

IN THE SUPREME COURT OF FLORIDA

Case No. SC08-2417

ALEXANDER F. VITALE *

Petitioner, *

v. *

ANNE VITALE n/k/a ANNE
MITCHELL, *

Respondent. *

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

On Appeal from the Fourth District Court of Appeal
Case No. 4D 08-145

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SUMMARY OF THE ARGUMENT

This Court should not exercise its discretionary jurisdiction in reviewing the Fourth District Court of Appeal's decision because:

1. The decision is not in conflict with other district court decisions on this issue as to the current version of **§61.13(2)(c), *Florida Statutes (2008)*** and **§47.122, *Florida Statutes (2008)***;
2. The decision is in conformity with the venue doctrines that govern family law; and,
3. The decision is correctly interpreted in light of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and how it relates to venue in custody or visitation cases.

ARGUMENT

The Fourth District Court of Appeal properly interpreted **Sections 61.13(2)(c), Fla. Stat. (2008)** and **Section 47.122, Fla. Stat. (2008)**. The Petitioner cites to *Vero v. Vero*, **659 So. 2d 1348 (Fla. 5th DCA 1995)**. At the time *Vero, supra*, was rendered, **61.13(2)(c)** provided: The Circuit Court in the county in which either parent or the children reside and the Circuit Court in which the original award of custody was entered have jurisdiction to modify an award of child custody. The Court may change the venue in accordance with **Section 47.122. Section 61.13(2)(c), Fla. Stat. (1993)**. Therefore, the 1993 version of the Statute had three applicable venue locations where a modification action could be had by the parties: The Former Wife's residence, the Former Husband's residence, or where the original award of custody was entered. Therefore, the *Vero* case is distinguishable at many different levels, but the change in the Statute crucially flaws Petitioner's argument. The current text of the Statute states, pursuant to *Florida Statute 61.13(2)(c) (2008)* that an action for modification may only be brought in the following counties:

The Circuit Court in the county in which either parent and the child resides, or the Circuit Court in which the original award of custody was entered, have jurisdiction to modify an award of child custody.

Currently, the Statute only provides for two locations where a modification action may be filed or “in which it might have been brought”.

Actions for modification of Florida judgments awarding child support, maintenance or alimony may be brought in the Court of the Circuit in which the parties, or either of them, reside at the date of the execution of the settlement agreement, or reside at the date of the application for modification, or in which the agreement was executed, or in which the prior order was rendered. *See, Florida Statute 61.14(1), Mingione v. Mingione, 756 So. 2d 197 (Fla. 4th DCA 2000), Bryant v. Bryant, 566 So. 2d 65 (Fla. 5th DCA 1990).*

As stated previously, the proper venue choices for bringing modifications of custody or visitation are: the county in which either party and **the child** reside or the Circuit county in which the original award of custody was entered have jurisdiction to modify an award of child custody. In *Torres v. Torres*, the Third District Court of Appeal explains how **Section 47.122** is properly applied with **Section 61.13(2)(c)**. In *Torres v. Torres, 561 So. 2d 1310 (Fla. 3rd DCA 1990)*, the parties were divorced in Dade County Circuit Court wherein the mother was granted primary physical custody of their child and later moved to Pensacola, Escambia County. The Former Husband moved for a modification in Dade County and the Former Wife was granted a transfer of the modification proceeding to Escambia County pursuant to the forum non

conveniens Statute, **Section 47.122, Fla. Statutes (1989)**. The Court stated that the intention of the **Statute 47.122** was fulfilled when its concluded:

Whatever the present status of the rule as applied to that particular situation, it does not affect the present one, in which, as we see it, the venue of the modification controversy has been transferred from one county to another for the convenience of the parties and witnesses—particularly that of the little girl who lives in the transferee circuit and whose well-being is the sole issue involved.

As can be seen by *Torres, supra*, the action was transferred pursuant to **§47.122** to a jurisdiction in which the original Supplemental Petition for Modification could have been brought. The intention of *Florida Statute 61.13(2)(c)* for modifications of custody and visitation is to have venue where evidence exists for the subject matter of the action, that being the minor child’s best interest, which can be more readily ascertainable where the children primarily reside with one of the parties or where there is evidence and facts from the original final decree.

The *Torres, supra*, court went on to additionally state:

Finally, we note that, if the mother and child had moved to another state, rather than another county, the Dade County Court would have been required to defer jurisdiction over the child to her new “home state” pursuant to the forum non conveniens provisions of the Uniform Child Custody Jurisdiction Act.” *Alvarez v. Alvarez, (Fla. 3rd DCA Case No. 90-648, opinion filed, April 12, 1990) [15 FLW 993]*.

It makes little sense, and less law, to apply a different jurisdictional analysis or to reach a different conclusion because the parties’ new home is in a different part of

Florida. See, *Williams v. Starnes*, 522 So. 2d 469, 473-74 (Fla. 2d DCA 1988).

Not only did the Fourth District Court of Appeal interpret *Florida Statutes 61.13(2)(c) (2008)* and *Florida Statute 47.122 (2008)* correctly, its application of the law is in line with the intent of the Statutes and Rules governing family law.

The Fourth District Court of Appeal is not in conflict expressly with any other case or doctrine when you review the analysis of *Thomas v. Thomas*, 724 So. 2d 1246 (Fla. 4th DCA 1999) which correlates venue and the Uniform Child Custody Jurisdiction Act. The court in *Thomas, supra*, stated:

Venue is commonly defined as the place where a case is to be tried. To be sure, most venue determinations involve site selections within a state. But, in those rare instances where an interstate compact operates to require the trial of some matters in one state rather than another, even though both states may have subject matter jurisdiction, then, I respectfully suggest that 'venue' may cross state lines. I am aware that the doctrine of forum non conveniens may not be used to justify the transfer of a suit to a forum in another state. See, *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978). Nonetheless, by its express provisions, the Uniform Child Custody Jurisdiction Act is an exception to the rule. The language of **Section 61.1314(1), Florida Statute (1981)**, acknowledges that a Florida court may have subject matter jurisdiction but requires the Florida court to restrain the exercise of its jurisdiction when the court of another state has a pending custody action concerning the same parties. Under the Uniform Child Custody Jurisdiction Act, a court's decision on whether to stay the resolution of a

child custody proceeding is essentially a venue determination . . .

The Court went on to state:

. . . upon reconsideration of this venue jurisdictional issue, we now agree with the analysis of Judge Hurley. In light of the policies of the UCCJA, it is especially important that the issue as to where the child custody proceeding will be waged be determined with the greatest dispatch.

As the Fourth District Court of Appeal correctly interpreted the venue statute, it also properly enlightened the litigants that venue is only proper in Broward County or North Carolina where the mother and children reside. Pursuant to **Section 61.1316(1)**, as stated in *Thomas, supra*:

A court which has jurisdiction under this act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

As stated in *Yurgel v. Yurgel*, **572 So. 2d 1327 (Fla. 1990)**:

There may be circumstances in which equity and fairness require the courts of Florida to decline to exercise continuing jurisdiction because another state is the more appropriate forum. This particularly is true when Florida, for whatever reason, has become an inconvenient forum.

Currently pending in the trial court is the Mother's Motion to Transfer Venue to North Carolina in the interest of the minor children and pursuant to the Uniform Child Custody Jurisdiction Enforcement Act.

The venue statute as applied by the Fourth DCA is in line with **Section 61.1316** as stated in *Thomas, supra*, which criteria was as follows:

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) If another state is or recently was the child's home state;

(b) If another state has a closer connection with the child and his or her family or with the child and one or more of the contestants;

(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state . . .

. . . The principal criterion is the traditional "best interests of the child."

The trial court found and the Appellate Court reiterated that:

Neither parent has ever resided with the children in Collier County, nor is Collier County the place where the Final Judgment awarding custody was entered. Collier County does not qualify as either of the two places authorized by **Section 61.13(2)(c)**. *See, Vitale v. Vitale, 994 So. 2d 1242 (Fla. 4th DCA 2008)*.

Florida law has been consistent and clear and there appears to be no decisions expressly and directly conflicting with the Fourth DCA as stated above. In *Jacobsen v. Jacobsen*, 389 So. 2d 332 (Fla. 5th DCA 1980), the law in Florida appears to be very consistent and the court stated:

It is uncontroverted that at the time the suit was instituted the husband and the children were residing in Leon County and had never resided in Orange County. This case is governed by the principles reviewed in *Waterhouse v. Pringle*, 68 So. 2d 599 (Fla. 1953). See also *Rivenbark v. Rivenbark*, 335 So. 2d 23 (Fla. 1st DCA 1976); *Dones v. Green*, 212 So. 2d 919 (Fla. 1st DCA 1968).

CONCLUSION

As set forth above, the decision of the Fourth District Court of Appeal and the instant case in no way expressly and/or directly conflicts with any decisions of the Supreme Court of Florida or other District Court of Appeal and therefore, the Florida Supreme Court does not have discretionary jurisdiction to review said decision.

CERTIFICATE OF SERVICE

WE CERTIFY that a true copy of the foregoing was served by mail upon the Petitioner, Alexander F. Vitale, *pro se*, 2135 Arielle Road, Unit 2410, Naples, Florida 34109, this 18th day of February, 2009.

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By: _____
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**CERTIFICATE OF COMPLIANCE
WITH RULE 9.210(a)(2), *FLORIDA RULES
OF APPELLATE PROCEDURE***

The undersigned hereby certifies that the foregoing Reply Brief on Jurisdiction of Respondent complies with the font requirement of **Rule 9.210(a)(2), *Florida Rules of Appellate Procedure***.

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