2008, THAT WERE --
>> AS A GENERAL RULE, THAT'S
TRUE.
>> OKAY.
>> THE LEGISLATURE IN 2008 IN
ITS WISDOM AMENDED FLORIDA
STATUTE 61 TO PROVIDE INTER ALIA
MANY DIFFERENT CRITERIA.
NEW CRITERIA UNDER 6113 AS TO
THE ISSUES TO CONSIDER AS TO
WHAT WOULD BE IN THE BEST
INTERESTS OF THE CHILD, NEW
ISSUES CONCERNING, FIRST OF ALL,
ABOLISH THE ROTATING CUSTODY
PRESUMPTION WHICH HAD EXISTED
FOR OVER FOUR DECADES --
>> AND HOW DID THEY DO THAT AS
OF THE 2008-2009 STATUTES?
>> AFFIRMATIVELY.
BY STATING IT IN THE STATUTE.
AS OPPOSED TO WHAT YOU WILL HEAR
THERE MY COLLEAGUE THAT IN 1997
THERE WAS A ONE-SENTENCE
CODIFICATION OF THE THREE OR
FOUR-DECADE HISTORY OF THE
ROTATING CUSTODY ISSUE THAT
MANDATED THAT THE REQUESTING
PARTY -- THE FATHER IN THIS
CASE -- IF THEY WANTED RETATING
CUSTODY, THEY HAD TO OVERCOME
THE REBUTTABLE -- THE

PRESUMPTION AGAINST ROTATING
CUSTODY BY SOME TYPE OF
EXCEPTIONAL CIRCUMSTANCES.
AND THAT'S WHAT THE TRIAL COURT
WAS CHARGED WITH.
THE TRIAL COURT CONSIDERED THIS
CASE AND FOUND THAT THE REBUTTAL
PRESUMPTION HAD NOT BEEN
OVERCOME AND AWARDED AN EXPANDED
TIME-SHARING SCHEDULE, NOT
ALTERNATING WEEKENDS, BUT FIVE
NIGHTS OUT OF 14.
THE FATHER WANTED SEVEN NIGHTS
OVER 14.
BUT TO ANSWER THE QUESTION
DIRECTLY, 2008, THAT REBUTTABLE
PRESUMPTION MANDATE NO LONGER
EXISTS.
>> NOW I HAVE ANOTHER SORT OF
RELATED QUESTION.
I APPRECIATE YOUR CANDOR ON THAT
AS FAR AS WHAT THE EFFECTS OF
THE 2008-2009 AMENDMENTS WERE.
MY QUESTION IS THAT THE, AS YOU
SAID, THIS WAS A PRESUMPTION
THAT WAS A FOUR-DECADE-OLD
PRESUMPTION, AND ACTUALLY I WAS
SMILING ABOUT JUSTICE TERRELL
BACK THERE BECAUSE I WENT BACK.
I DON'T KNOW IF YOU'VE GONE BACK
AND READ THE CASES IN THE
1940s --
>> YES.
>> -- THAT GAVE RISE TO THE
PRESUMPTION.
AND WHAT THEY SAID IS SO

CONTRARY TO EVERYTHING THAT
OCCURRED IN THE LAST TWO OR
THREE DECADES.
THAT IS, THEY SAID, FIRST OF
ALL, THAT THE PRESUMPTION WAS
BASED ON THE TENDER YEARS
DOCTRINE.
THAT'S BEEN ABOLISHED.
THEY SAID THAT IN THAT ARCHAIC
WAY THAT NO PERSON SHOULD HAVE
TO SERVE TWO MASTERS, AND WE NOW
HAVE THE POLICY BEING IN 6113
BEFORE 2008 IN THE 1990s THAT
THE POLICY OF THE STATE IS THAT
THERE SHOULD BE FREQUENT AND
CONTINUING CONTACT WITH BOTH
PARENTS, AND BOTH PARENTS ARE
ENCOURAGED TO SHARE THE RIGHTS,
RESPONSIBILITIES AND JOYS OF
CHILD REARING.
SO MY QUESTION TO YOU IS WHETHER
OR NOT IT WAS EXPLICITTY
OVERTURNED BY THE 1997
STATUTE -- WHY WOULDN'T EVEN
BEFORE 2008, WHY SHOULDN'T THE
PRESUMPTION HAVE BEEN JUDICIALLY
ALTERED BECAUSE THE VERY BASIS
OF IT, THE UNDERPINNINGS ARE,
HAVE VANISHED?
>> I TAKE THE COURT'S POINT.
THE LEGISLATURE IN ITS WISDOM
REVISITED THIS MATTER GOING BACK
TO THE 1940s AND WENT AHEAD
AND DID WHAT LEGISLATURES DO,
AND IN 2008 THEY ENACTED A
NEUTRAL POLICY, AND THEY

ABANDONED THE PRESUMPTION
REQUIREMENT, THEY CHANGED THE
VISITATION REQUIREMENTS'
PARENTING PLAN.
THE CRITERIA IN 6113 WAS ALSO
CHANGED.
HOWEVER, THE TRIAL COURT IS
CHARGED WITH THE RESPONSIBILITY
OF FOLLOWING THE LAW AT THE TIME
THE CASE IS PRESENTED.
AS WE ALL KNOW, FINALITY IS
REQUIRED.
THIS -- THERE ARE THREE SEPARATE
OPINIONS FROM THE FIRST, SECOND
AND FOURTH DISTRICT POST-1997
THAT CONSIDERED THIS ISSUE.
AND THEY CONSIDERED IT IN IN THE
TEETH OF THE 61.121 CODIFICATION
AND SAID IN THEIR WISDOM IF THE
LEGISLATURE WANTED TO ABOLISH
THE PRESUMPTION, THEY KNEW HOW
TO DO IT.
AND IN POINT OF FACT, THEY DID
IT WITH A COMPANION STATUTE WHEN
THEY SAID THAT THE PRESUMPTION
THAT ALLOWED THE CUSTODIAL
PARENT TO RELOCATE OUT OF THE
STATE OF FLORIDA, FOR EXAMPLE,
ACTING IN GOOD FAITH THAT THAT
PRESUMPTION WAS EXSTAMPED.
AND THEY WERE ALLOWED TO DO IT.
AND THE LEGISLATURE SAID, NO,
NO, NO, WE'RE GOING TO ABOLISH
THAT PRESUMPTION THAT ALLOWED,
FOR EXAMPLE, THE MOTHER TO LEAVE
THE STATE IF SHE ACTED IN GOOD

FAITH BECAUSE THEY RECOGNIZED
THAT THAT WAS ARCHAIC, AND IT
WAS NOT FAIR TO, PRESUMABLY, THE
FATHERS AT THAT TIME.
HOWEVER, THEY AFFIRMATIVELY,
CLEARLY AND CONCISELY ABOLISHED
THE PRESUMPTION.
AND THAT WAS A COMPANION
STATUTE.
THE LEGISLATURE IN ITS WISDOM
DID NOT ABOLISH THE REBUTTABLE
PRESUMPTION CRITERIA.
>> WELL, I'M NOT SURE -- AGAIN,
I THINK YOU HAVE A VERY STRONG
STATUTORY CONSTRUCTION ARGUMENT
THAT IN THE SAME LEGISLATIVE
SESSION TWO STATUTES WERE IN
WERE IN ONE BILL AND ONE
SPECIFICALLY SPOKE ABOUT THE
PRESUMPTION AND THE OTHER
DIDN'T, BUT THE ARGUMENT ON THE
OTHER SIDE IS AS OF 1997 THE
LEGISLATURE IS SAYING THAT A
STATUTE, THE STATUTE SAYS
ROTATING CUSTODY MAY BE AWARDED
IF IT'S IN THE BEST INTERESTS OF
THE CHILD.
TO ME THAT -- AND THIS IS, I
GUESS, THE QUESTION.
THAT SEEMS TO BE AT ODDS WITH
THE PRONOUNCEMENT THAT THE
PRESUMPTION -- YOU SAY IT'S
REBUTTABLE, BUT IT'S REALLY, THE
PRESUMPTION IS THERE UNLESS IT'S
OVERCOME BY EXTRAORDINARY
CIRCUMSTANCES.

THAT DOESN'T SEEM CONSISTENT
WITH SAYING THAT ROTATING
CUSTODY IS ON THE SAME PLANE AS
EVERY OTHER TYPE OF CUSTODY
ARRANGEMENT.
>> BECAUSE THE LEGISLATURE
DIDN'T INTEND TO MAKE A LEVEL
PLAYING FIELD IN 1997, AND IN
POINT OF FACT --
>> SO WHAT WAS NEEDED, WHAT WAS
IT NEEDED FOR?
>> PURELY CODIFYING FOUR DECADES
OF JUDICIALLY-CREATED LAW
FOLLOWED BY A LEGION OF LOWER
COURTS.
AND IF I MAY, THE LOWER COURTS,
THE TRIAL COURTS IN DISSOLUTION
OF MARRIAGE PROCEEDINGS BEFORE
1972, IN DIVORCE PROCEEDINGS
CONSIDERED ROTATED CUSTODY,
SOMETIMES THEY AWARDED IT,
SOMETIMES THEY DID NOT.
THEY HAD THAT RESPONSIBILITY,
AND THEY CONSIDERED IT IN THE
TRIAL COURT.
THIS STATUTE 61.121 AS THE
FIRST, SECOND AND FOURTH
DISTRICTS FOUND AND IN A LEGION
OF OTHER CASES CITED IN THE
PETITIONER'S BRIEF, THE
LEGISLATURE DID NOT -- HAVING
THE OPPORTUNITY -- ABOLISH THAT
PRESUMPTION.
AND IN POINT OF FACT, IN 1982
WHEN THE SHARED PARENTAL
RESPONSIBILITY ACT WAS PASSED,

THEY HAD AN OPPORTUNITY TO DO
SO, AND THEY AGAIN DID NOT, AND
THE THIRD DISTRICT IN THE FRAY
DECISION A YEAR LATER RECOGNIZED
THAT THE PRESUMPTION SURVIVED IN
1982 STATUTE WHICH DID SOMETHING
IMPORTANT WHICH WAS TO GIVE BOTH
PARENTS SHARED PARENTAL
RESPONSIBILITY.
SO WE'RE HERE TODAY ON THE ISSUE
OF WHAT WAS THE LAW WHEN THIS
CASE WENT TO TRIAL 2007?
AND WE'VE SUPPLEMENTED OUR
BRIEF, FOR EXAMPLE, IN THE HAHN
CASE RECENTLY DECIDED JUST A FEW
WEEKS AGO.
THE DECISION WAS THAT IT WAS A
2005 FINAL JUDGMENT.
THE FATHER SOUGHT A MODIFICATION
IN 2008 UNDER THE NEW STATUTE.
THE TRIAL COURT SAID, I'M GOING
TO FOLLOW THE NEW STATUTE
NOTWITHSTANDING THAT THERE WAS A
FINAL DECISION IN 2005.
AND THE APPELLATE COURT SAID,
NO, YOU CANNOT GO BACK
RETROACTIVELY AND USE A STATUTE
THAT WAS, THAT DIDN'T EXIST AT
THE TIME THIS CASE WAS
FINALIZED.
AND THAT'S ALL THE TRIAL COURT
DID.
THE TRIAL COURT CONSIDERED THE
TESTIMONY, ENTERED A THOROUGH
FINDING OF FACT INCLUDING THE
LAW AND SAID -- BY THE WAY, I

APOLOGIZE, I'D LIKE TO LEAVE
ABOUT TEN MINUTES TO MY
COLLEAGUE.
>> I'M SORRY, YOU'RE CONSUMING
THAT NOW, AND I OVERLOOKED THAT
MYSELF.
>> THAT'S MY FAULT.
I APOLOGIZE.
>> YOU'RE NOW DOWN TO EIGHT --
>> OKAY.
I'D LIKE TO LEAVE SOME REBUTTAL.
THAT'LL BE ADDRESSED BY MY
COLLEAGUE, MR. FALZON.
THANK YOU.
>> MAY IT PLEASE THE COURT,
KATHY KLOCK ON BEHALF OF THE
RESPONDENT, MICHAEL COREY, THE
FATHER IN THIS CASE.
JUSTICES, THE ALTERNATING WEEKS
TIME-SHARING SCHEDULE THAT THE
FATHER ASKED THE COURT TO
CONTINUE IN THIS CASE WAS
AUTHORIZED UNDER CHAPTER 61 THAT
WAS IN EFFECT AT THE TIME OF THE
TRIAL, AND THE FINAL JUDGMENT --
AND IT IS AUTHORIZED UNDER THE
CURRENT VERSION OF CHAPTER 61
BECAUSE THE ALTERNATING WEEKS'
TIME-SHARING SCHEDULE WAS IN THE
BEST INTEREST OF THIS CHILD.
THE NOMENCLATURE FOR ROTATING
CUSTODY OR, EXCUSE ME, FOR AN
ALTERNATING-WEEKS TIME-SHARING
SCHEDULE AT THE TIME OF TRIAL
WAS ROTATING CUSTODY.
ROTATING CUSTODY WAS

SPECIFICALLY AUTHORIZED UNDER
CHAPTER, EXCUSE ME, UNDER
SECTION 61.121 WHICH STATED A
CHILD COURT MAY ORDER ROTATING
CUSTODY IF THE COURT FINDS
ROTATING CUSTODY IS IN THE BEST
INTERESTS OF THE CHILD.
ROTATING CUSTODY IS NOW KNOWN,
IS NOW PART OF A PARENTING PLAN
OR A TIME-SHARING PLAN WITHIN A
PARENTING PLAN THAT A TRIAL
COURT IS AUTHORIZED TO ORDER
UNDER CHAPTER 61.
>> BUT HERE'S MY, HERE'S MY
CONCERN WITH THE THIRD
DISTRICT'S OPINION FROM A
STATUTORY OR CONSTRUCTION POINT
OF VIEW.
AND LET ME JUST SAY AT THE
OUTSET THAT, YOU KNOW, I THINK
THAT THE CONCESSION THAT THIS IS
OF A LIMITED -- IT MAY NOT BE
FOR YOUR CLIENT, BUT FOR THE
ADMINISTRATION OF JUSTICE THAT
FROM 2008 ON WE DON'T HAVE, YOU
KNOW, THESE PRESUMPTIONS AND
ARCANE NOTIONS ARE REALLY A
THING OF THE PAST.
BUT IN THE -- IN 1997 WHEN THE
STATUTE WAS PASSED THAT SAID
ROTATING CUSTODY MAY BE AWARDED
IF IT'S IN THE BEST INTERESTS OF
THE CHILD, AT THE SAME TIME THE
LEGISLATURE PASSED THAT, THEY
DID PASS THE STATUTE THAT SAID
THE PRESUMPTION AGAINST

RELOCATION HAS BEEN ELIMINATED.
AND WHAT THE THIRD DISTRICT SAYS
IN ITS OPINION IS THAT IF THE
LEGISLATURE WANTED TO CONTINUE
THE PRESUMPTION, THAT IT SHOULD
HAVE AFFIRMATIVELY STATED THAT.
AND MY CONCERN FROM A STATUTORY
CONSTRUCTION POINT OF VIEW IS
THAT'S REALLY NOT HOW WE HAVE
INTERPRETED STATUTES.
WE, WHAT WE GENERALLY WILL SAY
IS IF THE LEGISLATURE KNOWS HOW
TO SAY SOMETHING, SO THEY KNOW
HOW TO ABOLISH A PRESUMPTION.
OR WE SAY THE LEGISLATURE IS
PRESUMED TO KNOW THE EXISTING
LAW.
SO I FEEL THAT THAT STATEMENT BY
THE THIRD DISTRICT THAT SAYS
THAT THEY SHOULD OF PLAINLY SAID
IT IF THEY HAD MEANT IT IS
REALLY -- EVEN THOUGH, AGAIN, I
THINK THEIR RESULT, YOU KNOW,
IS, WOULD BE THE CORRECT RESULT.
I APPRECIATE THAT.
BUT FROM A POINT OF VIEW OF
STATUTORY CONSTRUCTION, I'M
CONCERNED ABOUT THAT, THAT
PRONOUNCEMENT.
SO CAN YOU TELL ME HOW IF YOU
DON'T RELY ON THAT PARTICULAR
STATEMENT FROM THE THIRD
DISTRICT, HOW DO YOU GET FROM A
STATUTORY CONSTRUCTION POINT OF
VIEW THAT IN 1997 THE PASSAGE OF
61.121?

>> 121.
>> YEAH.
AFFIRMATIVELY ABROGATED THE
PRESUMPTION?
>> YOUR HONOR, THE DIFFERENCE
IS, I BELIEVE, THAT IN THE
RELOCATION STATUTE THE COURTS
HAD CREATED A PRESUMPTION IN
FAVOR OF A RELOCATION.
AND THE COURT HAD TO NEUTRALIZE
THAT PRESUMPTION BY SAYING WHILE
YOU MAY RELOCATE, THERE'S NO
PRESUMPTION EITHER WAY.
I THINK THE DIFFERENCE IS IN
61.121 PRIOR TO THE PASSAGE OF
THAT STATUTE, TRIAL COURTS HAVE
ONE ALTERNATIVE WHEN THEY WENT
INTO -- THERE WAS A STATUTE THAT
SAID THIS IS WHAT YOU MAY DO.
AND THAT WAS 61.13.
AND THE STATUTE SAID, YOU MAY
DESIGNATE -- YOU SHALL DESIGNATE
A PRIMARY RESIDENCE.
AND THAT'S THE ONLY AUTHORITY
THE STATUTES GAVE.
SO THE COURTS HAD TO GRAPPLE
WITH THAT AND SAY, WELL, WE HAVE
NO STATUTORY AUTHORITY TO ENTER
THIS BECAUSE ROTATING CUSTODY IS
INCONSISTENT WITH A PRIMARY
RESIDENCE.
>> BUT THAT ISN'T WHY THE
PRESUMPTION WENT INTO EFFECT.
IN THE 1940s THERE WAS NO
SITUATION, EVEN A NOTION OF A
PRIMARY RESIDENTIAL PARENT OR

PRIMARY OR SHARED PARENTAL
RESPONSIBILITY.
SO I DIDN'T READ ANY OF THE
DECISIONS UP THROUGH 1997 OF
SAYING WE CAN'T DO, WE CAN'T
AWARD ALTERNATING TIME-SHARING
BECAUSE THE LEGISLATURE DOESN'T
AUTHORIZE US TO.
>> CORRECT, YOUR HONOR.
BUT THE CASES THAT WERE DECIDED
AFTER 1997 WHICH CONTINUE TO
APPLY THE PRESUMPTION,
BASICALLY, WERE RELYING ON THE
FACT THAT THE STATUTE DIDN'T
SPECIFICALLY SAY IT.
BUT WHAT THE STATUTE DID DO,
WHEN THEY TOOK AWAY THE
DISABILITY AND THE DISABILITY
WAS YOU HAVE NO RIGHT, THE
COURTS HAD NO STATUTORY
AUTHORITY TO DO ANYTHING BUT TO
DESIGNATE A PRIMARY RESIDENTIAL
PARENT.
AND EVEN THE CASES DISCUSS THAT.
THEY SAID THE REASON WHY THE
PRESUMPTION AGAINST ROTATING
CUSTODY AROSE IS BECAUSE IT WAS
NOT ONE OF THE ALTERNATIVES.
>> WELL, THEY SAID THAT, BUT
THAT'S NOT THE CASE BECAUSE YOU
GO BACK AND READ THE 1940s
CASES, AND THEY HAD NOTHING TO
DO WITH THAT.
>> I AGREE, YOUR HONOR.
BUT WHEN THE FLORIDA LEGISLATURE
SAID YOU MAY ORDER ROTATING

CUSTODY IF THEY MEANT TO CODIFY
A PRESUMPTION, THEY WOULD HAVE.
IN FACT, IN THE 2009 LEGISLATION
THAT MR. SCHINDLER REFERRED TO
THE COURT ACTUALLY PUT IN A
PROVISION THAT SAYS THERE IS NO
PRESUMPTION FOR OR AGAINST ANY
PARTICULAR TIME-SHARING
SCHEDULE.
>> YES.
AND HE AGREES THAT THAT IS AN
AFFIRMATIVE STATEMENT THAT THEN,
NOW, LEGISLATIVELY OVERRULES ANY
JUDICIAL PRESUMPTION.
>> BUT IT DIDN'T OVERRULE IT.
THE LEGISLATIVE HISTORY SAYS
THIS CLARIFIES THAT THERE IS NO
PRESUMPTION.
SO I BELIEVE, YOUR HONORS, THAT
AT THE TIME IN 1997 WHEN THIS
STATUTE WAS AFFECTED, THE
LEGISLATURE CLEARLY INTENDED TO
PUT ROTATING --
>> WELL, WE WOULD -- AT LEAST, I
WOULD NEVER TAKE AS LEGISLATIVE
INTENT IN 1997 WHAT A
LEGISLATURE SAYS ABOUT SOMETHING
IN 2008 OR '9.
I MEAN, YOU'RE NOT SUGGESTING
THAT WE TAKE A, SOMETHING THAT
WAS SAID BY SOME SENATE STAFF
ANALYSIS 12 YEARS AFTER THE FACT
AND SAY THAT'S WHAT WAS INTENDED
IN 1997, ARE YOU?
>> WELL, YOUR HONOR, I THINK
THAT IT IS CERTAINLY INSTRUCTIVE

BECAUSE THEY DIDN'T SAY WE NOW
FIND, WE NOW WISH TO OVERRULE OR
ABOLISH THIS PRESUMPTION.
THEY SAID, WE ARE CLARIFYING --
>> WOULDN'T THE BETTER WAY TO
APPROACH THIS BE IF WE WERE TO
KEEP THIS CASE TO SAY THAT WHILE
THE LEGISLATURE MAY NOT HAVE
EXPLICITLY OVERRODE IT BECAUSE
EVERY REASON FOR ANY JUDICIAL
PRESUMPTION HAS BEEN COMPLETELY
EVISCERATED OVER THE FOUR
DECADES THAT THERE SHOULD NOT,
YOU KNOW, THAT THE PRESUMPTION
JUDICIALLY MADE NO MORE SENSE?
>> ABSOLUTELY, YOUR HONOR.
BECAUSE THE RATIONALE FOR THE
PRESUMPTION NO LONGER EXISTS.
>> BUT DID IT EXIST IN 2007?
I'M SORRY, 1997?
>> NO.
IT DID NOT.
BUT UNDER THIS COURT'S DECISION
IN RIPLEY V. EASEL, YOU CAN ALSO
APPLY THE STATUTORY
INTERPRETATION CONCEPT OR
DOCTRINE THAT THE IMPLICATION OF
A PRESUMPTION AGAINST ROTATING
CUSTODY WOULD BE INCONSISTENT
WITH 61.121 WHICH SAYS YOU MAY
ORDER ROTATING CUSTODY IF YOU
FIND THAT IT'S IN THE BEST
INTERESTS OF THE CHILD.
SO, NUMBER ONE, THE LEGISLATURE
GAVE THE COURT THE AUTHORITY
THAT THEY DID NOT HAVE

PREVIOUSLY, AND THEY ESTABLISHED THE STANDARD.
IF THE LEGISLATURE HAD INTENDED FOR A ROTATING PRESUMPTION AGAINST IT TO EXIST, THEY WOULD HAVE -- IT WOULD HAVE MADE MORE SENSE THAT THEY WOULD HAVE INCLUDED IN IT.
IT IS NOT A CODIFICATION OF THE EXISTING CASE LAW.
IT IS GIVING COURT'S AUTHORITY FOR THE FIRST TIME IN THE HISTORY OF THE FLORIDA STATUTES FOR A COURT TO ORDER ROTATING CUSTODY.
>> IF -- LET'S, I'D LIKE TO TALK ABOUT THIS PARTICULAR CHILD, AND I WAS -- IT WAS HARD FOR ME NOT TO GO BACK AND REALIZE THAT THESE DIVORCE PROCEEDINGS HAVE GONE ON FROM THE TIME THIS CHILD WAS, I THINK, 4 YEARS OLD UNTIL HE'S ALMOST 10 YEARS OLD.
AND I, I'M JUST -- I HOPE THAT WHATEVER ELSE IS GOING ON WITH THE LAWYERS THAT THE PARENTS ARE CONTINUING TO COOPERATE FOR THIS CHILD'S WELFARE AND BEST INTERESTS.
THAT BEING SAID, IF WE, IF WE APPROVE THE THIRD DISTRICT OPINION, IT WOULD, IT WOULD GO BACK THEN TO THE TRIAL JUDGE WITHOUT A -- THERE WOULD BE NO FINAL JUDGMENT.
AND WHAT IS YOUR POSITION AS TO

THEN THE WAY THE JUDGE WOULD LOOK AT WHAT SHOULD BE THIS CHILD'S LIFE PLAN, TIME-SHARING? WOULD IT BE WHAT EXISTED AS OF 2007, OR WOULD IT BE WHAT EXISTS IN 2010?
>> YOUR HONOR, IT IS THE FATHER'S POSITION THAT IF THIS COURT APPROVES OF THE THIRD DISTRICT'S DECISION, WHAT SHOULD HAPPEN IS TO GO BACK TO THE TRIAL COURT AND ALLOW THE TRIAL COURT TO USE THE FACTUAL FINDINGS THAT HE MADE AFTER CAREFUL REVIEW OF ALL THE EVIDENCE IN THE TRIAL LESS THE TWO FACTUAL FINDINGS THAT WERE REMOVED BY THE THIRD DISTRICT'S DECISION BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE, COMPETENT EVIDENCE TO SUPPORT THEM AND MAKE A DETERMINATION UNDER THE LAW THAT IS ESTABLISHED BY THIS COURT'S DECISION.
ANY OTHER RESULT WOULD BE A TRAVESTY OF JUSTICE AND SIMPLY DELAY THIS CHILD BEING RETURNED TO A ROTATING CUSTODY SCHEDULE --
>> AGAIN, NOW YOU SAY "TRAVESTY OF JUSTICE."
IN 2007 THE FATHER LIVED AROUND THE BLOCK IN KEY BISCAYNE, WHAT IF -- AND, YOU KNOW, WE DON'T KNOW ANYTHING THAT DEVELOPED SINCE, WHAT IF -- AND THE FATHER

WAS WORKING IN THE STATE
ATTORNEY'S OFFICE AND THE MOTHER
WAS IN THE SCHOOL.
NOW THREE YEARS LATER IF THERE'S
THE FACT THAT MAYBE THE FATHER
LIVES IN SOUTH MIAMI AND MAYBE
WORKS IN A BIG LAW FIRM THAT'S
REQUIRING HIM TO, YOU KNOW,
WORK, BILL 2400 HOURS A YEAR.
SO I'M NOT SURE I -- I MEAN,
THAT IS WHAT YOU SAY, THAT'S
YOUR POSITION, THOUGH, THAT YOU
JUST -- THE RECORD STAYS FREEZED
AS OF 2007?
IS THAT --
>> YES, YOUR HONOR.
BECAUSE IF ANYTHING HAS CHANGED,
THEN EITHER PARTY WOULD HAVE THE
RIGHT TO GO IN AND MOVE FOR
MODIFICATION UNDER THE STANDARDS
FOR A MODIFICATION ORDER.
>> THE OTHER QUESTION I --
>> LET ME SEE IF I UNDERSTAND.
WE WOULD MAKE A DECISION BASED
ON, I MEAN, THE TRIAL JUDGE
WOULD NOW MAKE THE DECISION
BASED ON WHAT WAS THE STATUS IN
2007, AND THEN THE OTHER PARTY
WOULD HAVE TO COME IN AND FILE
ANOTHER MOTION FOR MODIFICATION
TO SHOW WHAT'S GOING ON IN 2010,
THAT'S WHAT YOU'RE SAYING?
>> YES.
I BELIEVE THE TRIAL COURT'S
DECISION WAS ENTERED IN 2008, I
BELIEVE, AND I BELIEVE IT WOULD

BE APPROPRIATE TO GO BACK AND
JUST HAVE THE TRIAL COURT MAKE
IT, MAKE HIS AMENDED FINAL
JUDGMENT BASED UPON HIS ORIGINAL
FINDINGS THAT ARE STILL VIABLE
UNLESS THERE IS A MOTION FOR
MODIFICATION WHICH SUGGESTS THAT
THERE ARE CERTAIN --
>> CAN THAT BE DONE
SIMULTANEOUSLY?
>> EXCUSE ME?
>> COULD THAT BE DONE
SIMULTANEOUSLY?
I MEAN, IT SEEMS TO ME LIKE AN
AWFUL WASTE OF JUDICIAL TIME AND
EFFORT TO MAKE A DECISION BASED
ON FACTS THAT WERE APPLICABLE IN
2007-2008 AND THEN HAVE SOME
OTHER MOTION -- I MEAN, CAN
THESE BE DONE AT THE SAME TIME?
>> I GUESS IT COULD BE, YOUR
HONOR, BUT IT WOULD REQUIRE A
NEW TRIAL, AND THEN WHAT WOULD
HAPPEN IS A TIME-SHARING
SCHEDULE THAT WENT INTO EFFECT
BECAUSE OF AN ERRONEOUS FINAL
JUDGMENT WOULD THEN BE THE BASIS
OF DETERMINING WHETHER IT SHOULD
STAY OR THE ROTATING SCHEDULE
THAT WAS IN EFFECT THAT HAD BEEN
SO MUCH IN THE BEST INTERESTS OF
THIS CHILD SHOULD GO BACK.
IN OTHER WORDS, YOU'RE REWARDING
THE ERRONEOUS, EXCUSE ME, YOU'RE
REWARDING THE PARTY WHO WAS THE
BENEFICIARY OF AN ERRONEOUS

DECISION BECAUSE IT TAKES TIME
TO GO THROUGH THE COURT
SYSTEM --
>> WE'RE NOT -- AGAIN, OUR
PRIMARY INTEREST IS ALSO THE
BEST INTERESTS OF THE CHILD,
NOT, YOU KNOW, THIS ISN'T ABOUT
PUNISHING OR REWARDING A PARTY.
>> EXACTLY, YOUR HONOR.
>> NOW, THE OTHER PART ABOUT
THIS CASE THAT CONCERNS ME IS
THAT THE THIRD DISTRICT, YOU HAD
SEVERAL ARGUMENTS BEFORE THE
THIRD DISTRICT.
ONE WAS THAT THE STATUTORY
PRESUMPTION WAS ABROGATED.
THE OTHER WAS THAT COMPETENT
SUBSTANTIAL EVIDENCE DIDN'T
SUPPORT THE DECISION ON DENYING
ROTATING CUSTODY.
THE THIRD WAS THAT THE AWARD TO
THE MOTHER OF PRIMARY
RESIDENTIAL PARENT WASN'T
SUPPORTED, CORRECT?
THOSE WERE THREE THINGS?
>> YES, YOUR HONOR.
>> AND ON APPEAL BEFORE THIS
COURT YOU CONTINUE TO ARGUE AS
RAISED IN YOUR ANSWER BRIEF THAT
THE THIRD DISTRICT WAS CORRECT
AS TO THAT THE FINDING WAS
FLAWED AS TO PRIMARY RESIDENTIAL
PARENT AND THAT IF WE WERE TO
FIND THAT THE PRESUMPTION STILL
REMAINED IN EFFECT, IT WOULD
STILL HAVE TO BE EVALUATED TO

THE EVIDENCE.
>> THAT'S CORRECT.
AND MY CONCLUSION, YOUR HONOR, I
SAID THAT BECAUSE THE THIRD
DISTRICT'S OPINION BASICALLY
STOPS BY SAYING THERE IS NO
PRESUMPTION, AND IF THERE IS NO
PRESUMPTION, THERE'S NO
REQUIREMENT IN OVERCOMING THE
PRESUMPTION.
>> WELL, THEY DIDN'T STOP.
THEY WENT ON AND SAID THAT, AND
ANYWAY THE FINDING IS FLAWED AS
TO WHO SHOULD BE THE PRIMARY
RESIDENTIAL PARENT.
>> THAT IS CORRECT.
>> SO EVEN IF WE WERE TO QUASH
THE THIRD DISTRICT, IT WOULD
HAVE TO GO BACK TO THE THIRD
DISTRICT TO REEVALUATE THE ISSUE
OF WHETHER THERE'S COMPETENT
SUBSTANTIAL EVIDENCE TO SUPPORT
THE DENIAL OF ROTATING CUSTODY?
>> YOUR HONOR, THE ISSUE OF
WHETHER THE THIRD DISTRICT'S
FINDING THAT THERE WAS NO
COMPETENT SUBSTANTIAL EVIDENCE
TO SUPPORT THE TWO FACTORS UNDER
61.13 IS NOT AN ISSUE ON THIS
APPEAL.
IT WAS NOT RAISED BY THE
PETITIONER IN THE INITIAL BRIEF,
WAS NOT RAISED IN ISSUES --
>> RIGHT, I UNDERSTAND.
SO EITHER WAY --
>> YES.

>> -- IT WOULD HAVE TO -- EVEN
IF -- SO, BUT THE QUESTION ON
ROTATING CUSTODY IS THAT
SOMETHING THAT THE THIRD
DISTRICT WOULD STILL HAVE TO
DETERMINE IF WE SAID THERE WAS A
PRESUMPTION, BUT YOU DETERMINE
WHETHER THERE WAS COMPETENT
SUBSTANTIAL EVIDENCE TO SUPPORT
THE JUDGE'S FINDING.
>> IF THIS COURT WERE TO FIND
THAT THE PRESUMPTION STILL
EXISTED IN 2008 WHEN THE FINAL
JUDGMENT WAS ENTERED, THE CASE
WOULD HAVE TO GO BACK TO THE
TRIAL, TO THE THIRD DISTRICT
BECAUSE THE THIRD DISTRICT WOULD
THEN HAVE TO SAY WHAT THE
TRIAL -- WAS THE TRIAL COURT
CORRECT IN FINDING THAT THE
FATHER HAD NOT OVERCOME THE
PRESUMPTION.
IN ADDITION, THE THIRD DISTRICT
STANDARD'S A LITTLE BIT
DIFFERENT THAN OTHER DCAs
BECAUSE THE THIRD DISTRICT
DOESN'T ACTUALLY SAY STRONGLY
THERE'S A PRESUMPTION AGAINST
IT.
HE SAYS THEY'RE STRONGLY
DISFAVORED WHICH IS SIMILAR, BUT
IT'S ALLOWED WHERE THERE'S
AMELIORATING CIRCUMSTANCES.
SO THEY'RE DIFFERENT FROM THE
OTHER DCAs FROM THAT
STANDPOINT, SO IT WOULD HAVE TO

GO BACK TO THE THIRD DCA TO MAKE
A DETERMINATION WHETHER THE
TRIAL COURT'S FINDING THAT THE
FATHER FAILED TO OVERCOME THIS
PRESUMPTION WAS ERRONEOUS.
>> OKAY.
AND EITHER WAY, THOUGH, BECAUSE
AS YOU SAID THE ISSUE OF WHO'S
THE PRIMARY RESIDENTIAL PARENT
WASN'T RAISED AS A POINT
INITIALLY ON APPEAL, WE, YOU
WOULD URGE UNDER OUR PROCEDURES
THAT WE WOULD NOT DISTURB THAT
FINDING?
>> CORRECT, YOUR HONOR.
THIRD DCA'S FINDINGS THAT THERE
WAS NO SUBSTANTIAL COMPETENT
EVIDENCE TO SUPPORT THOSE TWO
FINDINGS WOULD STAND.
SO WHAT WOULD HAPPEN IS WE WOULD
GO BACK TO THE THIRD DCA AND,
ULTIMATELY, TO THE TRIAL COURT
WITH AN ENTIRELY EVEN PLAYING
FIELD.
LEVEL.
BECAUSE EVERY FACTOR WAS FOUND
TO BE EQUAL AS TO BOTH PARENTS
EXCEPT FOR THE TWO FACTORS THAT
THE THIRD DISTRICT FOUND WERE
NOT SUPPORTED BY SUBSTANTIAL,
COMPETENT EVIDENCE.
SO WHAT WE HAVE IS A EVEN
PLAYING FIELD ALTHOUGH THE
FATHER DID ARGUE IN THE THIRD
DISTRICT THAT THE TRIAL COURT
ERRED IN NOT MAKING FINDINGS IN

FAVOR OF THE FATHER UNDER
CERTAIN FACTORS BECAUSE OF
CONDUCT THAT WAS ATTRIBUTABLE TO
THE MOTHER.
SO THE THIRD DISTRICT COURT OF
APPEAL IS GOING TO HAVE TO, IF
YOU FIND THAT THERE WAS A
PRESUMPTION AGAINST ROTATING
CUSTODY, IT WOULD HAVE TO GO
BACK TO THE THIRD DISTRICT TO
DETERMINE WHETHER OR NOT THE
FATHER HAD OVERCOME THE
DISFAVORING OR THE PRESUMPTION,
WHATEVER IT IS CALLED --
>> DON'T YOU THINK THE PUBLIC
HEARING THIS CASE WOULD WONDER
HOW WE ARE -- HOW THIS IS
GETTING SO COMPLICATED WHEN IN
THIS SITUATION SINCE AT LEAST
2008 THIS WHOLE IDEA OF
PRESUMPTIONS AND ROTATING
CUSTODY IS JUST NO LONGER EVEN
AN ISSUE?
>> ABSOLUTELY, YOUR HONOR.
AND IT TIES RIGHT IN WITH YOUR
FIRST ORAL ARGUMENT THIS
MORNING.
THIS IS WHAT THE COURT'S
RESOURCES ARE BEING USED FOR.
HOWEVER, YOUR HONOR, IT IS
IMPORTANT TO THE CHILD IN THIS
CASE.
AND I BELIEVE -- AND I BELIEVE
YOU WILL CONCLUDE -- THAT THE
LEGISLATURE COULD NOT HAVE BEEN
MORE CLEAR IN ITS INTENT IN

PASSING 61.121.
THE COURT SAID A TRIAL COURT MAY
ORDER ROTATING CUSTODY IF IT IS
IN THE BEST INTERESTS OF THE
CHILD.
THE LEGISLATURE GAVE THE COURTS
THE AUTHORITY, AND THE
LEGISLATURE ESTABLISHED THE
STANDARD.
IT WOULD BE INCONSISTENT WITH
THE LEGISLATURE'S CLEAR LANGUAGE
AND CLEAR INTENT TO THEN SAY,
OH, BUT FIRST, TRIAL COURTS, YOU
HAVE TO ASSUME THAT THERE IS A
PRESUMPTION AGAINST THIS
ARRANGEMENT THAT WE HAVE JUST
AUTHORIZED YOU TO GIVE, TO MAKE.
AND YOU HAVE TO OVERCOME THAT
PRESUMPTION.
AND THE LEGISLATURE WOULD HAVE
HAD TO SAY LIKE THEY DID WITH
RELOCATION, WHAT FACTORS WOULD
YOU CONSIDER.
>> BUT EVEN WITH THE PRESUMPTION
ROTATING CUSTODY WAS, IN FACT,
AN OPTION FOR A TRIAL JUDGE IN
THESE DISSOLUTION/CUSTODY
SITUATIONS, CORRECT?
>> YES.
>> AND SO EVEN UNDER THE
PRESUMPTION, WHAT WOULD A TRIAL
JUDGE LOOK AT?
WOULDN'T A TRIAL JUDGE BE
LOOKING AT EXACTLY WHAT THE
LEGISLATURE CODIFIED WHICH IS
THAT IT WOULD BE, YOU COULD DO

IT IF IT'S IN THE BEST INTERESTS
OF THE CHILD?
>> EXACTLY.
>> ISN'T THAT WHAT YOU WOULD
HAVE LOOKED AT IF, IN FACT, THE
PRESUMPTION IS THERE?
WHETHER OR NOT -- WOULD YOU BE
LOOKING AT, WOULDN'T A TRIAL
JUDGE BE LOOKING AT WHETHER OR
NOT THIS ROTATING CUSTODY --
ALTHOUGH THERE'S A PRESUMPTION
AGAINST IT, IF IT'S IN THE BEST
INTERESTS OF THE CHILD, THE
TRIAL JUDGE COULD ORDER IT.
>> THEY WOULD HAVE TO HAVE SAID
WHAT YOU NEED TO LOOK AT TO
DETERMINE IF THE FATHER OVERCAME
THE PRESUMPTION.
OTHERWISE, THE CASES WOULD BE
ALL OVER THE PLACE LIKE THEY ARE
NOW, AND IN THIS CASE, YOUR
HONOR, THE TRIAL COURT FELT
HANDICAPPED, AND HE WAS BECAUSE
THERE WAS NO CONTRARY DECISION
OF THE THIRD DCA.
HE HAD TO FOLLOW THE DECISIONS
OF THE OTHER DISTRICT COURTS OF
APPEAL WHICH WERE INCORRECT,
BUT, YOUR HONORS, IN THIS CASE
THIS CUSTODY ARRANGEMENT --
EXCUSE ME, THIS TIME-SHARING
ARRANGEMENT WAS IN PLACE FOR TWO
YEARS AT THE TIME OF THE TRIAL.
>> SO WHAT'S -- WHERE'S THE
CHILD NOW?
OR WHAT KIND OF ARRANGEMENT --

>> UNDER THE TRIAL COURT'S
ORDER, THE CHILD IS OPERATED
UNDER THE FINAL JUDGMENT.
BECAUSE -- WELL, THE CHILD IS
UNDER THE FINAL JUDGMENT, YOUR
HONOR.
BUT --
>> YOU'RE NOW IN OVERTIME HERE,
SO IF YOU COULD SUM UP IN ABOUT
A MINUTE.
>> OKAY.
WELL, YOUR HONOR, THE ONLY THING
I WOULD LIKE TO SUM UP IS TO SAY
IF ROTATING CUSTODY WAS NOT IN
THE BEST INTERESTS OF A CHILD
UNDER THE CIRCUMSTANCE OF THIS
CASE WHERE ALL OF THE EVIDENCE
AT TRIAL WAS THAT THE CHILD WAS
THRIVING AND COULD NOT BE DOING
BETTER AND EVEN IN THE
PETITIONER'S OWN WORDS COULD NOT
BE DOING BETTER AND HAD EVEN
IMPROVED SINCE THE ROTATING
CUSTODY ARRANGEMENTS STARTED,
THEN ALTERNATING TIME-SHARING
SCHEDULE IS NOT IN THE BEST
INTERESTS OF THE CHILD, AND THE
FLORIDA LEGISLATURE INSTEAD OF
CLARIFYING THAT THERE IS NO
PRESUMPTION WOULD HAVE SAID
THERE IS AN IRREBUTTABLE
PRESUMPTION.
THANK YOU, YOUR HONOR.
>> THANK YOU.
>> MAY IT PLEASE THE COURTS, IT
APPEARS TO ME LISTENING TO THIS

ARGUMENT THAT WHAT RESPONDENT
WANTS YOU TO DO IS LOOK AT THE
1997 LEGISLATION WHICH,
ACCORDING TO RESPONDENT, DID TWO
THINGS.
IT ABROGATES TWO REBUTTABLE
PRESUMPTIONS.
IN ONE CASE IT ABROGATES THE
REBUTTABLE PRESUMPTION THAT HAD
BEEN JUDICIALLY CREATED AND
AFFIRMED BY THIS COURT, AND IT
IS EXPRESSLY USING EXPRESS
LANGUAGE AND SET OUT A WHOLE NEW
SET OF FACTS THAT HAD TO BE
APPLIED IN DETERMINING GOING
FORWARD WHETHER TO ALLOW
RELOCATION.
IN THAT SAME STATUTE, WHAT THE
RESPONDENT WOULD LIKE YOU TO
BELIEVE IS THAT IN ONE SENTENCE
IT'S ABROGATED A
SIMILARLY-CREATED JUDICIAL
PRESUMPTION AND DID IT BY
IMPLICATION.
>> WELL, IF -- AS I UNDERSTAND
IT, THE STANDARD WOULD BE
DIFFERENT.
IF THE PRESUMPTION IS THERE --
>> UH-HUH.
>> -- THEN THE PARTY WHO IS
TRYING TO GET OVER THAT
PRESUMPTION HAS TO DEMONSTRATE
THAT IN THIS CASE THAT
PRESUMPTION SHOULD NOT BE
APPLICABLE.
>> CORRECT.

>> WHEREAS UNDER THE STATUTE IF
THERE, THE CHILD JUDGE HAS THE
OPPORTUNITY TO DO THE ROTATING
CUSTODY, ALL YOU HAVE TO
DEMONSTRATE IS THAT IT'S IN THE
BEST INTERESTS OF THE CHILD.
AREN'T THOSE TWO DIFFERENT
STANDARDS THAT YOU WOULD HAVE TO
DEMONSTRATE, TRYING TO GET OVER
THE PRESUMPTION VERSUS
DEMONSTRATING WHAT'S IN THE BEST
INTERESTS OF THE CHILD?
>> BUT FROM A PRACTICAL POINT OF
VIEW, WHAT WOULD THE FACTORS BE
THAT YOU'D HAVE TO LOOK AT IN
ORDER TO DEMONSTRATE WHAT IS IN
THE BEST INTERESTS OF THE CHILD,
WHETHER ROTATING CUSTODY IS IN
THE BEST INTERESTS OF THE CHILD?
IT IS NOT BECAUSE THE STATUTE
SAYS SO, BUT BECAUSE THE ONLY
FACTORS THERE ARE THE 61.13
WHICH WERE PASSED IN 1982 AND
DEAL EXCLUSIVELY BETWEEN
CHOOSING BETWEEN TWO PARENTS ON
THE ISSUE OF WHICH PARENT SHALL
HAVE PRIMARY RESIDENTIAL
CUSTODY.
>> NOW IT SOUNDS LIKE YOU'RE
SORT OF SAYING THIS PRESUMPTION
WAS NEVER A BIG DEAL, AND AFTER
READING ALL OF THE APPELLATE
CASES, IT WASN'T JUST A
REBUTTABLE PRESUMPTION LIKE
SOMEBODY GOES AND SAYS, OKAY, I
DON'T THINK THIS IS A GOOD IDEA,

BUT YOU, FATHER OR MOTHER, YOU
INTRODUCE SOME EVIDENCE AND NOW,
YOU KNOW, THE PRESUMPTION'S
ERASED.
THE WAY THE PRESUMPTION READ IS
THAT IT IS PRESUMED THAT
ROTATING CUSTODY IS NOT IN THE
BEST INTERESTS OF THE CHILD AND
THAT THE PERSON TRYING TO GET
ROTATING CUSTODY HAS TO SHOW
EXTRAORDINARY CIRCUMSTANCES TO
REBUT IT.
THAT'S -- ISN'T THAT THE WAY,
YOU KNOW, ISN'T THAT THE WAY THE
LAW AS ENUNCIATED BY OUR CASES
AND THE APPELLATE COURTS
ARTICULATED THIS PARTICULAR
PRESUMPTION?
>> THE WAY I SEE IT IS THAT
THOSE ARE WHAT ARE CALLED
SPECIAL CIRCUMSTANCES, SPECIAL
AMELIORATING ARE SIMPLY SAYING
THAT IF THE CHILD IS BEFORE
SCHOOL YEARS, THEN YOU MAY LOOK
AT ROTATING CUSTODY.
IF THE CHILD IS OLDER, YOU LOOK
AT ROTATING CUSTODY.
SO THERE ARE CERTAIN SITUATIONS
WHICH IT IS APPROPRIATE.
THAT IS ALL THEY'RE SAYING.
IT'S NOT SOME HUGE BAR, IT'S A
CERTAIN TYPE OF SITUATION.
IT MAY BE BASED ON OLD-FASHIONED
NOTIONS, BUT, YOU KNOW, WE'RE
NOT BE HERE TO SUBSTITUTE OUR
JUDGMENTS.

>> SO WHAT DOES THE PRESUMPTION
MEAN AS OF 1997 OR 2007?
I'M NOT SURE NOW I GET YOUR, THE
DRIFT.
BECAUSE IT SURE SEEMED THIS
TRIAL COURT FELT THAT THE FATHER
HADN'T MET WHAT WAS, HAS BEEN
DESCRIBED AS A HEAVY BURDEN TO
OVERCOME THE PRESUMPTION.
ARE YOU SAYING THAT THAT WASN'T
THE WAY COURTS SHOULD HAVE EVEN
APPLIED THE PRESUMPTION?
>> I THINK, NO.
WHAT I'M SAYING IS ALL THE TRIAL
COURT DID HERE WAS DO THE SAME
THING THE ROUGHREDGE COURT DID.
THE CHILD HAD ADAPTED, THE
PARENTS HAD ADAPTED TO THE
SITUATION.
WELL, THAT'S NOT THE POINT.
THE POINT IS THAT IS IT IN THE
BEST INTERESTS OF THE CHILD, AND
THE TRIAL COURT FELT BASED ON
THE FACT THAT THE MOTHER WAS
AVAILABLE IN THE AFTERNOONS TO
TAKE THE CHILD ON THE TWO DAYS
WHEN THE CHILD HAD
EXTRACURRICULAR ACTIVITIES AND
THIS WAS IN THE BEST INTERESTS
OF THE CHILD THAT THE CHILD
SHOULD STAY WITH THE MOTHER
RATHER THAN GOING HOME WITH THE
MOTHER AND TO BE PICKED UP BY
THE FATHER.
>> SO YOUR POINT WOULD BE IF IT
GOES BACK WITHOUT A PRESUMPTION,

THE TRIAL COURT AND THE FATHER
JUST SAYING IT GOES BACK ON THIS
RECORD, WE'LL REACH THE SAME
CONCLUSION.
>> EXACTLY.
>> SO THERE SHOULD BE --
>> EXACTLY.
>> BUT HOW COULD WE POSSIBLY
KNOW THAT?
WITHOUT GETTING INTO ARGUMENT
THAT THE PRESUMPTION IS NOT
IMPORTANT JUST STRIKES ME AS
FANCIFUL.
I MEAN, A PRESUMPTION CHANGES
THE WHOLE DYNAMIC IN THE
DECISION-MAKING PROCESS, ISN'T
THAT CORRECT?
>> YES, IT DOES.
IF THEY COME WITHIN THOSE
CERTAIN CIRCUMSTANCES.
THE YOUNG CHILD OR THE OLDER
CHILD OR WHERE THE DIVISION OF
TIME BETWEEN THE PARENTS IS IN
THE CHILD'S BEST INTERESTS THAT
THE CHILD BE MOVED BACK AND
FORTH.
DON'T FORGET IN THIS DECISION,
THE PARENTS WILL SHARE TIME
EQUALLY.
IT'S ONLY DURING THE SCHOOL YEAR
WHERE THERE ARE THOSE
EXTRACURRICULAR ACTIVITIES TWICE
A WEEK THAT THERE IS NEED OF
THIS SMALL DIFFERENCE, FIVE DAYS
AS OPPOSED TO, AS OPPOSED TO
NINE DAYS FOR THE MOTHER.

AGAIN, FROM A PRACTICAL POINT,
FROM A PRACTICAL POINT OF VIEW,
WHAT ARE THE FACTORS?
IF THIS PRESUMPTION HAD BEEN
REPEALED SUB SILENTIO BY
IMPLICATION, THEN WHAT ARE THE
FACTORS THAT WOULD HAVE TO BE
APPLIED?
THE LEGISLATURE DIDN'T PROVIDE
ANY.
THE ONES THAT EXIST DON'T HAVE
ANYTHING TO DO WITH ROTATING
CUSTODY.
>> THIS IS -- EXCEPT THAT THE
TRIAL COURT -- AND GOING BACK TO
WHAT THE TRIAL COURT SAID IS
THAT THE FATHER, WITH THE THIRD
DISTRICT, SAID THE FATHER WAS
REQUIRED TO ESTABLISH
EXCEPTIONAL CIRCUMSTANCES IN
ORDER TO JUSTIFY THIS.
AND THE TRIAL COURT'S ORDER SAYS
WHILE THE COURT CLEARLY HAS THE
POWER TO ORDER ROTATING CUSTODY,
THE LONG-PREVAILING LAW HAS BEEN
SUCH AN ARRANGEMENT IS
PRESUMPTIVELY NOT IN A CHILD'S
BEST INTEREST.
IN ORDER TO MAKE SUCH AN AWARD,
THIS COURT WOULD HAVE TO FIND
EXCEPTIONAL CIRCUMSTANCES EXIST
WHICH MAKES THE ARRANGEMENT IN
THE CHILD'S BEST INTEREST.
NOT JUST MAKE A FINDING THAT
IT'S IN THE CHILD'S BEST
INTEREST, BUT THAT EXCEPTIONAL

CIRCUMSTANCES EXIST THAT MAKE
SUCH AN ARRANGEMENT IN THE
CHILD'S BEST INTEREST.
WHERE IS THE EXCEPTIONAL
CIRCUMSTANCES EVEN IN THE
STATUTE THAT THEY WERE OPERATING
UNDER, 61.121?
>> IT'S ALL JUDICIALLY CREATED.
IT'S ALL THE BIENVENU STANDARD,
THERE ARE A WHOLE LIST OF THEM.
THE CHILD WAS IMMATURE, THE
CHILD WAS NOT YET IN SCHOOL.
>> RIGHT.
THEY WERE ALL CREATED BASED ON
OUTDATED NOTIONS THAT THE MOTHER
SHOULD BE WITH THE CHILD, THAT
TWO PARENTS SHOULDN'T BE
RESPONSIBLE FOR DECISIONS
REGARDING THE CHILD, AND
EVERYTHING THAT WAS SAID IN THE
1940s IS JUST COMPLETELY --
>> AGAIN IN 1983.
SAID AGAIN IN 1983 BECAUSE THE
ARGUMENT WAS WRONG BEFORE THE
THIRD DISTRICT IN 1983 THAT THEY
ALSO HAD IMPLIEDLY REPEALED --
>> BUT ISN'T THE REALITY THAT
ALL OF THAT, ALL THAT LONG
HISTORY AND ALL THOSE DIFFERENT
THING THAT IS THE COURT SAID
JUST CANNOT BE REASONABLY
RECONCILED WITH THE LANGUAGE
THAT THE LEGISLATURE HAS CHOSEN
TO USE?
NOW THEY'VE GOT DIFFERENT
LANGUAGE NOW, AND YOU ADMIT IT

CAN'T BE RECONCILED WITH THAT.
>> RIGHT.
>> BUT THERE'S LANGUAGE AT ISSUE
HERE THAT THE LEGISLATURE CHOSE
TO USE.
>> NO.
BECAUSE ALL IT SAYS IS WE'RE
CODIFYING THE LONG-STANDING
COMMON LAW IN FLORIDA THAT YOU
CAN AVOID ROTATING CUSTODY WHEN
IT'S IN THE BEST INTERESTS OF
THE CHILD, WHEN YOU CAN SHOW
THOSE EXCEPTIONAL CIRCUMSTANCES.
>> DID THEY SAY ANYTHING IN THE
HISTORY ABOUT CODIFYING THE
PRESUMPTION?
>> THEY DIDN'T HAVE TO BECAUSE
THE COMMON LAW CANNOT BE --
THAT'S THE COMMON LAW OF
FLORIDA, YOU CANNOT OVERRULE
IT --
>> YOU THINK THE COMMON LAW OF
FLORIDA THAT IS SOMETHING A
JUDGE CREATED A DECISION IN THE
1940s, YOU THINK THAT'S WHAT
THE COMMON LAW IS?
>> IT IS NOT THE FACT TODAY, BUT
IN 1997 -- I AGREE WITH YOU, AND
I GO TO THE MANDELL COURTS.
IF WHAT THE LEGISLATURE WAS
DOING WAS TRYING TO OVERTURN
THIS PRESUMPTION, THAT THEY
DIDN'T DO A GOOD JOB OF IT.
THE LANGUAGE ISN'T CLEAR ENOUGH.
>> YOU'RE NOW IN OVERTIME.
>> THANK YOU.

>> THANK YOU VERY MUCH.
THANK YOU BOTH.
THE COURT WILL NOW TAKE ITS
MORNING RECESS OF TEN MINUTES.
>> PLEASE, RISE.