

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC04-1012**

CAROLYN R. WADE, f/k/a  
CAROLYN R. HIRSCHMAN,

Petitioner,

v.

L.T. No. 5D03-2797

MICHAEL D. HIRSCHMAN,

Respondent.

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**ON REVIEW FROM THE DISTRICT COURT  
OF APPEAL, FIFTH DISTRICT  
STATE OF FLORIDA**

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PETITIONER'S JURISDICTIONAL BRIEF

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**TABLE OF CONTENTS**

Table of Citations ..... ii

Statement of the Case and Facts ..... 1

Summary of the Argument ..... 3

Argument ..... 4

Standard of Review ..... 4

THE FIFTH DISTRICT’S DECISION EXPRESSLY AND DIRECTLY  
CONFLICTS WITH THE FIRST DISTRICT’S DECISION IN  
*COOPER v. GRESS*, 854 SO. 2D 262 (FLA. 1ST DCA 2003), ON THE  
SAME POINT OF LAW AND, THEREFORE, THIS COURT HAS  
DISCRETIONARY JURISDICTION TO REVIEW THIS CASE ..... 5

THIS COURT SHOULD EXERCISE ITS DISCRETION IN FAVOR  
OF RESOLVING THIS CASE ON THE MERITS AND DEFINE ONE  
UNIFORM LEGAL STANDARD TO BE APPLIED ..... 9

Conclusion ..... 10

Certificate of Service ..... 10

Certificate of Compliance ..... 10

**TABLE OF CITATIONS**

CASES

*Cassin v. Cassin*, 726 So. 2d 399 (Fla. 2d DCA 1999) . . . . . 3

*Cooper v. Gress*, 854 So. 2d 262 (Fla. 1st DCA 2003) . . . . . *passim*

*Dep't of HRS v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888  
. . . . . (Fla. 1986)4

*Mooney v. Mooney*, 729 So. 2d 1015 (Fla. 1st DCA 1999) . . . . . 3, 7

*Newsom v. Newsom*, 759 So. 2d 718 (Fla. 2d DCA 2000) . . . . . 3, 8

*Ring v. Ring*, 834 So. 2d 216 (Fla. 2d DCA 2002) . . . . . 3, 7, 8

*Skirko v. Skirko*, 677 So. 2d 885 (Fla. 3d DCA 1996), *rev. den.*,  
. . . . . 689 So. 2d 1071 (Fla. 1997)3

**CONSTITUTIONS**

Art. V, § 3(b)(3), Fla. Const. . . . . 4, 8

**STATUTES**

§ 61.13(3), Fla. Stat. . . . . 3, 4, 6

**RULES**

Fla. R. App. P. 9.030(a)(2)(A)(iv) . . . . . 4, 8

## STATEMENT OF THE CASE AND FACTS

Petitioner, Carolyn R. Wade (the “Mother”), appealed to the Fifth District Court of Appeal, a trial court order that modified the parties’ original final judgment of dissolution. (Appendix “A.”1.) The original decree did not name either party as the Child’s primary residential parent. (A1.) Instead, it incorporated the parties’ agreed-to rotating custody arrangement and plan to use a parenting coordinator. (A.1.) The trial court’s modification order, from which the Mother appealed, terminated the rotating custody arrangement and granted primary residence of the parties’ minor son (the “Child”) to the Respondent, Michael Hirschman (the “Father”). (A.1.)

Both parties petitioned to modify the agreed-to rotating custody arrangement incorporated into the original final judgment of dissolution. (A.1-2.) They both argued that a change in circumstances had occurred and sought primary residential custody of the Child. (A.2.) Although the trial court found that the parenting coordination plan had failed because the Mother refused to abide by it, the trial court was uncertain as to the proper legal standard to apply to the modification proceeding. (A.2.)

The Mother argued that the standard modification test applied. (A.3.). That test requires the party seeking a custody modification to meet the extraordinary burden of demonstrating a substantial or material change in circumstances and to show that the child’s best interests would be promoted by the change in custody (the “Change Test”). (A.3.) The Fifth District noted that “this standard has been adopted by *all* of the Florida appellate courts in an effort to forestall repeated child custody modification proceedings being filed and to achieve stability and finality in child custody degrees [sic].” (A.3 (emphasis added).) The Fifth District acknowledged that it is not in the

best interests of children or parents to constantly litigate over children's custody or primary residency. (A.3.)

The Fifth District conceded that if the Change Test applied in this case, the Father had failed to meet it. (A.3-4.) The Fifth District concluded that the Father had not demonstrated a substantial or material change. (A.3-4.) In addition, it noted that the Mother had argued there was no evidence that the Child had suffered any detriment while in her care or that her behavior negatively impacted the Child in any way. (A.4.) The Fifth District acknowledged that the evidence showed that the Child had no diagnosable emotional distress, was "happy go lucky," resilient, and doing well in school. (A.4.)

Nevertheless, the Fifth District determined that it did not have to address the Father's failure to satisfy the Change Test because that is not the test that applies where there is no primary residential parent and the parties have rotating custody. (A.4-5.) The Fifth District decided that:

Once it is established through substantial and competent evidence that the split rotating custody plan has failed and is doomed to future failure, for *whatever reason* (the child's obtaining school age, or one party's complete refusal to adhere to the plan), then the court should be free to *redetermine custody* based on the considerations set out in section 61.13, *as though it were making an initial custody determination*.

(A.5 (emphasis added).) To reach this decision, the Fifth District relied upon *Mooney v. Mooney*, 729 So. 2d 1015 (Fla. 1st DCA 1999), but recognized the contrary cases of *Cooper v. Gress*, 854 So. 2d 262 (Fla. 1st DCA 2003), *Ring v. Ring*, 834 So. 2d 216 (Fla. 2d DCA 2002), *Newsom v. Newsom*, 759 So. 2d 718 (Fla. 2d DCA 2000), *Cassin v. Cassin*, 726 So. 2d 399 (Fla. 2d DCA 1999), and *Skirko v. Skirko*, 677 So.

2d 885 (Fla. 3d DCA 1996), *rev. den.*, 689 So. 2d 1071 (Fla. 1997). (A.4-5, n. 6.)

Because the Fifth District observed that the trial court had addressed all of the necessary factors required under section 61.13(3), Florida Statutes (the “Best Interests Test”), and because it found that the trial court’s findings on those factors were supported by competent substantial evidence, the Fifth District affirmed the trial court’s change in custody, which made the Father the Child’s primary residential parent. (A.5-6.)

### **SUMMARY OF THE ARGUMENT**

This Court has discretionary jurisdiction to review this case. The Fifth District’s decision, which establishes the legal standard applicable in modification proceedings involving rotating custody agreements incorporated into final judgments of dissolution, expressly and directly conflicts with the First District’s decision in *Cooper* on the same point of law. The Fifth District decided that where a rotating custody arrangement is determined to have failed for any reason, the trial court may redetermine custody as if it were doing so in the first instance under the Best Interests Test, as set forth in section 61.13(3), Florida Statutes. (A.5.) In contrast, the First District concluded in *Cooper* that the Change Test applies. These decisions cannot be reconciled and are expressly and directly in conflict. Consequently, this Court has discretionary jurisdiction to hear this appeal pursuant to Article V, § 3(b)(3) of the Florida Constitution, and the Mother respectfully requests that it do so.

## **ARGUMENT**

### **Standard of Review**

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court on the same point of law. Art. V, § 3(b)(3) Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The Court may not review inherent or implied conflicts, however. *Dep't of HRS v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986). Thus, the conflict must be express and direct on the face of the opinion sought to be reviewed. *Id.*

THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIRST DISTRICT'S DECISION IN *COOPER v. GRESS*, 854 SO. 2D 262 (FLA. 1ST DCA 2003), ON THE SAME POINT OF LAW AND, THEREFORE, THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THIS CASE

The Fifth District's decision in this case expressly and directly conflicts with the First District's decision in *Cooper* on the same point of law. The Fifth District held that where a rotating custody agreement that was incorporated into the parties' divorce decree fails for any reason, the trial court can redetermine custody under the Best Interests Test as if it were deciding custody in the first instance. In *Cooper*, the First District decided that the Change Test applies to those facts. Thus, the decisions conflict on the same points of law. As a result, this Court has jurisdiction to review this case.

The facts of *Cooper* are virtually identical to those in this case. In *Cooper*, the father appealed the trial court's grant of the mother's petition to modify the agreed-to rotating custody arrangement incorporated into the parties' original final judgment of dissolution. *Id.* at 263. As in this case, at the time of the Coopers' original dissolution proceeding, the parties agreed to a rotating custody arrangement. *Id.* Each of the parties also agreed that each parent should share in all decisions and cooperate with each other regarding the children. *Id.* They also agreed that if they could not agree on an issue related to the children, they would mediate their disputes through the local Family Mediation Unit. *Id.* at 264. The final judgment incorporated these agreements by reference. *Id.* at 264.

Subsequently, the parties filed cross-petitions to modify the final judgment and to be appointed as the primary residential parent for the children. *Id.* at 264-65. Both

parties argued that a change in circumstances had occurred in that the parties' agreement to cooperate and communicate had failed. *Id.* at 264-65. In reviewing the parties' cross-petitions, the trial court found that the children's best interests would be served by granting the mother primary residential custody. *Id.* at 265. In so doing, the trial court applied the Best Interests Test pursuant to section 61.13(3), Florida Statutes, which is normally used to make initial custody determinations. *Id.* at 265.

On appeal, the First District concluded that the Change Test, rather than the Best Interests Test, applied. *Id.* at 265-66. The First District stated that the "fact that the parties had a rotating-custody arrangement, or that both parties were seeking designation as the primary physical residential parent, did not lessen the evidentiary threshold, given the facts of the case." *Id.* at 265. Instead, the First District recognized that the posture of a modification proceeding is entirely different from that of an initial custody determination because the party seeking to modify custody has a much heavier burden to show a proper basis for the change. *Id.* at 267.

The mother argued, however, that where the parents have a rotating custody arrangement and both parents seek a modification based upon a substantial change in circumstances, the modification should be decided as if custody were being determined in the first instance. *Id.* at 268. The First District expressly disagreed and distinguished, among other cases, *Mooney v. Mooney*, 729 So. 2d 1015 (Fla. 1st DCA 1999), the case the Fifth District relied upon in this case to apply the Best Interests Test. In so doing, the First District noted that in *Mooney*, the court found that neither party bore a higher burden of proof in a custody modification proceeding where the final judgment of dissolution had provided for rotating custody, and the parties had

expressly agreed that the child's commencement of kindergarten would constitute a change of circumstances that would require the entire custody question to be revisited. *Cooper*, 854 So. 2d at 268.

In *Cooper*, however, the parties' cross-petitions alleged nothing more than that their agreement to communicate and cooperate had failed, which was legally insufficient as a change in circumstances. *Id.* In addition, because the trial court failed to hold the parties to the extraordinary burden of proof required under the Change Test, and applied the lesser burden of the Best Interests Test, the First District reversed the trial court's order and remanded the case with instructions for the trial court to reinstate the rotating custody arrangement. *Id.*; *see also Ring*, 834 So. 2d at 216-17 (applying the Change Test to a modification proceeding where the final judgment of dissolution incorporated a marital settlement agreement that provided for rotating custody of the parties' children); *Newsom*, 759 So. 2d at 719 (same).

The facts of this case and *Cooper* are virtually identical. In both cases, the parties agreed to a rotating custody arrangement and some method to assist them in working out disputes regarding their children: in *Cooper*, a mediation program; in this case, a parenting coordinator and plan. In both cases, the dispute resolution mechanisms and the rotating custody agreements were incorporated by reference into the parties' final divorce decrees. Likewise, in both cases, the parents filed cross-petitions to change custody that alleged the failure of the communication and cooperation plans as the change in circumstances required under the Change Test. Despite the virtually identical facts in these cases, however, the First and Fifth Districts reached diametrically-opposed decisions as to the proper legal standard to be applied

and different results.

Because this express and direct conflict of decisions appears on the face of the opinions in this case and *Cooper*, this Court has discretionary jurisdiction to review this case pursuant to Article V, section 3(b)(3), Florida Constitution, and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. Also, because this case presents a question of great public importance, this Court should exercise its discretion in favor of hearing this case on the merits.

**THIS COURT SHOULD EXERCISE ITS DISCRETION IN FAVOR  
OF RESOLVING THIS CASE ON THE MERITS AND DEFINE ONE  
UNIFORM LEGAL STANDARD TO BE APPLIED**

Because this Court has discretionary jurisdiction to hear this case, and because the outcome of this case will affect all child custody modifications dealing with rotating custody arrangements, this Court should exercise its discretion in favor of hearing this case on the merits. Having uniform legal standards in child custody cases is a matter of great public importance to Florida's children and families. Children and families within the jurisdiction of one district court of appeal in this state should not be subjected to one standard, and a lesser one at that, than children and families in other districts. Thus, this Court should declare one uniform legal standard to be applied where the parties agree to a rotating custody arrangement and that agreement is incorporated into the final judgment of dissolution, but subsequently, one or both parties seeks a modification because rotating custody has failed, for whatever reason. Indeed, if the Court were to accept this case on the merits, the Mother would argue that the Court should adopt the more difficult, extraordinary burden Change Test, as the standard most likely to ensure stability in children's custodial arrangements.

Regardless of how the Court rules, however, one uniform standard for the modification of rotating custody agreements would benefit all Florida's children, families, and trial judges struggling with these issues, and not just the parties involved in this case. Consequently, because having uniform legal standards in child custody cases is a matter of great public importance, this Court should exercise its discretionary jurisdiction in favor of hearing this case on the merits.

### CONCLUSION

This Court has discretionary jurisdiction to review the decision below and it should exercise that jurisdiction to consider the merits of the Petitioner's argument.

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### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Linda Logan Bryan, Esquire**, Miller Shine & Bryan, P.L., Post Office Box 3376, St. Augustine, Florida 32085-3376, Attorney for Respondent, this \_\_\_\_\_ day of July, 2004.

### CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Attorney