

Wade v Hirschman
903 So. 2d 928
Fl. Sup. Ct. May 26, 2005.

BELL, J.

We have for review Wade v. Hirschman, 872 So.2d 952 (Fla. 5th DCA 2004). . . . At issue is the test courts should use in proceedings to modify rotating custody agreements. The conflict to be resolved is whether the trial court should base modification of rotating custody agreements on the considerations set forth in section 61.13, Florida Statutes (2003), as if it were making an initial custody determination or whether the trial court should utilize the "substantial change test." For the reasons set forth below, we conclude that the substantial change test applies to modification of all custody agreements.

I. FACTS AND PROCEDURAL HISTORY

In Wade, the Fifth District stated in pertinent part:

The parties were divorced in October 2000, and neither was named primary residential custodian of their child. After mediation, the parties agreed to a split rotating custody and parenting coordinator plan. It was approved by the court on November 8, 2001, and the parties were ordered to abide by its terms. However, Wade [the Mother] refused to sign the mediated agreement. As noted by the court in its decree, [the Mother] said she objected to all paragraphs of the agreement. The court found her disagreements "unreasonable." [The Mother] did not appeal from this decree.

In this modification proceeding, the parties both alleged there had been a substantial change in circumstances and both sought primary residential custody of the child. . . .

The trial court found that the rotating custody plan had failed, that there had been substantial and material changes in circumstances since the

entry of the final judgment, and that the rotating custody agreement was no longer in the best interest of the child. The trial court then applied the factors in sections 61.13(3)(a) and 61.13(4)(c)(5), Florida Statutes (2003), [FN6] and ordered the parties to have shared parental responsibility with the Father as the primary residential parent.

FN6. The trial court was uncertain what legal standard applied to the modification proceeding. Wade, 872 So.2d at 953-54.

The Mother appealed. The Fifth District held the substantial change test did not apply and announced a new test for modification of rotating custody agreements. . . . "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." The rationale articulated in Wade was that in rotating custody cases, there is no primary residential parent; thus, the court should be free to make a de novo custody determination based on the considerations set forth in section 61.13(3).

The Mother petitioned this Court for review, alleging express and direct conflict with Cooper v. Gress, 854 So.2d 262 (Fla. 1st DCA 2003). . . . Given the conflict in the district courts in Wade and Cooper, we must determine the test for modification of a rotating custody agreement. We conclude that unless otherwise provided in the final judgment, the two-part substantial change test used in Cooper applies to modification of all custody agreements. Accordingly, we quash the decision of the Fifth District Court of Appeal in Wade and approve the trial court's decision below.

II. Res Judicata

A final divorce decree providing for the custody of a child can be materially modified only if (1)

there are facts concerning the welfare of the child that the court did not know at the time the decree was entered, or (2) there has been a change in circumstances shown to have arisen since the decree. . . . Thus, there is a presumption in favor of the reasonableness of the original decree. . . . To modify such judgments, the trial court must decide whether there is a "factual basis sufficient to show that conditions have become materially altered since the entry of the previous decree." The degree of change in the conditions and circumstances since the date of the previous decree must be of a substantial character.

III. The Substantial Change Test in Statutory and Common Law

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Several district courts of appeal have provided slight variations of the substantial change test. The substantial change test has been described as both a two-part and a three-part test. For example, the First District stated that the party seeking a modification carries the extraordinary burden of proving (1) a substantial and material change in circumstances, and (2) that the best interests of the child will be promoted by such modification. This is essentially the test applied in [Cooper](#).

The Second and Third Districts have added to the substantial change test an implicit finding of *detriment* by the trial court. The arguments advanced for requiring evidence of detriment have been couched as promoting the stability of the child, and preventing micromanagement of the child's custody by the trial court. Also, the finding of detriment has apparently been used to increase the magnitude of the burden required to overcome the res judicata effect of the previous decree. ("[E]vidence tended to show that there has been a substantial and material change of circumstances ... of such a magnitude that it would be detrimental for the children to remain in the custody of the husband").

The arguments favoring a finding of detriment fail to recognize adequately the purpose of the "best interest of the child" prong of the substantial change test, which when properly

applied ensures the stability of custody-related awards because of the res judicata effect of the original decree. Moreover, the detriment requirement conflicts with [section 61.13\(3\)](#), which enumerates the factors affecting the welfare and best interest of the child, which the trial court is to consider in proceedings dealing with shared parental responsibility and primary residence.

We agree with Judge Cope's special concurrence in [Perez](#) in which he opined:

The detriment-to-the-child standard obviously conflicts with Florida's shared parenting law... Moreover, it appears to turn the best interests standard on its head. One clearly could demonstrate that a change of custody would promote the child's best interest, thereby helping the child, while not having evidence that the current situation would be detrimental to the child.

Requiring proof of detriment is inconsistent with this Court's prior holdings and is not an element of the substantial change test necessary to modify a child custody award.

IV. Application of the Substantial Change Test to the Facts

The substantial change test articulated herein applies to the modification of a divorce decree providing for the custody and care of a child. A decree for purposes of the substantial change test includes *both a decree that has incorporated a stipulated agreement concerning child custody and a decree awarding custody after an adversarial hearing*. In other words, a party seeking to modify a final decree adopting an agreement to rotate custody must satisfy the identical substantial change test that applies in cases involving the modification of custody orders after an adversarial hearing on the issue of custody. In either circumstance, satisfaction of the substantial change test is necessary in order to overcome the res judicata effect of the final judgment.

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V. The Trial Court's Decision

Having determined that the substantial change test applies to modifications of rotating custody,

we now review the order of the trial court below that changed custody from rotating custody to shared parental responsibility and designated the Father the primary residential parent. On appellate review, an order changing custody has a presumption of correctness and will not be disturbed absent a showing of abuse of discretion.

The trial court in *Wade* concluded that there were substantial and material changes in circumstances, and its findings are supported by competent, substantial evidence, including: evidence of parental alienation of the Father by the Mother; failure of the Mother to cooperate with the parenting coordinator and comply with the parenting agreement; violation of shared parental responsibility as evidenced by the Mother's unilateral change of the child's elementary school and her unilateral change of the child's therapist; and the finding that the Mother was in contempt of court for her actions relative to visitation. The trial court considered the factors in [section 61.13\(3\)\(a\) through \(j\) and \(m\)](#) and found that the shared rotating custody agreement was no longer in the best interest of the child. The trial court further found that it was in the best interest of the child for the parties to be awarded shared parental responsibility with the Father as the primary residential parent. We cannot find that the trial court abused its discretion in modifying the custody agreement. Thus, we agree with the trial court's decision.

It is so ordered.