No. 2D17-1921

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

M.M.,

Appellant,

v.

J.H.,

Appellee.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit
in and for Hillsborough County, Florida
L.T. No. 13-DR-5945, Hon. Nick Nazaretian

ANSWER BRIEF OF J.H.

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STATEMENT OF THE CASE AND FACTS

Nature Of The Case

This paternity case involves parents who, for the most part, cooperatively co-parented their son despite their breakup. But things changed when the Mother sought to relocate the Child 2,600 miles from Tampa, Florida to Star, Idaho. Litigation ensued, resulting in a final judgment of paternity that incorporated the Father's proposed parenting plan. This appeal concerns an interlocutory order vacating a prior judgment of paternity, error preservation, and the broad discretion trial courts have in determining parenting matters and in denying rehearing motions.

Course Of The Proceedings

In 2013, M.M. ("the Mother") petitioned for a judgment declaring J.H. ("the Father") the legal father of their child, J.B.H. ("the Child"). R. 13-35. Her petition also asked the trial court to establish a parenting plan. R. 15.

Thereafter, the trial court entered an order setting the first case management conference. R. 45-46. The Father was served with a copy of the Mother's petition and the order. R. 494. He neither answered the petition nor was defaulted. Tr. 71-72, 91. He also did not attend the conference (R. 258; Tr. 91), which proceeded as a final hearing (R. 494). On July 11, 2013, the trial court entered a final judgment of paternity, which determined J.H. was the Child's Father and incorporated the Mother's proposed parenting plan. R. 68-89.

In late October 2013, the Father moved for relief from the final judgment, arguing it was void. R. 94-96. Due to a lack of record activity, the trial court issued a notice warning of an impending dismissal for non-prosecution (R. 122) and eventually dismissed the action (R. 123).

On May 6, 2016, the Mother petitioned the trial court to allow her to relocate the Child to Star, Idaho. R. 124-27. The Father moved to dismiss the relocation petition (R. 183-84), and the Mother moved for an emergency temporary relocation (R. 198-216). The Father answered the relocation petition (R. 226-35) and opposed the temporary relocation motion (R. 236-45). The Father's answer to the relocation petition simultaneously served as a counterpetition requesting modification of the final judgment that was then in effect. R. 229-35. The trial court convened a hearing on the Mother's emergency motion but did not rule on it. Tr. 4-60.

Thereafter, the Father moved to vacate the July 11, 2013 final judgment. R. 257-61. He simultaneously petitioned to determine paternity and for other relief. R. 265-69. Thus, the Father's paternity petition presupposed his motion to vacate would be granted. *See* R. 265-269. These papers had to be filed at the same time because if the court were to have vacated the final judgment with no paternity petition pending, there would have been nothing stopping the Mother from moving to Idaho with the Child. Indeed, this was discussed at the hearing on the Mother's temporary relocation motion. *See* Tr. 39-44, 59.

Thereafter, the Mother moved to dismiss (R. 271-75) and then answered (276-81) the Father's modification petition. She also moved to dismiss the Father's paternity petition (R. 373-77), filed an answer that asserted affirmative defenses (R. 380-86), and responded to the Father's motion to vacate (442-84).

The trial court convened a hearing on the Father's motion (Tr. 65-125) and vacated the final judgment (R. 494-95). This rendered moot the Mother's relocation petition and the Father's modification counterpetition. *See* R. 124, 229, 812. After a trial on the Father's paternity petition (R. 601-806), the trial court entered a final judgment that incorporated the Father's proposed parenting plan (R. 812-34).

The Mother moved for rehearing or to alter or amend the final judgment. R. 835-45. The Father opposed. R. 847-58. The trial court denied the motion without a hearing. R. 859. The Mother then appealed the final judgment (R. 860) and moved for a stay pending appeal (R. 885-91). The trial court convened a hearing on the motion (Hr'g on Mot. to Stay) and denied the stay (App. 235). In this Court, the Mother sought review of the order denying her request for a stay. *See* Mot. for Review. The Father responded (Resp. to Mot. for Review), and this Court approved the trial court's denial of a stay (*See* Order of June 29, 2017).

Statement Of The Facts

A. The Mother's And Father's Relationship As Co-Parents

Starting in 1997, the Mother and Father dated for 14 years and lived together for 11 years. R. 603. The Child was born in 2009, and they split in 2011. R. 265, 603. Before the trial court entered the initial final judgment and parenting plan, the Mother and Father maintained an informal time-sharing arrangement. R. 603-04. Under this arrangement, the Child spent about 40 percent of his time with the Father and about 60 percent with the Mother. R. 603-04.

Once the trial court entered the initial final judgment, the parties followed it until it was vacated, with one notable exception: they agreed to exercise an 8/6 time-sharing schedule instead of the 9/5 dictated by the parenting plan. *See* R. 230, 618-19. At trial, they "both acknowledged they communicated well and did not have any issues co-parenting." R. 817; *see also* R. 615, 623, 702, 787.

In 2015, the Mother married a vascular physiologist ("the Husband"). R. 125. Believing he would soon lose his job at the University of South Florida, the Husband obtained a research professorship at Boise State University in Idaho, where his two biological minor children live. R. 637-40. To accompany the Husband, the Mother sought to relocate the Child to Idaho. R. 125-27.

B. The Initial Final Judgment

1. The Order Setting The First Case Management Conference

The order setting the first case management conference provided it "may be used as a final hearing if all legal requirements are satisfied." R. 45. For instance, the order expressly stated, "Evidence of Service of Process" was to be filed "at least five (5) days prior to the scheduled conference." R. 45. It, however, was not. Rather, the Mother filed this evidence three years after the trial court used the conference as a final hearing and entered the initial final judgment. *See* R. 68, 364-66.

2. The Initial Parenting Plan

The initial final judgment adopted the Mother's proposed parenting plan. *See* R. 68-89. As the Mother concedes, the initial judgment was "problematic." *See* Mother's Br. 8-9; R. 71-87. Although the parenting plan reads as though it were an agreed parenting plan, neither the Father nor the Mother had signed it. R. 71-87. Also, discussion on the record at the hearing on the motion to vacate (Tr. 93-100) and evidence of early negotiations between the parties showed the Father disputed several allegedly agreed-upon provisions (*see* R. 340). Specifically, the parenting plan stated the Father agreed the Mother could relocate with the Child if she wished to do so "for work or marriage." R. 84. Yet an email from the Mother's former counsel to the Mother showed the Father wanted the initial parenting plan

to contain language "prevent[ing] [the Mother] from moving a certain distance away" with the Child. R. 340.

C. The Motion To Vacate

In the motion to vacate the initial final judgment, the Father argued his due process rights were violated when the trial court held a final hearing, even though only a case management conference had been noticed. R. 258-59. He claimed the initial final judgment should be vacated as void. R. 258-59.[1] The Mother argued the final judgment was merely voidable, not void (Tr. 117-24), and that the Father's due process rights had not been violated, because "he clearly had notice of the final hearing as well as the terms contained in the Final Judgment and parenting plan" (R. 448).[2]

At the hearing, the trial court explained it could not recall ever converting a "very first court date" into a final hearing absent a representation that the parties had agreed to so proceed. Tr. 78. It also mused it normally would not have held a final hearing without first holding a case management conference and noticing a subsequent case management conference/final hearing if one of the parties had failed to appear. Tr. 75-80.

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[1] The Father also raised three other grounds to vacate the initial final judgment. *See* R. 257. But inadequate notice is the only one that pertains to this appeal.

[2] The Mother acknowledged that noticing only a case management conference and then proceeding with final hearing is "improper and not consistent with the applicable rules of procedure." *See* Mot. for Review at 11.

In the order vacating the initial final judgment, the trial court found the Father was "served with a copy of the petition and the Order Setting Initial CMC." R. 494. Yet "the Affidavit of Service of Process was not filed with the Court until … over three years later and in violation of the Court's Order." R. 494. The trial court further found the Mother "failed to give the Father proper notice" that the case management conference "would be used as a final hearing." R. 494.

Based on these findings and *Rodriguez* v. *Santana*, 76 So. 3d 1035, 1037 (Fla. 4th DCA 2011), the trial court ruled, "[t]he Final Judgment of Paternity is void for lack of the Father's due process guarantee of notice and an opportunity to be heard." R. 495. Accordingly, it vacated the initial final judgment. R. 495.

D. The Trial

A trial was held on the Father's petition to determine paternity and related relief. R. 601-806. Indeed, the Mother's counsel acknowledged, "since we no longer have a final judgment, we really don't have a relocation case." R. 604. She also agreed the parties were proceeding on the Father's petition to establish paternity and asserted she wanted the court to establish a long-distance parenting plan in the first instance. R. 606-08. She even affirmatively withdrew her relocation petition. R. 607. The trial court's factual findings further made clear that "[t]he Mother [did] not have any affirmative claims for relief," and the case was litigated "as a long distance parenting plan request," not "a relocation case." R. 813-14.

At trial, the Mother, Father, and Husband testified. R. 601-806. The Mother's parenting plan sought to relocate with the Child to Star, Idaho, and provided only 91 overnights per year with the Father. *See* 813-14, 1104-16. She wanted the Child to attend Star Elementary, a C-rated school. R. 621. The Father requested an equal, alternating time-sharing schedule in Tampa. *See* R. 813, 1131-48. Alternatively, he asked for the 8/6 time-sharing schedule the parties had been exercising for the past several years. *See* R. 813, 1131-48. The Father wanted the Child to attend Gorrie Elementary in his district, an A-rated school. R. 606, 631.

The Mother and Husband both testified the Child's relationship with the Father was more important than his relationship with his stepfamily. R. 619-20, 643. The Mother also testified with "[o]ne thousand percent" certainty that she would not go to Idaho if the trial court established a parenting plan that required the Child to stay in Tampa. R. 792. The Father testified that the Child's paternal aunt, paternal grandmother, and cousin, who is also one of his best friends, all live in the Tampa Bay area. R. 745, 780; *see also* R. 821.

Before the trial concluded, both parties submitted proposed parenting plans. *See* R. 791-92, 1104-16.[3] Then, they submitted written closing arguments. R. 574-79, 580-600, 791-92. Along with his written argument, the Father also filed the

[3] The record omits that version of the Father's proposed parenting plan.

version of the proposed judgment and parenting plan from which the trial court adopted the parenting plan provisions. *See* R. 1131-48.

Disposition In The Lower Tribunal

A. The Final Judgment

The final judgment stated that in establishing the parenting plan and time-sharing schedule, the trial court "considered all of the facts presented and applie[d] them to the" best-interest-of-the-child factors set forth in § 61.13(3), *Fla. Stat.* R. 814. In determining the Child's best interests, the trial court also "consider[ed] the relocation factors in Section 61.13001(7)(a)-(k), *Florida Statutes*" (R. 814, 822), and made specific findings regarding each one (R. 815-20). The Mother does not challenge the trial court's factual findings. *See* Mother's Br. 40 n.5.

Time-Sharing. After giving the Child's best interests a "great deal of thought," the trial court determined, "the child's life is here in Tampa." R. 822. Applying the relocation factors, the trial court found, "the child's biological family and the child's friends are in the Tampa Bay area." R. 815. Accordingly, it ordered shared parental responsibility and "an equal, fifty-fifty (50) timesharing schedule on a week-on, week-off basis" in Tampa. R. 823-24.

The Child's School. The trial court specifically found that the Child's "school opportunities here in Tampa are better" than in Star, Idaho. R. 822. Accordingly, the parenting plan required the Child to attend elementary school in the

Father's district. R. 832. It, however, ordered that the Child "remain enrolled in his current school, Clark Elementary, through the end of the [2016-2017] school year." R. 832-33.

Child Support. With regard to income, the trial court found, "the father grosses $8,000.00 to $11,000.00 per month of which he places $2,000.00 in [his] business account." R. 819. It also found, "the mother is not working and relies on the step-father to provide for her and the child." R. 819. The trial court made no other findings regarding the respective incomes of the parties.

The trial court then "determine[d] the Parties' respective child support obligations in accordance with Section 61.30, *Florida Statutes*." R. 814. It required the Mother to pay the Father $97/month in child support, $582 in retroactive child support, and $1,400 as reimbursement for child support he had overpaid. R. 833-34. The judgment indicated that a child support guidelines worksheet would "be filed under separate cover" (R. 833), but no such worksheet was filed.

Nevertheless, the Father's written closing argument calculated that the Mother owed $97/month in child support. *See* R. 596-99. This arithmetic presumed the Father's monthly gross income was $5,857.33, and his net income, after the deduction of taxes, was $4,236.33. R. 596. These figures comported with the Father's financial affidavit, which was admitted into evidence at trial. R. 1001-06.

The Father argued, "[a]ccording to the Mother's own testimony and her Financial Affidavit," she should be imputed the following monthly net incomes: (1) $1,404.00 (minimum wage, working 40 hours a week); (2) $2,333.33 (annual, recurring gift from parents); (3) $1,500.00 (imputed income for rent-free living); (4) $50.00 (business income). R. 597; *see also* R. 628-29, 986-99. The sum of these figures left the Mother with a net income of $5,287.33. R. 597. Based on these calculations, the Father argued that "[u]nder an equal timesharing schedule with the parties alternating the tax dependency exemption," an application of the child support guidelines would result in the Mother owing the Father "$97.00 per month in child support." R. 598. In her written closing argument, the Mother did not specifically address child support. *See* R. 574-79.

B. The Order Denying Rehearing

After trial, the Mother moved for rehearing or to alter or amend the final judgment. R. 835-45. She argued that because the parties believed Gorrie Elementary had a science, technology, electronics, and mathematics ("STEM") program, and she later discovered it did not, the trial court should hear new evidence. R. 838.

In response, the Father argued: (1) "[t]he Mother has known throughout" the entire litigation that the Father wanted the Child to attend Gorrie; (2) "the Mother conducted substantial discovery," which included deposing the Father; (3) "the Father testified in his deposition that Gorrie had a STEM program"; (4) "the Mother

failed to conduct any discovery or investigation regarding Gorrie" before trial; and (5) "[t]he Mother is attempting to reopen the discovery process … and to re-litigate issues she should have litigated during the three-day final hearing." R. 849-50.

The trial court denied the Mother's motion without a hearing. R. 859.

SUMMARY OF ARGUMENT

1. The trial court did not abuse its discretion in vacating the initial final judgment. Instead, it correctly ruled the Father's due process rights were violated when a final hearing took place although only a case management conference had been noticed. This rendered the initial final judgment void from the outset.

Additionally, the Mother invited and benefited from any error the trial court may have made in deciding to vacate the initial final judgment. She agreed to proceed on the Father's paternity petition and affirmatively withdrew her relocation petition. By doing so, she wrongly relieved herself of the initial burden of proving relocation was in the Child's best interests. As such, the invited error doctrine prohibits her from challenging on appeal the order vacating the initial final judgment.

2. The Mother's arguments that the trial court erred in modifying the initial final judgment and in denying relocation misapprehend the nature of the proceedings below and are not preserved for appellate review. Neither a modification of the void, vacated initial final judgment nor relocation was litigated below. Ra-

ther, the parties proceeded on the Father's petition to determine paternity and sought to establish a parenting plan in the first instance.

3. The trial court did not abuse its discretion when it established the parenting plan, because it applied the correct legal framework and reached the right result. As required by § 61.13(2)(c), *Fla. Stat.*, the trial court considered the best interests of the Child in establishing the parenting plan. Because the Mother had requested a long-distance parenting plan, the trial court also considered the statutory relocation factors in determining the Child's best interests. The trial court's decisions were supported by competent, substantial evidence. It therefore did not abuse its discretion in establishing a parenting plan that provided for a 50/50 timesharing schedule in Tampa and a school in the Father's school district. The Mother's attempt to characterize the underlying action as a relocation case and, on that premise, attack the trial court's application of the law is of no avail.

4. The trial court did not abuse its discretion in applying the child support guidelines. Although the trial court adopted verbatim the child support provisions of the final judgment from the Father's proposed order, the record indicates the trial court's child support determination was the product of its own independent analysis. And in any case, the Mother did not preserve her argument challenging the trial court's independent decision-making. Additionally, the final judgment's child support award was based on competent, substantial evidence.

ARGUMENT

I. ISSUE 1: DID THE TRIAL COURT ACT WITHIN ITS DISCRETION WHEN IT VACATED THE INITIAL FINAL JUDGMENT AS VOID FOR LACK OF DUE PROCESS?

The initial final judgment was void. The trial court was therefore legally obligated to vacate it and did not abuse its discretion in doing so.

Standard Of Review

Ordinarily, orders granting relief from final judgment are reviewed for abuse of discretion. *E.g.*, *Deluca* v. *King*, 197 So. 3d 74, 75 (Fla. 2d DCA 2016); *accord Rodriguez* v. *Santana*, 76 So. 3d 1035, 1036-37 (Fla. 4th DCA 2011). But "[a] decision whether or not to vacate a void judgment is not within the ambit of a trial court's discretion."[4] *Wiggins* v. *Tigrent, Inc.*, 147 So. 3d 76, 81 (Fla. 2d DCA 2014); *accord Deluca*, 197 So.3d at 75. Rather, "if a judgment previously entered is void, the trial court *must* vacate the judgment." *Wiggins*, 147 So. 3d at 81 (emphasis added). Factual findings are reviewed for clear error. *Buxton* v. *Buxton*, 963 So. 2d 950, 953 (Fla. 2d DCA 2007).

[4] The Mother correctly recognizes the precise inquiry "[w]hether 'a judgment is void is a question of law reviewed de novo.'" Mother's Br. 26 (quoting *Vercosa* v. *Fields*, 174 So. 3d 550, 552 (Fla. 4th DCA 2015)). But she fails to acknowledge the discretionary nature of a trial court's ultimate ruling on a motion to vacate a final judgment. Nevertheless, "[t]he trial court's discretionary power is subject only to the test of reasonableness." *Canakaris* v. *Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). "[T]hat test requires a determination of whether there is logic and justification for the result." *Id.* Here, the trial court relied on "cases essentially alike" in ruling the initial final judgment was void, and it "reach[ed] the same result." *Id.* Therefore, it did not abuse its discretion in vacating the judgment.

Merits

Claiming the initial final judgment was merely voidable, not void, the Mother argues the trial court erred in vacating it for lack of due process. Mother's Br. 26-29. She is mistaken. And in any event, the Mother invited and benefited from any error the trial court may have made in vacating the judgment.

A. The Initial Final Judgment Was Void, Not Voidable

A judgment is void when it "'is so defective that it is deemed to never have had legal force and effect.'" *Bank of Am., N.A.* v. *Kipps Colony II Condo. Ass'n, Inc.*, 201 So. 3d 670, 675 (Fla. 2d DCA 2016) (citation omitted). On the other hand, a judgment is voidable when, although it "'has been entered based upon some error in *procedure* that allows a party to have [it] vacated," it still "'has legal force unless and until it is vacated.'" *Id.* (citation omitted) (emphasis in original). "[A] void judgment may be attacked at any time." *Vercosa*, 174 So. 3d at 552. When a judgment is merely voidable, however, "a party must move to vacate within one year of the entry of the judgment." *Kathleen G. Kozinski, P.A.* v. *Phillips*, 126 So. 3d 1264, 1268 (Fla. 4th DCA 2013).

In ruling the initial final judgment was void, the trial court relied on *Rodriguez*, 76 So. 3d at 1037. R. 495. Indeed, *Rodriguez* compels affirmance here. There, the mother claimed she did not receive proper notice "that a final hearing on [the father's paternity] petition was going to proceed instead of the case manage-

ment conference which had been noticed." *Id.* at 1036. The trial court sent the mother a notice of the case management conference, but it was returned undeliverable. *Id.* The mother did not appear at the conference, and the trial court converted it into a final hearing. *Id.* At the hearing, the trial court "rendered a final judgment of paternity." *Id.*

Reviewing for abuse of discretion, *Rodriguez* explained, "[a] judgment is void if, in the proceedings leading up to the judgment there is a violation of the due process guarantee of notice and opportunity to be heard." *Id.* at 1037 (citations and punctuation omitted). In that regard, "due process requires fair notice and a real opportunity to be heard and defend in an orderly procedure." *Id.* A party is entitled to this process "*before* a judgment is rendered." *Id.* (citation and punctuation omitted) (emphasis in original).

In determining whether the judgment was void, *Rodriguez* recognized the related, well-established principle "'that it is a violation of a parent's due process rights for a court to modify visitation in a final judgment unless the issue of modification is … noticed to the parties.'" *Id.* (quoting *Illanes* v. *Gutierrez*, 972 So. 2d 222, 223 (Fla. 3d DCA 2007)). Extrapolating from that premise, *Rodriguez* held a trial court had improperly "expand[ed] the scope of [the] hearing to address and determine matters not noticed for hearing." *Id.* Accordingly, *Rodriguez* concluded

the trial court "denied [the mother's] due process rights by proceeding with the evidentiary hearing after notifying [her] of only a case management conference." *Id.*

Here, the Father did not receive notice that the case management conference would be used as a final hearing. R. 494; Tr. 70-73. And like the paternity action in *Rodriguez*, the case management conference in this case proceeded as a final hearing, complete with submission of a parenting plan that indicated it had been agreed upon. *See* R. 68-89. In reality, however, any final hearing was contested, and the parenting plan had neither been agreed upon nor signed by either party. Tr. 92-94; R. 86-88. Additionally, the Father had not answered the initial petition to determine paternity and had not been defaulted (Tr. 91), which further indicated the lack of a real opportunity to be heard. Hence, the trial court correctly ruled the initial final judgment was void for lack of due process.

Another instructive case is *Shah* v. *Shah*, 178 So. 3d 70 (Fla. 3d DCA 2015). There, a husband filed for divorce, alleging the marriage was irretrievably broken and had no marital assets to be divided. *Id.* at 71. The wife, who had lived in India during the marriage, filed a pro se reply opposing these allegations. *Id.* The trial court correctly treated the reply as an answer and entered its "Order Scheduling Uncontested Final Hearing or in the Alternative Setting Status Conference." *Id.* The order declared that if the wife had not filed an answer, the court would hold an uncontested final hearing. *Id.* It further announced that if she had filed an answer,

the hearing would proceed as a status conference. *Id.* Although the wife had answered, the trial court conducted a final hearing. *Id.* The husband and his counsel were present, and the wife appeared telephonically from India. *Id.* At the hearing, the trial court "orally granted the petition over the wife's objection." *Id.*

Because the trial court convened a final hearing despite the notice stating only a status conference would proceed if the wife had filed an answer, *Shah* held, the trial court "changed the nature and expanded the scope of the scheduled hearing without proper notice." *Id.* "In doing so, the court violated the wife's due process rights." *Id.*

Essentially, *Shah* reversed the final judgment because the trial court failed to observe the noticed legal requirements before expanding the scope of the status conference (by converting it into a final hearing). *Id.* at 71. Here, the trial court held a final hearing even though the Mother had not satisfied the legal requirements that would have allowed the case management conference to proceed as a final hearing. *See* R. 494. Importantly, the order setting the case management conference required "Evidence of Service of Process" to be filed "at least five (5) days prior to the scheduled conference." R. 45. The Mother filed this evidence three years after the trial court entered the initial final judgment. R. 364-66.

Also, like the dissolution petition in *Shah*, the Mother's paternity petition, which incorporated her proposed parenting plan, was contested. At the hearing on

the Father's motion to vacate the initial final judgment, it was clear that based on early negotiations between the parties: (1) the Father was concerned the Mother and Child would move a certain distance away; (2) he was concerned about the potential adoption of a parenting plan allowing the mother to relocate if she wished; and (3) those concerns remained unresolved. Tr. 93-100; *see also* R. 340. Because the Father was not notified that the case management conference would be a final hearing, he was not afforded a real opportunity to voice these concerns before the entry of a final judgment. Even the trial court noted the procedure was unusual. Tr. 75-80. Accordingly, the initial final judgment was void for lack of due process.

In the Mother's motion for review, she cited *Shah* in arguing that unlike the void judgment in *Rodriguez*, the initial final judgment in this case was voidable. Mot. for Review at 9-10. She stated, "[t]he wife [in *Shah*] filed for both rehearing and, thereafter, a motion to vacate the judgment." *Id.* at 10. Although not raised here, she also pointed out that in reversing the trial court's denial of those motions, "the District Court noted that the wife's due process rights had been violated, but it did not hold that the resulting judgment was 'void' as a result." *Id. Shah*, however, also did not hold that the lack of due process made the judgment *voidable*. 178 So. 3d at 71. In fact, *Shah* did not mention the void versus voidable distinction at all. It did, however, cite *Rodriguez* in holding the wife's due process rights were

violated. *Id.* And because *Rodriguez* held lack of due process renders judgments void, 76 So. 3d at 1037, it follows that the judgment in *Shah* was likewise void.

B. The Mother Does Not Distinguish *Rodriguez* v. *Santana* And Relies On Inapposite Cases

In her brief, the Mother makes no attempt to distinguish *Rodriguez*, the sole case upon which the trial court expressly relied in vacating the initial final judgment. *See* R. 494-95. Instead, she relies exclusively on *Sterling Factors Corp.* v. *U.S. Bank N.A.*, 968 So. 2d 658 (Fla. 2d DCA 2007), and *Kathleen G. Kozinski, P.A.* v. *Phillips* to argue the initial judgment was voidable. Mother's Br. 26-29. Those cases are distinguishable.

The narrow issue addressed in *Sterling Factors Corp.* was:

> whether a judgment of foreclosure is void simply because a defect in a notice of hearing provides no actual notice of the final hearing to a defendant who is another lienholder over whom the court has established personal jurisdiction if the final judgment is timely served on that defendant following the hearing.

968 So. 2d at 665-66. Answering that question, *Sterling Factors Corp.* explained, "[a]lthough the case law on the void/voidable distinction could draw clearer lines, generally so long as a court has jurisdiction over the subject matter or a party, a procedural defect occurring before the entry of a judgment does not render a judgment void." *Id.* at 666. The Mother concedes that holding a final hearing while only having noticed a case management conference "was not consistent with the applicable rules of procedure." Mother's Br. 29. But she argues that "this alone does

not render the judgment void." Mother's Br. 29. She further claims that because the Father "received a copy of the final judgment one day after it was entered," the judgment was merely voidable and subject to the one-year time limit for seeking relief under Florida Rule of Civil Procedure 1.540. Mother's Br. 29.

This argument fails because the due process problem that rendered the judgment void was not that the Father did not receive notice of the case management conference. Rather, it was that the trial court held a final hearing even though only a case management conference had been noticed. In the family law context, this Court has held a judgment "may not stand" when it is based on an issue that was not "noticed for hearing," "framed by the pleadings," or "litigated by the parties." *Sabine* v. *Sabine*, 834 So. 2d 959, 960 (Fla. 2d DCA 2003); *accord Gordon* v. *Gordon*, 543 So. 2d 428, 429 (Fla. 2d DCA 1989) (reversing an order "listing … the parties' marital home for sale" because "the notices for hearing on [their] motions [did not give] notice that the court could consider a final disposition of the marital home"). "The failure to follow these basic procedural requirements implicates due process concerns as well as fails to properly invoke the trial court's jurisdiction." *Sabine*, 834 So. 2d at 960.

Here, because only a case management conference was noticed, the trial court had no jurisdiction to enter the initial final judgment. This rendered the judgment void, not voidable, which made it susceptible to attack at any time. *See*

Sterling Factors Corp., 968 So. 2d at 665. Additionally, the void judgment in this case was a final judgment of paternity, not a final judgment of foreclosure, and the parties were parents, not lienholders.

Furthermore, the Mother's contention that the "Father had actual knowledge of the entry of the Original Judgment," enjoyed its benefits, and "even sought enforcement thereof," is of no avail. Mother's Br. 29. The Father was entitled to due process "before" the trial court entered the initial final judgment. *Rodriguez*, 76 So. 3d at 1037. Because he was denied this process, the judgment was void from the outset and thus never had any legal effect. *Sterling Factors Corp.*, 968 So. 2d at 665 ("[a] void judgment is so defective that it is deemed never to have had legal force and effect").

In her brief, the Mother claims the Father never asserted the trial court lacked jurisdiction to enter the initial final judgment. Mother's Br. 28. She is wrong. In the motion to vacate the initial final judgment, the Father argued, among other things, "the final judgment is void and should be vacated to the extent the Parenting Plan incorporated therein exceeds the Court's authority pursuant to Florida law." R. 259; *see also* BLACK'S LAW DICTIONARY 855 (7th ed. 1999) ("jurisdiction" is "a government's general power to exercise authority over all persons and things within its territory"). Although the Father used the word "authority" in arguing certain provisions of the parenting plan were improper (R. 259-60), his void-

for-lack-of-due-process argument naturally encompassed the assertion that the trial court lacked jurisdiction to enter the final judgment of paternity. *See Sabine*, 834 So. 2d at 960 (expanding the scope of a hearing beyond what was noticed violates due process and "fails to properly invoke the trial court's jurisdiction").

In any event, had the Father truly never claimed the trial court lacked jurisdiction to enter the judgment, this Court could still affirm the vacation order based on grounds argued in this brief. *See Dade County Sch. Bd.* v. *Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (ruling "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record," and "an appellee, in arguing for an affirmance … is not limited to legal arguments expressly asserted as grounds for the judgment in the court below").

Phillips does not help the Mother either. *See* Mother's Br. 26, 28. *Phillips* addressed a situation involving defective service of process, not a failure to provide notice to a party that a case management conference would be used as a final hearing. 126 So. 3d at 1268-69. Unlike the facts of this case, the trial court in *Phillips* entered and later vacated a default judgment against the defendant, and the appeal pertained to the trial court's order vacating that judgment. *Id.* at 1266-67.

Phillips held that although the service of process did not comply "with the [service] statutes," the plaintiff's defective attempts at service "were sufficient to

put [the defendant] on notice of the proceedings against her." *Id.* at 1268. This rendered the judgment voidable. *Id.* Noting the plaintiff had sent "a notice of the hearing on the motion for default judgment," *Phillips* "stress[ed] that [its] holding should be limited to the facts of [that] case, in which [the plaintiff] served the defendant with numerous, albeit defective, documents that undoubtedly gave [the defendant] multiple actual notices of the suit against her and her obligation to timely contest the action or risk default." *Id.* Here, no notice indicating the case management conference would be used as a final hearing was sent to the Father. R. 494; Tr. 70-73. Thus *Phillips* is inapplicable.

C. The Invited-Error Doctrine Precludes The Mother From Arguing The Trial Court Improperly Vacated The Initial Final Judgment

Even if the trial court had erred in declaring the initial judgment void, the invited-error doctrine prohibits the Mother from challenging that ruling on appeal.

A party "'cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make.'" *Sciame* v. *Sciame*, 215 So. 3d 190, 192 (Fla. 2d DCA 2017) (citation omitted). He or she also cannot enjoy the benefits of an alleged error and then "seek to remedy the error on appeal." *Goodyear Tire & Rubber Co.* v. *Jones*, 929 So. 2d 1081, 1084 (Fla. 3d DCA 2005); *accord Sierra ex rel. Sierra* v. *Public Health Trust of Dade County*, 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995) (a party "may not avail himself of the benefits of an order and subsequently assign such order as error"). Further-

more, "'[i]t is well-established law that where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal.'" *Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981) (citation omitted).

When trial began, the Mother's counsel: (1) stated "since we no longer have a final judgment, we don't have a relocation case"; (2) agreed that the parties were proceeding on the Father's petition to establish paternity; (3) asserted she was advocating for the court to establish a long-distance parenting plan in the first instance; and (4) affirmatively withdrew the Mother's relocation petition. R. 604-08.

If the Mother had proceeded on her relocation petition, she would have had the initial burden of proving by a preponderance of the evidence that relocation was is in Child's best interest. *See* § 61.13001(8), *Fla. Stat.* By allowing the case to proceed on the Father's paternity petition, the Mother dodged this initial burden. *See* § 61.13(2)(c), *Fla. Stat.* ("The court shall determine all matters relating to parenting and time-sharing of each minor child in accordance with the best interests of the child."). Contemplating how an appellate court would consider the case's posture on appeal, the trial court specifically asked the Mother, "[s]o if you have an outstanding petition that's out there that's been filed that hasn't been dealt with, you are now withdrawing that petition; is that correct?" R. 607. Her counsel responded, "Yes." R. 607.

The mother did not file an interlocutory appeal when the trial court vacated the judgment. She instead chose to enjoy the benefit of being able to advocate in favor of a parenting plan that would provide for long-distance time-sharing. If the trial court had not vacated the initial judgment, the Mother would have had to proceed on a relocation petition to be able to exercise time-sharing with the Child in Idaho. As such, she benefited from the order vacating the initial final judgment. When the trial court specifically asked how she wished to move forward, she chose not to proceed with her relocation petition or correct the alleged error. Therefore, she cannot now claim the trial court erred in vacating the initial final judgment. *See Sierra ex. rel. Sierra*, 661 So. 2d at 1298.

II. ISSUE 2: DID THE MOTHER PRESERVE FOR APPELLATE REVIEW THE ISSUES WHETHER THE TRIAL COURT IMPROPERLY MODIFIED THE INITIAL FINAL JUDGMENT OR IMPROPERLY DENIED RELOCATION, WHERE THE JUDGMENT HAD BEEN VACATED AND NEITHER MODIFICATION NOR RELOCATION WAS LITIGATED OR ADJUDICATED BELOW?

Standard Of Review

Error preservation is "a question of law arising from undisputed facts," so it is reviewed de novo. *Aills* v. *Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010). When an argument is raised for the first time on appeal, it is reviewed only for fundamental error. *Sanford* v. *Rubin*, 237 So. 2d 134, 137 (Fla. 1970).[5]

[5] The Mother claims standards of review pertaining to modification and relocation proceedings apply. *See* Mother's Br. 30-31. She is wrong because this case did not proceed as a relocation or modification case. *See infra* Argument II.C.

Merits

The trial proceeded on the Father's petition to establish paternity and for related relief, not a petition to modify the initial final judgment (which had been vacated) or a relocation petition. *See* R. 604-08, 813-14. Hence, the trial court did not make rulings regarding modification or relocation, and the final judgment now on appeal could not have been based on such rulings. Therefore, the Mother's arguments regarding relocation and a non-existent modification of the initial judgment are not preserved for appellate review.

A. Error Preservation Is Important

"It is difficult to overemphasize the importance, absent fundamental error, of preserving issues and arguments before asking an appellate court to reverse a trial court's final judgment." *Pensacola Beach Pier, Inc.* v. *King*, 66 So. 3d 321, 326 (Fla. 1st DCA 2011). "The importance of this principle is too often not appreciated, and the appellate courts are constrained … to affirm orders which otherwise might have been reversed." *Id.* (affirming despite otherwise meritorious appellate arguments because they were not properly preserved); *accord Franklin* v. *Patterson-Franklin*, 98 So. 3d 732, 738 (Fla. 2d DCA 2012).

"Proper preservation of error for appellate review generally requires three components." *Aills*, 29 So. 3d at 1108. "First, the party must make a timely contemporaneous objection at the time of the alleged error." *Id.* (citations omitted).

"Second, the party must state a legal ground for that objection." *Id.* (citations and punctuation omitted). "Third, [i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Id.* (citation and punctuation omitted). "While no magic words are required to make the proper objection," "the specific concern articulated in the objection must be sufficiently specific to inform the court of the perceived error." *Id.* at 1109.

The preservation requirement's purpose "is to put the trial judge on notice of a possible error, to afford an opportunity to correct the error early in the proceedings, and to prevent a litigant from not challenging an error so that he or she may later use it for tactical advantage." *Clear Channel Commc'ns, Inc.* v. *City of North Bay Village*, 911 So. 2d 188, 190 (Fla. 3d DCA 2005); *accord City of Orlando* v. *Birmingham*, 539 So. 2d 1133, 1134-35 (Fla. 1989). Timely objections also afford opposing parties the opportunity to correct the error and avoid its prejudicial effect. *See Parlier* v. *Eagle-Picher Indus., Inc.*, 622 So. 2d 479, 481 (Fla. 5th DCA 1993).

B. The Mother Improperly Conflates Actions Seeking A Determination Of Paternity And Related Relief With Relocation Actions And Actions Seeking To Modify A Parenting Plan That Has Been Incorporated Into A Final Judgment

The Mother's modification and relocation arguments misapprehend the nature of the proceeding that produced the final judgment. *See* Mother's Br. 30-36. An action seeking a paternity determination and a court-ordered parenting plan is

different from an action seeking to modify a parenting plan incorporated into an existing final judgment. It is also different from a relocation action. Each type of proceeding employs a different legal and procedural framework.

When a child is born out of wedlock and no legal father has been established, the mother or the person claiming to be the father may bring an action to determine paternity. § 742.10, *Fla. Stat.* In such a proceeding, the trial court may rule on "substantive issues of paternity" and "custody," and it may grant "other relief." *L.J.* v. *A.S.*, 25 So. 3d 1284, 1289 (Fla. 2d DCA 2010). It must, however, "determine all matters relating to parenting and time-sharing in accordance with the best interest of the child." § 61.13(2)(c), *Fla. Stat.*

On the other hand, a trial court's authority to modify an existing parenting plan derives from § 61.13(2)(c), *Fla. Stat.*, not § 742, *Fla. Stat. See Wade* v. *Hirschman*, 903 So. 2d 928, 933 (Fla. 2005) ("Section 61.13(2)(c) grants continuing jurisdiction to the circuit court to modify the custody order."). A request to modify an existing time-sharing schedule that has been incorporated into a final judgment naturally presumes there is a valid final judgment in the first place. As such, a party seeking to modify a court-ordered parenting plan must institute a modification proceeding. *See Wade*, 903 So. 2d at 931; *see also Jarrard* v. *Jarrard*, 157 So. 3d 332, 336 (Fla. 2d DCA 2015) ("During the adjudicatory process,

the party seeking a modification must file a pleading that adequately alleges a claim for modification.").

Once a trial court has established a parenting plan, it may not modify the time-sharing schedule unless the parent seeking the modification can show "'a substantial, material, and unanticipated change in circumstances.'" *D.M.J.* v. *A.J.T.*, 190 So. 3d 1129, 1131 (Fla. 2d DCA 2016) (quoting *Griffith* v. *Griffith*, 133 So. 3d 1184, 1186 (Fla. 2d DCA 2014)); *see also George* v. *Lull*, 181 So. 3d 538, 540 (Fla. 4th DCA 2015) ("It is well settled that in order to modify a timesharing plan there must be a substantial change in circumstances.). A trial court also may not modify a time-sharing schedule "without findings or evidence that a modification is in the best interests of the child." *D.M.J.*, 190 So. 3d at 1132.

The relocation statute, however, applies when there "is a court order in existence at the time" a parent seeks to move at least 50 miles away with the child. *Decker* v. *Lyle*, 848 So. 2d 501 (Fla. 2d DCA 2003); *accord* § 61.13001(1)(e) and (11)(a)(2); *see generally Mian* v. *Mian*, 775 So. 2d 357 (Fla. 2d DCA 2000). Under the relocation statute, if there is no written agreement to relocate with the child, "a parent or other person seeking relocation must file a petition to relocate." § 61.13001(3), *Fla. Stat.* In determining whether to grant a parent's relocation petition, a trial court must consider several relocation factors. § 61.13001(7)(a)-(k), *Fla. Stat.* The parent requesting relocation carries the initial "burden of proving

that relocation is in the best interests of the child." § 61.13001(8), *Fla. Stat.* Importantly, there can be no relocation case when there is no court order in existence at the time a party seeks to move to another state with the child. *Decker*, 848 So. 2d at 503.

C. The Mother Did Not Preserve For Appellate Review Her Modification And Relocation Arguments

In her brief, the Mother claims the Father's paternity petition failed to allege a substantial change in circumstances, and the record reveals no such changes. Mother's Br. 31-33. She argues the trial court thus "erred by modifying the Original Judgment and the parenting plan generally." Mother's Br. 33. She further argues the trial court erred by denying the Mother's request to relocate and by changing the Child's school district. Mother's Br. 33-36. She is mistaken.

The Mother conceded there was no judgment of paternity or court-ordered parenting plan in effect when the case was tried, acknowledged she did not have "an active relocation petition pending," and affirmatively withdrew her relocation petition so that the record would be clear regarding the pleading on which the trial proceeded. R. 604, 607. She also agreed the parties were seeking to establish a parenting plan in the first instance. *See* R. 603, 607. Indeed, she even submitted a proposed long-distance parenting plan. R. 1104-16. The parties then proceeded on the Father's petition to determine paternity, not on a modification of the void, vacated initial final judgment or the mother's mooted and withdrawn relocation petition. R.

262-70, 494-95, 607-08, 812-14 ("The Court litigated this case as a long distance parenting plan request," and "it was not viewed as a relocation case."). Accordingly, neither party sought to prove or disprove a substantial change in circumstances, the trial court made no modification findings, and the trial court did not adjudicate whether "relocation" was in the best interests of the child.

Moreover, the trial court did not "change" the Child's school district. Mother's Br. 36. The parties essentially started from scratch after the initial judgment was vacated, and after hearing evidence at trial (where the Mother argued for a school in Idaho), the trial court ordered the Child to attend school in the Father's school district. R. 832-33.

For these reasons, neither a change in circumstances nor relocation (in the statutory sense) was an issue below. Indeed, the Mother does not challenge the trial court's factual findings included in the final judgment (Mother's Br. 40 n.5), and the trial court expressly found it "litigated this case as a long distance parenting plan request" and did not view the action "as a relocation case." R. 814. As such, it is no surprise that the trial court made no rulings on these mooted or withdrawn matters. Furthermore, the Mother did not and could not have objected to these rulings, because the case proceeded on the Father's paternity petition, not his former

modification petition or the Mother's relocation petition.[6] Allowing her to argue on appeal that her relocation petition should have been granted even though she affirmatively withdrew it would endorse the prohibited practice of "not challenging an error" and later using it for a "tactical advantage." *Clear Channel Commc'ns, Inc.*, 911 So. 2d at 190.

Therefore, the Mother's arguments regarding modification of the initial judgment and relocation are not properly preserved for appellate review.

D. The Mother Does Not And Cannot Argue The Trial Court Fundamentally Erred

The Mother's modification and relocation arguments neither assert a jurisdictional defect in the final judgment nor allege error going to the merits of the Father's paternity action. Thus, the Mother does not argue the trial court *fundamentally* erred in modifying the initial final judgment or in denying relocation. *Sanford*, 237 So. 2d at 137 (explaining an error is fundamental only if it "goes to the foundation of the case or goes to the merits of the action"). And in any event, the Mother cannot argue the trial court erred in taking actions it never took. *See supra* Argument II.C (the trial court did not modify the initial final judgment or deny relocation). Therefore, this Court should not consider those arguments, because they are unpreserved and do not point to any error, let alone fundamental error.

[6] When the Mother withdrew her relocation petition (R. 607), she invited any error regarding the lack of a ruling on this petition. *See supra* Argument I.C.

E. Even If The Modification And Relocation Issues Had Been Preserved, They Would Be Moot

The Mother's arguments presume the trial court abused its discretion in vacating the initial final judgment, and it was therefore valid and in effect when the trial court entered the subsequent final judgment. *See* Mother's Br. 31, 32-36. Even if this Court decides those arguments were preserved, they are moot because the trial court did not abuse its discretion in vacating the initial final judgment. *See supra* Argument I; *see also Jacquot* v. *Jacquot*, 183 So. 3d 1158, 1159 (Fla. 5th DCA 2015) ("'[a]n issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect'" (citation omitted)).

III. ISSUE 3: DID THE TRIAL COURT ABUSE ITS DISCRETION IN DETERMINING THAT A 50/50 TIME-SHARING SCHEDULE AND A SCHOOL IN FLORIDA WERE IN THE CHILD'S BEST INTERESTS?

Mischaracterizing the nature of the trial and resulting final judgment, the Mother argues the trial court erred in denying relocation and in changing the Child's school district. Mother's Br. 37-47. Specifically, she claims the trial court's relocation findings favored relocation, the trial court misapplied the law, and it abused its discretion in ruling the Child's best interests favored an elementary school in the Father's school district. The Mother's relocation arguments are misplaced because relocation was not adjudicated below. *See supra* Argument II.C. In any event, the trial court considered the Child's best interests and did not abuse its

discretion in establishing the parenting plan that was incorporated into the final judgment. Nor did it abuse its discretion in denying the Mother's rehearing motion.

Standard Of Review

A final judgment establishing a parenting plan is reviewed for abuse of discretion. *A.L.G.* v. *J.F.D.*, 85 So. 3d 527, 529 (Fla. 2d DCA 2012). Discretion is abused "'when the judicial action is arbitrary, fanciful, or unreasonable.'" *Id.* at 529 (quoting *Canakaris*, 382 So. 2d at 1203). When "'reasonable people could differ with respect to the trial court's decision[s],'" an appellate court must affirm the parenting plan so long as the trial court's decisions are supported by competent substantial evidence. *Turnier* v. *Stockman*, 139 So. 3d 397, 400 (Fla. 3d DCA 2014) (citation omitted). The denial of a motion for rehearing based on newly discovered evidence is reviewed for abuse of discretion. *Noor* v. *Continental Cas. Co.*, 508 So. 2d 363, 365 (Fla. 2d DCA 1987).

Merits

A. The Trial Court Properly Considered The Child's Best Interests In Establishing The Parenting Plan

A trial court must "determine all matters relating to parenting and time-sharing … in accordance with the best interests of the child." § 61.13(2)(c), *Fla. Stat.* In doing so, it must consider several factors. *A.L.G.*, 85 So. 3d at 529; *see also* § 61.13(3)(a)-(t) (listing factors). "There is no statutory requirement that a trial court engage in a discussion of each of the factors, although a discussion of the rel-

evant factors can be helpful in determining whether the trial court's judgment is supported by competent substantial evidence." *Schwieterman* v. *Schwieterman*, 114 So. 3d 984, 987-88 (Fla. 5th DCA 2012); *accord A.L.G.*, 85 So. 3d at 529.

When a party requests a long-distance parenting plan, the trial court must consider the relocation factors, § 61.13001(7)(a)-(k), *Fla. Stat.*, "as part of [its] evaluation of 'all factors affecting the welfare and interests of the child.'" *Decker*, 848 So. 2d at 503 (quoting § 61.13(3), *Fla. Stat.*).

The final judgment expressly stated that in establishing the parenting plan and time-sharing schedule, the trial court "considered all of the facts presented and applie[d] them to the" best-interest-of-the-child factors set forth in § 61.13(3), *Fla. Stat.* R. 814. It also considered the relocation factors in determining the best interests of the Child (*see* R. 814, 822) and made specific findings regarding each one (R. 815-820). Therefore, the trial court applied the correct legal standard in establishing the parenting plan.

B. The Mother Advances An Inapposite Legal Standard

The Mother argues, "the trial court applied the wrong legal standard to the relocation issue" because it "should have begun its analysis by finding that Mother had carried her initial burden to show that relocation was in the child's best interests," and the Father "failed to carry his burden to show the contrary." Mother's Br. 40, 43. Of course, relocation was not litigated below, *see supra* Argument II.C;

R. 812-14, so the burden-shifting framework prescribed by § 61.13001(8), *Fla. Stat.*, never applied to the trial court's best-interests analysis. As such, in claiming she had satisfied her initial burden because the trial court found that all except 3 "of the 11 statutory factors either favored relocation or were neutral," Mother's Br. 40, she misapprehends the pertinent inquiry. Trial courts do not establish parenting plans and time-sharing schedules based on a scoreboard tallying of how many relocation factors favor each parent. Rather, a trial court's relocation analysis is only relevant to the extent it bears upon the best interests of the child. *See Decker*, 848 So. 2d at 503. Accordingly, it is the Mother who applies the wrong legal standard.

She further asserts, "the trial court started from the presumption that relocation would be harmful to Father, and that Mother's legal burden was to prove such punishment was warranted." Mother's Br. 40. That is not true. The trial court did not apply any presumptions or burdens in determining the best interest of the Child. Instead, it "utilize[d] the factors in F.S. 61.13 and F.S. 61.13001(7)(a)-(k)" in "order[ing] the … parenting plan." R. 822. Hence, the only inquiry pertaining to whether the trial court abused its discretion in establishing the parenting plan is whether the trial court's decisions were supported by competent, substantial evidence. As discussed below, they were.

C. The Parenting Plan Was Within The Trial Court's Discretion

Competent, substantial evidence supported the trial court's determinations that it was in the Child's best interest to attend a school in the Father's school district and for his parents to have a 50/50 timesharing schedule in Tampa. R. 824.

1. A 50/50 Time-Sharing Schedule In Tampa Was In The Child's Best Interests

After giving the case "a great deal of thought," and noting the best interests of the Child presented a "very close issue," the trial court ultimately found, "the child's life is here is Tampa." R. 822. It also found, "[t]he school opportunities here in Tampa are better for the child." R. 822.

Specifically, in applying the relocation factors, the trial court found, among other things, "the child's biological family and the child's friends are in the Tampa Bay area." R. 815. Notably, the Child's cousin, who is also one of his best friends, lives in Tampa and so do the Child's paternal aunt and grandmother. R. 815. These findings were supported by the Father's trial testimony. *See* R. 745, 780.

The trial court also found that although "the child's step father is in the educational field, the school the child will be attending in [Star, Idaho] will not be of the same quality of the schools here in Tampa." R. 816. This finding was also supported by the trial evidence. *See* R. 621-22, 631. The Mother claims the trial court ruled the factor addressing the Child's educational development favored the Father "because a school in Father's district offered a STEM program (and the school in

Idaho did not).” Mother’s Br. 42. Actually, the trial court ruled this factor favored the Father because the Idaho school earned a C rating, whereas Gorrie Elementary in Tampa earned an A rating. R. 621, 631. The trial court even remarked, “if he’s bored at Clark because he’s super intelligent, he’s going to blow the people at Star away.” R. 631. Even if Gorrie has no STEM program, the fact remains Gorrie is better than Star Elementary, the only alternative presented to the trial court.

In the final judgment, the Court also indicated the Mother’s move to Idaho would not enhance the Child’s “emotional benefits.” R. 818. She claims, “[i]t is impossible to comprehend the trial court’s rationale” in reaching this conclusion given that it found “relocating would ‘have [an] emotional benefit’ for the child because he would be ‘with his step-siblings, mother and step-father as a family unit.’” Mother’s Br. 41-42 (quoting final judgment). The trial court’s conclusion, however, was supported by competent, substantial evidence. The Mother and her husband both testified that the Child’s relationship with the Father is more important than his relationship with his stepfamily. R. 619-20, 643. Of course, the Mother’s relationship with the Child is just as important as the Father’s. But the Mother testified with “[o]ne thousand percent” certainty that she would not go to Idaho if the trial court established a parenting plan that required the Child to stay in Tampa. R. 792.

By ordering a parenting plan with time-sharing in Tampa, the trial court enabled the Child to foster a meaningful relationship with both of his biological parents. Surely, this was in his best interest. In any event, a "conflict in the evidence" will not cause an appellate court to "disturb the trial court's custody decision," where, as here, there was "competent substantial evidence to support that decision." *Miller* v. *Miller*, 842 So. 2d 168, 169 (Fla. 1st DCA 2003) (citation omitted).

Citing *Buonavolonta* v. *Buonavolonta*, 846 So. 2d 649 (Fla. 2d DCA 2003), the Mother argues the trial court "misread" and misapplied the relocation factor set forth in § 61.13001(7)(i), *Fla. Stat.* Mother's Br. 41. That factor asks the trial court to evaluate "[t]he career and other opportunities available to the objecting parent or other person if the relocation occurs." § 61.13001(7)(i), *Fla. Stat.* Her reliance on *Buonavolonta* is misplaced because that case concerned relocation, not a long-distance parenting plan. As such, its legal framework is different from the one involved here. *See* 846 So. 2d at 650.

Additionally, the relocation statute, § 61.13001, *Fla. Stat.*, which amended the parenting and time-sharing statute, § 61.13, *Fla. Stat.*, was enacted in 2006. *See* 2006 Fla. Sess. Law. Serv. Ch. 2006-245 (C.S.C.S.S.B. 2184). Because *Buonavolonta* was decided in 2003, it did not apply the 11 relocation factors set forth in § 61.13001(7)(a)-(k), *Fla. Stat.* Instead, it considered the six relocation factors listed in the 2001 version of § 61.13(2)(d), *Fla. Stat. Buonavolonta*, 846 So. 2d at

650. None of those factors expressly required trial courts to consider the career opportunities available to a non-relocating parent if the other were to relocate. Nevertheless, the trial court concluded the Father owns and operates a hair salon in Tampa, and "there was no evidence that the Father's employment would be successful in Star, Idaho." R. 820. Competent substantial evidence supports these findings (or, in the case of professional success in Idaho, a lack thereof). *See* R. 632, 747.

This case is unlike *Orta* v. *Suarez*, 66 So. 3d 988 (Fla. 3d DCA 2011), where a trial court's factual findings showed relocation would have been in the child's best interest. *See* Mother's Br. 39-40. To the contrary, competent, substantial evidence supported the trial court's factual findings, which the Mother does not challenge. *See* Mother's Br. 40 n. 5. And these findings in no way render the parenting plan "arbitrary, fanciful, or unreasonable." *Canakaris*, 382 So. 2d at 1203. Accordingly, the trial court did not abuse its discretion in establishing the parenting plan that provided for 50/50 timesharing with the Child in Tampa.

2. The Child's Best Interests Favored Gorrie Elementary Over Star Elementary

The Mother argues the trial court "erroneously determined that the parties' child should be moved from his current school, Clark, and placed in a school in Father's district." Mother's Br. 43. But this argument misstates the issue litigated below. There were two options: school with the Father in Florida or school with the Mother in Idaho. The trial court decided school in the Father's district was in the

Child's best interest. R. 822. Indeed, this decision makes perfect sense considering the parenting plan ordered a 50/50 time-sharing schedule in Tampa, the Mother does not work, the Father works, Gorrie Elementary is an excellent school, and it is very close to the Father's home and salon. Hr'g on Mot. to Stay at 28-30.[7] The Mother now couches the issue as which school, Clark or Gorrie, was in the Child's best interest. Mother's Br. 43-46. This was not litigated below (R. 812-34), so it is not preserved for appellate review. *See supra* Argument II.C.

Additionally, the trial court did not, as the Mother claims, need to make findings regarding why "changing" the Child's school from Clark to Gorrie was in his best interest. *See* Mother's Br. 46-47. This was not a modification case. No court order addressing the child's education was in place when the trial court entered final judgment. Therefore, the trial court needed to determine only whether it was in the Child's best interest to attend the Father's proposed school in Florida or the Mother's proposed school in Idaho. *See* R. 700. It did precisely that. R. 812-22.

D. The Trial Court Correctly Denied Rehearing

The Mother also argues that because the parties believed Gorrie had a STEM program (R. 621-22, 700), and the mother found out after trial that it does not (R.

[7] The Mother's summary of the Father's trial testimony (Mother's Br. 46) regarding her involvement in school activities is irrelevant to whether the Child's best interest favored school in Idaho or Florida.

838, 842-43), the trial court abused its discretion in denying rehearing and declining to reopen evidence on the issue (Mother's Br. 44-47). She is wrong.

Although not required, trial judges have authority to entertain issues and evidence introduced for the first time on rehearing. *Fitchner* v. *Lifesouth Cmty. Blood Centers, Inc.*, 88 So. 3d 269, 278 (Fla. 2d DCA 2012); *see also* Fla. R. Civ. P. 1.530(a). But "[w]here a party has access to such evidence prior to trial or hearing, yet fails to show any excuse or justification for her failure to introduce the evidence at the trial or hearing, her motion for rehearing is properly denied." *Dalton* v. *Dalton*, 412 So. 928, 929 (Fla. 1st DCA 1982).

The Mother was aware the Father was seeking to enroll the Child in Gorrie at least since the Father's deposition, which was taken almost four months before trial. *See* R. 1073-75. Still, the Mother did not challenge the Father's mistaken statement about Gorrie's STEM program. Rather, she explained in her motion for a stay pending appeal that the existence of such a program was "easily verifiable." R. 886. She, however, failed to verify that information until after the trial court had decided it was in the Child's best interests to stay in Florida and attend Gorrie. Therefore, the trial court properly denied the rehearing motion.

Also, the Mother argues *Fitchner* stands for the proposition that in the rehearing context, whenever a trial court declines to hear evidence that could potentially correct an injustice, it abuses its discretion if it could correct the injustice

"'easily and inexpensively.'" Mother's Br. 44 (citation omitted). She claims this rule applies regardless whether evidence is newly discovered. Mother's Br. 45. But the rule is actually much narrower. *Fitchner* explained, "rehearing *may* be granted in the appropriate case to prevent an injustice that would be caused by an error or omission by one of the lawyers." 88 So. 3d at 278 (emphasis added). It further noted that the injustice in that case could have been corrected easily and inexpensively because "[t]he proceeding on remand was still in the pleading stage." *Id.* at 279. In contrast, by the time the Mother got around to verifying whether Gorrie had a STEM program, the parties had conducted substantial discovery, the case had been tried, and a final judgment had been entered.

Importantly, even if the parties had realized before trial that Gorrie had no STEM program, it would have made no difference to the Mother. She did not ask the Court to order that the Child attend Clark. She asked for Star Elementary, which, STEM or no STEM, is a worse school than Gorrie. *See* R. 621, 631. The Mother essentially concedes this point by admitting, "[i]f this Court determines that Mother should have been permitted to relocate with the minor child, then this issue is moot." Mother's Br. 43-44. Thus, the trial court correctly denied rehearing.

IV. ISSUE 4: DID THE TRIAL COURT ABUSE ITS DISCRETION IN DETERMINING CHILD SUPPORT?

The Mother argues child support should be reversed because the trial court adopted it from the Father's proposed order. Mother's Br. 47-48. But she concedes

that this alone is not a ground for reversal. Mother's Br. 47. Here, the evidence supported the trial court's findings regarding the parties' respective incomes. Therefore, the trial court did not abuse its discretion in determining child support.

Standard Of Review

A trial court's determination of child support is reviewed for an abuse of discretion, subject to the statutory guidelines. *MacRae-Billewicz* v. *Billewicz*, 67 So. 3d 226, 229 (Fla. 2d DCA 2010) (citation omitted).

Merits

A. Adopting Provisions From A Proposed Judgment Verbatim Does Not, Without More, Require Reversal

Florida law "does not prohibit the verbatim adoption of a judgment that has been proposed by a party." *Bishop* v. *Bishop*, 47 So. 3d 326, 328 (Fla. 2d DCA 2010). Indeed, "the fact that the judgment was adopted from a proposal submitted by a party does not, standing alone," warrant reversal. *In re T.D.*, 924 So. 2d 827, 831 (Fla. 2d DCA 2005). Instead, this Court will affirm a judgment except "under circumstances that create an appearance that the judgment does not reflect the trial judge's independent decision-making." *Id.*

Four rules govern the solicitation and adoption of proposed final judgments. *See Perlow* v. *Berg-Perlow*, 875 So. 2d 383, 384 (Fla. 2004). First, a trial judge may ask one or all parties "'to submit a proposed final judgment.'" *In re T.D.*, 924 So. 2d at 830 (citation omitted). Second, if parties file proposed judgments, each

should be allowed to review the other's "'and make objections.'" *Id.* (citation omitted). Third, "'if only one party submits a proposed final judgment,'" the other party *must* be afforded an opportunity to review it and object. *Id.* (citation omitted). Fourth, "'prior to requesting final judgments, the trial judge should, when possible, indicate on the record the court's findings of facts and conclusions of law.'" *Id.*

Here, both parties submitted proposed parenting plans. *See* R. 791-92, 1104-16. Thereafter, the trial court directed them to submit written closing arguments (R. 791), which they filed less than a month after the trial had concluded. R. 574-79, 580-600. At that time, the Father also filed the version of the proposed judgment and parenting plan from which the trial court adopted the parenting plan provisions. *See* R. 1128-29, 1131-48. In her written closing argument, the Mother did not specifically address child support. *See* R. 574-79. She also did not object to the Father's proposed judgment or parenting plan before the trial court entered final judgment a month and a half later. *See* R. 812. It was not until the trial court rejected her long-distance parenting plan that she decided to complain about the proposed order in her rehearing motion. R. 839-41.

Perlow's reasoning is instructive. In reversing the judgment, it relied heavily on the following facts: (1) the trial court had adopted the wife's proposed judgment without giving the husband a chance to object or respond, and it discouraged him from filing a proposed judgment of his own; (2) "the trial court [had] signed" the

wife's proposed judgment "within two hours of its submission without making any changes, additions, or deletions"; and (3) "the final judgment was 'so one-sided in its findings and conclusions that it could only reflect the views of the party that drafted and proposed it.'" *Bryan* v. *Bryan*, 930 So. 2d 693, 696 (Fla. 3d DCA 2006) (quoting *Perlow*, 875 So. 2d at 390 n. 5).

Here, although the parenting plan ordered in the final judgment adopted the Father's proposed plan almost verbatim[8] (*compare* R. 822-34, *with* R. 1132-48), the trial court's factual findings and best-interests analysis were not adopted verbatim (*compare* R. 814-22, *with* R. 1133-41). Also, the Mother had six weeks to object to the Father's proposed provisions before the trial court entered judgment, but she chose not to. *See Strand* v. *Escambia County*, 992 So. 2d 150, 155 (Fla. 2008) (verbatim adoption of proposed order approved, where trial court had "deliberated for six weeks"). Furthermore, the final judgment was not "one-sided" and did not contain "inflammatory" findings and conclusions like the one in *Perlow*, 875 So. 2d at 391-92 (Pariente, J., concurring) ("this proposed final judgment is more like a diatribe filled with exaggeration and venom"). Nor was it like the judgment in *Pedersen* v. *Pedersen*, where a trial court adopted the wife's entire proposed order verbatim, and the evidence did not support the factual findings regarding the

[8] The final judgment's parenting plan also contained a paragraph regarding modification and relocation that the Father's proposed plan did not. *See* R. 834.

husband's income and imputed income. 892 So. 2d 1125, 1126 (Fla. 2d DCA 2004).

Accordingly, the trial court did not "fail[] to use its independent judgment when ruling on child support." Mother's Br. 50. Additionally, the Mother did not challenge the trial court's independent decision-making in her rehearing motion and does so for the first time on appeal (*see* R. 835-41), so her argument is not preserved for appellate review. *See supra* Argument II.A, C.

B. The Trial Court's Child Support Determination Was Based On Its Factual Findings And Complied With § 61.30, *Fla. Stat.*

The Mother argues this Court should reverse the final judgment's child support provisions because "the trial court failed to make a single finding of fact that would enable meaningful appellate review." Mother's Br. 51. The trial court did, however, make such findings and calculated "the Parties' respective child support obligations in accordance with Section 61.30, *Florida Statutes*." R. 814.

In awarding child support, a trial court must "determine the net income of each parent" and explicitly make these net-income findings in the final judgment, *Hindle* v. *Fuith*, 33 So. 3d 782, 786 (Fla. 5th DCA 2010), or on the record, *Segall* v. *Segall*, 708 So. 2d 983, 988 (Fla. 4th DCA 1998); *see also* § 61.30, *Fla. Stat.* Additionally, under § 61.30(2)(b), *Fla. Stat.*, a trial court may impute income to a voluntarily unemployed or underemployed spouse. *Burkley* v. *Burkley*, 911 So. 2d 262, 268 (Fla. 4th DCA 2005); *accord Roth* v. *Roth*, 973 So. 2d 580, 590 (Fla. 2d

DCA 2008). But before imputing income, a trial court must consider "'the party's recent work history, occupational qualifications, and the prevailing level of earnings in the community for the'" applicable type of available jobs. *Torres* v. *Torres*, 98 So. 3d 1171, 1172 (Fla. 2d DCA 2011) (citation omitted). Importantly, "'[i]f the trial court does not make the required findings, the record must reveal competent, substantial evidence supporting [its] decision.'" *Id.* (citation omitted).

In the final judgment, the trial court expressly found, "the father grosses $8,000.00 to $11,000.00 per month of which he places $2,000.00 in the business account." R. 819. It also found "[t]he mother is not working and relies on the stepfather to provide for her and the child." R. 819. The trial court made no other findings regarding the respective incomes of the parties.

Nevertheless, the trial court's child support determination can be readily understood by reading the child support provisions of the final judgment (R. 833-34) alongside the Father's written closing argument (R. 596-99). The Father's argument explained how the only evidence regarding income—*i.e.*, the Mother's and Father's financial affidavits (R. 986-99, 1001-1107) and her trial testimony about income imputation (R. 627-30)—revealed the parties' respective "net" incomes per § 61.30, *Fla. Stat.* R. 596-99. It further explained that if the child support guidelines were applied under an equal timesharing and alternating tax exemption scheme (which the final judgment ultimately ordered (R. 824-27, 833)), the Mother

would owe the Father child support in the amount indicated in the final judgment (R. 598, 833-34). As such, the trial court did not abuse its discretion in ruling on child support, and the fact it did not file a worksheet does not undermine its application of the guidelines.

CONCLUSION

The Court should affirm the final judgment of paternity and its incorporated parenting plan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 22, 2017, I electronically served the following via eDCA and email: Mark F. Baseman (mbaseman@felixbasemanlaw.com), Felix, Felix & Baseman, LLC, 601 South Fremont Avenue, Tampa, FL 33606; Seth R. Nelson (seth@nelsonlg.com & cos@nelsonlg.com), Nelson Law Group, 442 West Kennedy Boulevard, Tampa, FL 33606; and Traci L. Koster (traci@nelsonlg.com & cos@nelsonlg.com), Nelson Law Group, 442 West Kennedy Boulevard, Tampa, FL 33606.

November 22, 2017 /s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

November 22, 2017 /s/ Thomas Burns
Thomas A. Burns