IN THE SUPREME COURT OF FLORIDA

Case No. SC08-2417

ALEXANDER F. VITALE,

Petitioner,

v.

ANNE VITALE, n/k/a ANNE MITCHELL

Respondent,

PETITIONER'S BRIEF ON JURISDICTION WITH ATTACHED APPENDIX

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

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PRELIMINARY STATEMENT:

Petitioner requests the Supreme Court of Florida to exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal which held that venue of a petition to modify child custody *against a non resident* under Sec 61.13(2)(c) Fla. Stat.(2008) can be laid *only* in the county that issued the original custody award. Petitioner believes this decision expressly and directly conflicts with prior decisions of the Supreme Court of Florida and the other District Courts of Appeal on the same question of law.

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A. Does the decision of the Fourth District Court of Appeal, which held that *venue* of a petition to modify custody, filed against a non resident, can lie *only* in the county which issued the original judgment of divorce and custody, expressly and directly conflict with prior decisions of the Supreme Court of Florida and other District Court's of Appeal on the same question of law.

B. Did the Fourth District Court of Appeal's decision improperly hold that Sec 16.13(2)(c) Fla. Stat. (2008) is a "special" or "exclusive" venue statute and ignore the legislature's intent that modifications proceedings can be transferred under the doctrine of *forum non conveniens*, in express and direct conflict with prior decisions of the Supreme Court of Florida and other District Courts of Appeal on the same question of law.

C. Does the Fourth District Court of Appeal's decision concerning venue of claims *against non residents* of the State of Florida, expressly and directly conflict with prior decisions of the Supreme Court of Florida and other District Courts of Appeal on the same question of law.

D. Does the Fourth District Court of Appeal's decision concerning transfer of venue of claims *against non residents* under 47.122,

Fla. Stat. (2008), expressly and directly conflict with prior decisions of the Supreme Court of Florida and other District Courts of Appeal on the same question of law.

E. Does the Fourth District Court of Appeals decision, by compelling Petitioner to litigate his claims for modification of custody and visitation in a forum over a hundred miles from his residence, and in a forum where he can not compel the attendance of witnesses, effectively deprive a Florida Resident of his due process guarantees, in violation of the Florida and United States Constitutions, and in express and direct conflict with prior decisions of the Supreme Court of Florida and other District Courts of Appeal on the same question of law.

THE APPLICABLE STANDARD OF REVIEW FOR JURISDICTION

Does the Fourth District Court of Appeal's decision, concerning venue of a petition for modification of child custody against a non resident, expressly and directly conflict with prior decisions of the Supreme Court of Florida and other District Courts of Appeal, on the same questions of law, so that the Supreme Court of Florida should accept discretionary jurisdiction of this appeal to review the decision.

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PETITIONER'S STATEMENT OF THE CASE AND FACTS

The Petitioner former husband and the Respondent former wife were initially living together in Broward County when the Petitioner filed for divorce. On May 25, 2004 the Circuit Court, Broward County, entered a Final Judgment of Divorce and Relocation which incorporated the mediated settlement agreements of the parties and permitted the Respondent and minor children to relocate to Birmingham, Alabama. A Copy of the Judgment of Divorce and Relocation is found in the Appendix filed in the District Court of Appeal, under Tab C, (hereafter "Appendix, Tab__"). A conformed copy of the Fourth District Court of Appeal's decision being appealed herein is found in the separate Appendix attached to this Brief.

The Petitioner has been a resident of Collier County since 2003. The Respondent former wife has never returned to reside in the State of Florida after relocating to Birmingham, Alabama with the minor children in 2004. Since 2004, the Respondent has relocated with the minor children from Birmingham, Alabama to Columbus, Ohio, and then to Charlotte, North Carolina, where she and the minor children are currently residing. The Petitioner has filed objections to these frequent out of state relocations.

In June 2007 the Petitioner filed a Supplemental Petition in the Circuit Court, Broward County, for modification of custody, visitation and child

support pursuant to Sec. 61.13(2)(c) and Sec. 61.14, Fla. Stats. (2008), (Appendix, Tab P). Petitioner also filed a verified motion to transfer venue of the action from Broward County to Collier County where he and his witnesses resided, (Appendix, Tab Q). The Circuit Court, Broward County, entered an order on November 28, 2007 transferring the Supplemental Petition for modification to Collier County, on the basis of *forum non conveniens* (Appendix, Tab T). Respondent appealed that non final order transferring venue, and the Fourth District Court of Appeal reversed, holding that venue of a modification proceeding against a non resident custodial parent can be laid only in the county which issued the original order of custody, or in the *out-of-state county* where the non resident custodial parent is currently residing.

Petitioner seeks discretionary review of the Fourth District Court of Appeal's decision because the District Court has misconstrued the venue provisions of Sec 61.13(2)(c), Fla. Stat. (2008), and the operation of the Florida venue statutes when the claim is being brought *against a non resident* of the State of Florida.

SUMMARY OF THE ARGUMENT

The decision of the District Court of Appeal should be reversed for the following reasons:

1. The District Court of Appeal's decision sets forth sufficient facts, and the legal principles it relied on, to establish a direct and express conflict with Supreme Court and other District Court of Appeal decisions to allow the Supreme Court to accept discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution.
2. The District Court of Appeal's decision directly conflicts with the doctrine announced by the Supreme Court, and the Legislature, that a defendant who is not a resident of the State of Florida does not enjoy the same venue privileges as a resident of the State of Florida, and can be sued in any county in the State.
3. The District Court of Appeal's decision mistakenly interprets Sec 16.13(2)(c) Fla. Stat.(2008) as a "special" or "exclusive" venue statute and ignores the legislative intent set forth in Sec 16.13(2)(c) Fla. Stat.(2008) to extend the doctrine of *forum non conveniens* to modification proceedings in this modern age of mobile families.
4. The District Court of Appeal's decision results in a direct infringement of the Petitioner's constitutionally protected due process rights by forcing him to litigate in a forum over a hundred miles from

his residence, and in a forum in which he can not compel the attendance of his witnesses.

5. If the District Court of Appeal's decision is allowed to stand it will compel the bizarre result that a non resident of the State of Florida is afforded more favorable venue treatment than a resident of the State of Florida, in contradiction of our venue statutes and Supreme Court case law.

THE ARGUMENT

Point I

An express conflict can exist for jurisdictional purposes even if it is not specifically identified as such by the District Court of Appeal in its decision

An express and direct conflict exists between the Fourth District Court of Appeal's decision and prior decisions of the Supreme Court of Florida and other District Courts of Appeal on the same issues: i.e. venue of suits against non residents and the application of the doctrine of *forum non conveniens* in family law matters.

The District Court's opinion below sets forth sufficient facts, and the legal principals upon which it was based, to raise the issue of an express and direct conflict for Supreme Court discretionary jurisdiction. *See, Ford Motor Co. v Kikis* 401 So. 2d 1341, at 1342, (Fla. 1981), where the Court held "It

is not necessary that a district court explicitly identify conflicting decisions in its opinion in order to create an "express' conflict under section 3(b)(3)." *See also Persaud v State*, 838 So. 2d 529, at 532, 533, (Fla. 2003), citing *Ford, supra* with approval, and *See also, Gandy v State*, 846 So. 2d 1141, at 1144 (Fla. 2003), holding the conflict can be established "hypothetically' if the District Court's opinion "included some facts in its decision so that the question of law addressed by the district court in its decision can be discerned by the Court".

The District Court found that the original custody order was entered in Broward County, that neither party has lived in Broward County for several years, that the Respondent is a non resident of Florida, living with minor children in Charlotte, North Carolina, and that the Petitioner is a resident of Collier County , where his witnesses reside.

The District Court also interpreted Sec 16.13(2)(c) Fla. Stat. (2008) as an "exclusive" venue statute that allows venue of modification proceedings *against a non resident* to be laid in *only* two counties, either the county in which the original custody order was entered, or in the case of a non resident of the State of Florida, in the out-of-state county where the custodial parent resides with the minor children.

Since the District Court of Appeal's decision below sets forth the facts and legal principles upon which is relied in reversing the trial court's order transferring venue, the question of law addressed by the District Court of Appeal in its decision (venue of modification proceedings against a non resident defendant) can be discerned by the Supreme Court.

POINT II

Non residents of the State of Florida do not enjoy the same venue privileges as residents of the State of Florida, and non residents can be sued in any county in the State. Venue also has been classified by the Florida Courts as a privilege belonging to Florida residents which can be waived. The Respondent voluntarily gave up her venue privileges in this case.

The Respondent voluntarily gave up her claim of venue privileges in Broward County by (a), voluntarily and permanently relocating out of state in March, 2004 and (b), by agreeing in the Mediated Settlement Agreement that Venue would lie in Broward County only so long as one or the other party resided in Broward County, (See Mediated Settlement Agreement, dated July 16, 2003, Par 32 and 33, Supplemental Appendix filed in the District Court, at Tab 1).

When the Appellant Former Wife moved out of the State of Florida in March, 2004 she became a non-resident of the State of Florida. Non-residents do not have the same venue privileges accorded to Florida residents. The general venue statute governing venue of actions in Florida,

Section 47.011, Fla. Stat.(2006), was enacted *to protect Florida residents*. and it specifically states these venue protections are not applicable to non-residents. The Supreme Court has held that a non resident defendant can be sued in any county in the State, See *State ex rel Bernhart v Barrs*, 12 So. 2d. 5776, (Fla. 1943), and *See also Hollywood Memorial Park Inc v Rosart*, 124 So. 2d 712 (Fla. 3d DCA 1960). This doctrine has been applied in dissolution of marriage cases, See, also *Kopecky v Kopecka*, 967 So. 2d 1109 (Fla. 4th DCA 2007).

Point III

The Venue privilege found in Section 61.13(2)(c), Florida Statutes (2008) is not applicable to a non resident like the Respondent.

Sec. 61.13(2)(c) Fla. Stat. (2008) establishes *initial venue* in two forums, the county where the parent and child currently reside, or the county where the original award of custody was entered. The Legislature recognized that venue of subsequent actions to modify prior awards of custody might lie more appropriately in venues other than the county where the original award of custody was entered, or the county where the parent and child currently reside, and therefore, Section 61.13 (2)(c) specifically states the Court which has jurisdiction and initial venue can change venue in accordance with Section 47.122, Florida Statutes (2008). See *Vero v Vero* 659 So. 2d 1348, at 1349, (Fla. 3d DCA 1995), where the court discussed a

motion to transfer venue of a modification proceeding and said "We agree with the former wife that a circuit court has authority to transfer venue once it finds that another circuit is more convenient for the parties."

If the legislature had intended that venue of actions for modification of child custody and visitation could lie *only* in the county where the parent and child reside, or in the county that issued the original award, they would not have added the provision that granted the initial court the power to transfer venue pursuant to Section 47.122.

Section 47.122, Florida Statues (2008), allows for the change of venue of civil actions, including matrimonial actions, to any other court of record in which it might have been brought. "In which it might have been brought" refers to what other county, or venue, the action could have been brought in, pursuant to the general venue statute, Sec 47.011, for the commencement of actions. It acts as a limitation to protect *Florida residents* from being sued in an improper venue. *See, Bingham v. Manson*, 363 So. 2d 370 (Fla. 1st DCA 1978). However, since the Respondent is a non resident, and has waived her venue privileges by moving out of state, venue of in persona or "transitory" actions against her, including a modification or enforcement proceeding, will lie in any county of the State. *See also Goedmakers v Goedmakers* 520 So. 2d 575, at 579, (Fla. 1988) where the

Court said, "When the dissolution of a marriage is sought, the action is regarded as transitory". The Court went on to speak about the venue rights of a "*resident defendant*" in a dissolution proceeding, (emphasis added), *Goedmakers, supra* at 579.

POINT IV

The District Court's opinion directly and expressly conflicts with other District Court opinions because it has the effect of denying Petitioner his Constitutionally protected rights of due process.

The District Court's decision requires the Petitioner to litigate his modification claims in a forum that is more than 100 miles from his residence and in a forum in which he can not compel the attendance of his witnesses from Collier County. To deny Petitioner the right of compulsory attendance of witnesses will be to deprive him of his rights without due process of law under the Florida State and Constitution, See Art. I. Sec. 9, Fla. Const.

The Courts have held that "the compulsory attendance of witnesses is a vital part of the American concept of due process and a fair hearing", see *Drogaris v Martine's Inc*., 118 So. 2d 95, at 97, (Fla. 1st DCA 1960); *See also AT&T Wireless Services Inc. v Castro* 896 So. 2d 828, at 832, (Fla.1st DCA 2005), where the Court said "To satisfy due process considerations, parties must be given a meaningful opportunity to present evidence and be

heard. (Citations omitted). Indeed, the right to call witnesses is one of the most important due process rights of a party…"

CONCLUSION

The District Court of Appeal's decision below, which reversed the transfer of venue of this action to Collier County, is directly and expressly in conflict with prior decisions of this Court and the other District Courts of Appeal as demonstrated herein, and the Supreme Court should accept discretionary jurisdiction of this appeal to review the District Court's interpretation of the venue rules pertaining to modification claims against a non resident defendant.

CERTIFICATE OF SERVICE AND COMPLIANCE

I Certify that a true copy of the foregoing was served by mail upon counsel for the Respondent, Christopher N. Link, P.A. Pine Island Office Centre, 111 North Pine Island Rd. Suite 209, Plantation, Fl, 33324, this 27 day of December, 2008. and that the forgoing Jurisdiction Brief complies with the font requirement of Rule 9.210(a)(2), Fla.R. App. P.

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