24-7518 ORIGINAL

UNITED STATES SUPREME COURT

SAMUEL LEE SMITH, JR.
Petitioner,

Case Number:

v.

NATASHA KATHERINA SMITH,
Respondent

_____/

PETITION FOR WRIT OF CERTIORARI

From September 4, 2024 Supreme Court of Florida Order
Case Number SC2024-1288

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QUESTIONS PRESENTED

1. SHOULD THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION FOR UNSUPERVISED TIMESHARING SHOULD BE REVERSED BECAUSE THE ORDER DENYING THE MOTION DOES NOT CONTAIN SPECIFIC FINDINGS OF FACT OR CONCLUSIONS OF LAW SUFFICIENT TO DETERMINE IF THE COURT'S DECISION WAS BASED UPON THE BEST INTEREST OF THE CHILD?

2. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED PETITIONER'S MOTION FOR UNSUPERVISED RELEASE BECAUSE THERE WAS NO SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE LOWER COURT'S DENIAL OF PETITIONER MOTION FOR UNSUPERVISED TIMESHARING?

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PETITION FOR WRIT OF CERTIORARI

1. DECISION BELOW

Petitioner petitions to this Honorable Court to review the State of Florida Supreme Court's September 4, 2024 Order Denying Petitioner's petition for writ of certiorari concerning Petitioner's Motion to allow unsupervised timesharing.

2. Jurisdiction

This petition seeks review of *Smith v. Smith, No.* SC2024-1288, 2024 WL 4040455, at *1 (Fla. Sept. 4, 2024).

The Supreme Court's appellate jurisdiction includes the authority to review decisions of state courts. *28 U.S.C. § 1257(a).* The current statute authorizing Supreme Court review of state court decisions allows the Court to review the judgments of "the highest court of a State in which a decision could be had." *Koon v. Aiken,* 480 U.S. 943 (1987). Here, the judgment for which review is sought, is not to further any further review in the State of Florida and is an effective determination of the litigation. *Flynt v. Ohio,* 451 U.S. 619 (1981); *Florida v. Thomas,* 532 U.S. 774 (2001). *Duquesne Light Co. v. Barasch,* 488 U.S. 299, 304 (1989).

3. Federal Rule/Question Involved

The Federal Rule or Federal Question involved concerns the 5th and 14th Amendments of the United States Constitution and the right to due process and to be free from arbitrary and capricious rulings by the lower court.

4. **Statement of the Case**

Petitioner and Respondent were married January 31, 2012 in Las Vegas, Nevada. Prior to their marriage, Respondent and Petitioner had one child together, a son [redacted] who was born August 25, 2008. [A.004-005]. Their son is 16 years old as of the filing of this petition [Id.]

Petitioner and Respondent became divorced is Miami Dade County on May 9, 2017. [A.004-005]. Incorporated into the Final Judgment of Dissolution of Marriage was a marital settlement agreement. [A.006-017]. The marital settlement agreement contained an agreed upon parenting plan (which included timesharing).[A.010-014]. In short, the parties were to have shared parental responsibility and Petitioner had the following timesharing:

Monday from 3-7 pm every week

Tuesday from 3 pm -Wed. 8 am every week
Thur. 3-7 pm every week
Every other weekend from Sat 3 pm to Sunday 5-pm

Holidays were also divided by the parties as set forth in the agreement.[A.010-014].

On February 8, 2018, Respondent filed an emergency motion to suspend Petitioner's timesharing as a result of the Petitioner's alleged erratic behavior, which she believed endangered the child. [A.018]. Angelica Zayas also granted the mother to take to take the child to be evaluated by a physiologist which is Andrea Lippman Loeb, who made provide the mother false reports and violated the fathers' rights with the frivolous reports and recommendations. The next day, on February 9, 2018, Angelica Zayas entered an Order granting Respondent's motion and suspended the Petitioner's timesharing for 30 days and also Terminated the Father's Rights so that Petitioner could be psychologically evaluated [A.018-020]. Angelica Zayas also granted the Respondent an Impermissible Domestic Violence Injunction improperly served by Stuart Perkins of MDPD. The Court also appointed Adam Schultz, Esq. as the Guardian Ad litem [GAL] for the minor child. The respondent has not provided the Court with

any factual findings. This case is based on racial discrimination and Abuse of Power by Angelica Zayas, Jason Dimitri.

On March 12, 2018, the Court ordered the Respondent and Petitioner to undergo a psychological evaluation based off the Respondents testimony, no credible evidence submitted by Respondent.

On August 1, 2018, after having no timesharing with his son for 6 months, the Court entered an Order granting temporary timesharing. Petitioner now had supervised timesharing every other Saturday from 10 am to 8 pm with the paternal grandmother being supervisor. [A.022]

On September 6, 2018, the trial court granted Petitioner's permission to travel out of State with his son so that his son could attend Petitioner's wedding. Petitioner's travel with the son was supervised. [A.023]. Petitioner paid a bond to the courts to travel with son at Angelica Zayas and Adam Schultz request.

Petitioner's timesharing was modified again on October 25, 2018. Petitioner was given supervised visitation on Tuesdays and Fridays from 3 pm to 7:30 pm and was given supervised visitation during the Thanksgiving and Christmas Holidays.

On February 5, 2019, the GAL was discharged.

On December 4, 2019, the Petitioner filed a motion to reinstate his Father Right's.

On April 25, 2019, Petitioner filed a motion to a second motion to reinstate his Father Right's and terminate supervised timesharing and for a new timesharing schedule. [A.015]. The Court entered an Order denying the Petitioner's request and ordered that the existing timesharing schedule remain in effect, but that Petitioner could go back to the timesharing that was set forth in this Final Judgment if the Petitioner (1) attended and completed individual counseling as recommended by Dr. Bodan; (2) successfully completes an anger management program through Family Court Services; (3) successfully complete coparenting courses through Family Court services. [A.025-043]. The Court deliberately disregarded ruling on the Petitioners motion to reinstate Petitioner's Father Rights.

On September 25, 2019, the parties entered into an agreed Order modifying timesharing, in which Petitioner was now permitted to have overnight supervised visitation with his son every other weekend from 3 pm Friday to 1 pm on Sunday. [A.044]

On July 2, 2020, Total Health Guidance filed a letter with the Court that advised the Court that Petitioner completed the recommended individual therapy sessions, that he had made significant progress and that he had a bona fide concern for the best interest of the parties' son. [A.045].

On July 21, 2020, Respondent filed a motion to stop physical visitation and supervised timesharing in a companion domestic violence claim. The motion alleged that Petitioner was acting erratic and hostile. On July 31, 2020, the Court conducted an evidentiary hearing. [A.046-061]. After the hearing, the Court entered an Order on August 4, 2020, that took away all in-person, physical visitation between the Petitioner and Child until the Child's Therapist Andrea Lippman Loeb advises the visitations are physically and emotionally safe, and that it is in the best interest of the Child. [A.062-064]. Andrea Lippman Loeb provided the Respondent and the GAL fraudulent reports and medical reports who submitted the documents to the judicial officials. The Petitioner requested case information of medical records and reports which was denied by South Miami Psychology Group. Petitioner made three request for the

same case information three with the Clerk of Courts also refused the Petitioner's request.

On February 18, 2021, Petitioner filed a supplemental petition to modify timesharing. [A.065-067]. The Supplemental Petition requested timesharing to be modified because Respondent was alienating the child against Petitioner and was attempting to ensure that Petitioner did not have a relationship with his son. The petition also alleged that Petitioner had completed all of the court imposed requirements for unsupervised timesharing. [A.065-067]. Petitioner also filed a motion for reinstatement of timesharing on April 12, 2021. [A.067-070]. The Court conducted a hearing on May 7, 2021, and following the hearing, the court entered an Order on May 24, 2021, granting in part and denying in part, the motion to reinstate timesharing. [A. 071-084; 085-087]. The May 24, 2021 Order stated, in pertinent part, that Petitioner's Motion to Set Aside the July 20, 2020 Order was granted, and that (1) Petitioner shall consult with Family Court Services to get recommended therapeutic services and engage in supervised visitation through Family Court Services with the minor child once a week and can request more therapeutic visitation if available subject to Court approval; (2) Petitioner shall

engage in Individual Therapy through Family Court Services; (3) the Parties shall attend extended coparenting with Family Court Services; (4) the Petitioner shall have liberal daily virtual contact with the minor child and the Respondent may supervise such virtual contact and (5) the Petitioner shall schedule a psychiatric evaluation through Family Court Services. [A.085-087].

On December 21, 2021, Petitioner requested that the Court grant him unsupervised timesharing. The motion alleged that Petitioner completed all of the court ordered requirements for timesharing and that he was requesting a restoration of his unsupervised timesharing. Significantly, three months later, Respondent agreed to remove a stay away order that prevented Petitioner from having contact with his son. [A.087-089]

Prior to a ruling on the Petitioner's December 21, 2021 motion, Petitioner's counsel withdrew, and his new counsel filed a new motion for the removal of unsupervised timesharing on January 9, 2023. [A.90-93] The motion alleged that in May 2020, the Respondent unilaterally stopped all visitation between the Petitioner and minor child without any Court Order. [A.090]. During that time, the Respondent filed an Injunction against the Petitioner that has since

been dismissed in March 2022. [A.090]. During the whole pendency of the injunction, the Petitioner has been denied the ability to exercise his parental rights, timesharing and that Petitioner has only been able to have supervised timesharing with his son. [A.090]. The motion also asserted that Petitioner completed his individual therapy through Family Court Services, completed Anger Management Counseling, and completed his Co-Parenting Courses and appeared for a complete a Psychiatric Evaluation. This was all completed as of June 2020. [A.091-092].

On June 28, 2023, the Court heard the Petitioner's Motion to Permit Unsupervised Timesharing, and after a two hour evidentiary hearing, the court denied the motion. [A. 100]. The motion was denied the same day. The Order denying the motion states that it heard the testimony from the Respondent, the Petitioner, Dr John Stiteler, and argument from Carla Lowry, Esq. (Petitioner's Counsel) and Adam Schultz, Esq (Guardian ad Litem). [A.100] The Order also states that the GAL recommendation, which was that based upon the Petitioner's mental health, that the Petitioner should only visit with his son with professional supervision for the safety of the son.[A.100]. Notably, while Petitioner's mental health is referred to in the Order,

there is no diagnosis or identification of the mental health problem. The therapist opined that since the Petitioner has not had therapy with his office for several years and since he has not communicated with the Respondent nor the Son about visitation, he cannot recommend unsupervised visitation without more information.[A.100]. The Respondent testified that she wants timesharing the Petitioner to have a healthy and safe relationship with their son, but she is uncomfortable with moving too fast and putting their Son in an uncomfortable or unsafe situation.[A.101].

The Order then states that the Petitioner "irrationally declined" unsupervised daytime visitation for two hours in a public place with a safety plan in place and with the Son maintaining his cellphone with him at all times. [A.101]. The Order also states that Petitioner politely demanded moving straight to longer duration visitation, including overnight timesharing. [A.101]. The court then opined that Petitioner's refusal to accept this offer of compromise led it to conclude that Petitioner's mental health was still questionable, and therefore denied the motion. [A. 101].

Petitioner timely appealed the Court's June 28, 2023 Order to the District Court of Appeal, Third District. [A.103-106].

On June 19, 2024, the District Court of Appeal per curiam affirmed with opinion the trial court's ruling. [A.107]. Petitioner moved for rehearing on July 28, 2024 but it was denied on August 14, 2024. [A.109-115; 116]

On November 26, 2024, Petitioner sought to invoke the Florida Supreme Court discretionary jurisdiction. However, the petition was dismissed on September 4, 2024.[A.118]

5. Argument

THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION FOR UNSUPERVISED TIMESHARING SHOULD BE REVERSED BECAUSE THE ORDER DENYING THE MOTION DOES NOT CONTAIN SPECIFIC FINDINGS OF FACT SUFFICIENT TO DETERMINE IF THE COURT'S DECISION WAS BASED UPON THE BEST INTEREST OF THE CHILD.

In this case the June 28, 2023 Order did not contain specific findings of fact to address the Petitioner's motion, and more importantly, to support the decision.

An order that makes a determination concerning timesharing should contain findings of fact and states that the decision is based upon substantial competent evidence. *See Wade v. Hirschman*, 903

So. 2d 928 (Fla. 2005); *Sordo v. Camblin*, 130 So. 3d 743 (Fla. 3rd DCA 2014).

Here, the Order denying the Petitioner's motion is without any factual support, and instead, merely recited conclusions. The order itself contains only 10 paragraphs, of which the first 4 paragraphs merely explains the scheduling of the hearing. So, a two hour evidentiary hearing was reduced to 6 paragraphs, none of which contain specific facts to justify the court's denial of the Petitioner's motion, and thus causing the order to be determined in an arbitrary and capricious manner

For example, paragraph 5 of the Order provides the GAL's recommendation, and states that "based on the Petitioner's mental health that the Petitioner should only visit with his son with professional supervision for the safety of the Son." [A.100]. However, there is nothing within the 4 corners of the Order than identifies the Petitioner's mental condition, and instead, the tern is used generically. The same is true when discussing the safety concerns for the child. Notably, there has not been any allegations that the

Petitioner ever harmed the child.[1] Moreover, the lower court completely ignores the GAL's report which was filed just shortly before the hearing. [A. 94-99]. The GAL report not only conflicts with the GAL's testimony, but it supports unsupervised visitation. The report states:

> The Child adores his parents, and wishes to spend more time with the Petitioner [Petitioner]. The Child has requested that he be permitted to spend one on one time with his Petitioner and has requested to attend workouts with his Petitioner as both are athletes. [A.096]

The GAL report also states:

> The Child has indicated that he wants one on one time with the Petitioner. I recommend that the Child's request should be accommodated to a degree. As the Child requested, I believe that the Petitioner be permitted to unsupervised visitations with the Child with the following conditions: the Petitioner should be permitted to have one on one work-out sessions with the Petitioner in a public place (for example a park or a gym). The Petitioner should not be

[1] Although the child is suffering from anxiety, it is not the result of the Petitioner but rather a result of the contentious proceedings borne by Respondent. Although Petitioner is not a mental health expert, common sense seems to dictate that an erratic and inconsistent timesharing routine and that being able to spend time with the child one day and then all of a sudden, not be able to see the child, (all of which was the product of Respondent and the court's doings) would cause his son anxiety.

> permitted to drive the Child. The Respondent indicated to me that she agrees to these visitations. The success of these visitations will be great help in making recommendations as to time-sharing. [A.096;098].

The GAL report supports unsupervised timesharing. Moreover, the GAL recommendation was based upon the assumption that Petitioner did not satisfy all of the conditions set forth by the trial judge. Since the Petitioner did satisfy all of the court's conditions imposed upon him, presumably, the GAL would have opined more in favor of the Petitioner's unsupervised timesharing.[2]

Another example is Petitioner's therapist's testimony. Dr. John Stiteler, PsyDN, testified that he could not make a recommendation one way or the other because he had not communicated with Petitioner or Respondent for years. [A.0100]. What the therapist stated was that he cannot recommend unsupervised visitation *without more information.* **He did not opine that he would not recommend unsupervised visitation**. Significantly, Dr. Stiteler stated after the Petitioner concluded his therapy sessions, he did not

[2] Petitioner contends that he satisfied all of the conditions, and no witness nor the trial judge found otherwise.

believe that Petitioner posed any danger to the child, and that his timesharing should resume[A.045]

Additionally, the Respondent's testimony referred to the June 28, 2023 Order was an unsupported opinion. Respondent did not testify that she was concerned with her son's safety (which is why she agreed to discharge the injunction). [A.066]. Instead, Respondent opined that things were moving too fast and she did not want to put her son in an uncomfortable situation.[A.101]. However, there is no explanation as to why Respondent believed their son would feel uncomfortable. There are no specific facts to support the Respondent's opinion, and in fact the opinion is flawed. The son had advised the GAL that he wanted to spend more time with his Petitioner, and specifically that he wanted more one on one time with his Petitioner. [A.096;098]. This flies in the face of Respondent's belief that the child will feel uncomfortable.

So paragraphs 5, 6 and 7 of the June 28, 2023 Order lacks specific factual determinations, and is barely short of being unsupported conclusions which are contrary to the facts before the court (which is discussed in more detail in Point II of this Brief.)

Paragraphs 8, 9 and 10 of the Order do not contain specific factual determinations. Instead, those paragraphs contain opinions unsupported by facts, and creates an impression that the court is penalizing the Petitioner for not accepting the Court's offer.[3] Again, demonstrating an arbitrary and capricious decision.

The trial judge's conclusion that Petitioner must have mental health problems because he would not accept anything less than an unhindered Petitioner and son relationship (which is the same relationship his son wants) is an unsupported opinion that defies logic and reason.[4]

The fact is that the Court's June 28, 2023 Order has no factual findings to support its denial of the Petitioner's motion. By

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[3] Petitioner denies that he stated if he could not have unsupervised and unrestricted supervision then he did not want any visitation at all. Unfortunately, the trial judge either misheard Petitioner or mischaracterized Petitioner's testimony. Petitioner advised the court that he has not had unrestricted visitation in almost 5 years, and that the restricted visitation feels like no visitation with his son at all. He testified that he and his son are like close friends , which is very different than loving Petitioner and son bond , and that such a bond can only come from unrestricted and unsupervised timesharing (which he is being deprived of).

[4] Petitioner is convinced that the trial judge punished him for not accepting his recommendation.

comparison, in *Miedes v. Ideses,* 346 So. 3d 686 (Fla. 3rd DCA 2022), this Court found no error in the trial court's *detailed thirty-four-page order* which discussed the modification of a parenting plan that contained explicit findings of fact supported by competent, substantial evidence and properly analyzed the statutory factors.

Here, Petitioner does not expect the trial judge to issue an exhaustive order in this case. However, the order in this case should have contained specific findings of fact that were supported by competent and substantial evidence, and that properly analyzed the statutory factors like in *Miedes*. In fact, the trial court's order did not discuss any statutory factors or express any legal analysis. Instead, the court relied upon its own opinion concerning the Petitioner's mental health without any expert or professional opinion to support same.

If the lower court does not express its factual findings to support its conclusion, then the court not only abuses its discretion, but it also fails to use discretion. Such is the case here, and as such the June 28, 2023 Order should be reversed.

THERE WAS NO SUBSTANTIAL EVIDENCE PRESENTED TO SUPPORT THE LOWER

COURT'S DENIAL OF PETITIONER MOTION FOR UNSUPERVISED TIMESHARING

Here, there was no substantial evidence to demonstrate that the Petitioner should not have unsupervised timesharing. In fact, all of the evidence supported Petitioner's motion being granted and that the timesharing set forth in the MSA be restored.

Substantial evidence" has been described as evidence that establishes a substantial basis of fact from which another fact at issue may reasonably be inferred. *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). The Florida Supreme Court has also described "substantial evidence" as being "relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* Meyers v. Meyers, 295 So. 3d 1207 (Fla. 2nd DCA 2020); *Becker v. Merrill,* 155 Fla. 379, 20 So. 2d 912, 914 (Fla. 1944); *Haines v. Dep't of Children & Families,* 983 So. 2d 602, 603 (Fla. 5th DCA 2008).

Here, all of the evidence would cause a reasonable mind to accept that the Petitioner should have unsupervised timesharing, and that his timesharing from the marital settlement agreement should be restored. The following is a list of facts that were either not

disputed or supported by the reports of the GAL, Dr. Stiteler and/or the Respondent:

A. Petitioner loves the parties' son.

B. The son loves the Petitioner.

C. The son wants more time with his Petitioner and that it be more one and one time.[5]

D. Respondent wants the Petitioner to have a relationship with the son.

E. Dr. Stiteler opined that the Petitioner does not pose a threat to his son.

F. Respondent does not believe that Petitioner poses a threat to her son (as evidenced by her agreement to dismiss the injunction as it relates to their son).

G. The GAL believes that the Petitioner should have unsupervised visitation.

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[5] Although mentioned in the June 28, 2023 Order, it fails to discuss the child's preference. The choice of the child where it has reached the age of intelligent discretion should also play an important part in timesharing cases. *See for example Marshall v. Reams*, 32 Fla. 499, 500 (Fla. 1893). Here, the child is a 15 years old and educated, and stressed his desire to have more time with his Petitioner and that it be one-one time.

H. Petitioner satisfied all of the conditions that the lower court imposed upon him including individual therapy, parenting courses, anger management and parent counseling.

Notably, none of those findings existed or appear to have even been considered by the trial judge since there is no mention of them in the June 28, 2023 Order.

Remarkably, the following findings were not included in the June 28, 2023 Order:

A. Petitioner is a danger to the child.

B. Petitioner has placed the child in imminent physical harm.

C. The child does not want to be with the Petitioner.

D. Expert testimony that states that the Petitioner still suffers from a mental condition.

E. Expert testimony that Petitioner is a danger to the child.

F. Expert testimony that Petitioner should not have unsupervised visitation.

G. There is substantial competent evidence to support the court's decision.

H. That it is in the best interest of the child that Petitioner still have supervised visitation.

Notably, the words "substantial competent evidence" do not even appear in the trial court's order. The only basis contained in the order for denying the Petitioner's motion and in support of the trial judge's conclusion is Petitioner's alleged position that he rather have no timesharing than the timesharing proposed by the judge, and therefore, there must be something wrong with the Petitioner's mental health, such that, he is dangerous to child and contrary to the child's best interest. This one paragraph is the only reason that the trial judge came up with during a 2 hour evidentiary hearing to support the denial of the Petitioner's motion. Such a basis does not constitute "substantial" evidence or "competent" evidence, and flies in the face of the evidence that was before the trial judge. This is probably why those words do not appear anywhere within the 4 corners of the Order. In fact, the absence of the words "substantial competent" evidence begs the question whether the trial judge even utilized that standard.

Overnight visitation is a very important component of a non-custodial parent's visitation rights and should be awarded, absent some overriding concern for the child's safety. *Todd v. Guillaume-Todd,* 972 So.2d 1003 (Fla. 4th DCA 2008). The sole basis contained

in the order for denying Petitioner's motion was not adequate to convince a reasonable mind to support the trial judge's conclusion, and certainly not sufficient to override Petitioner's important component of his non-custodial visitation rights.

Here, the lower court did not abuse its discretion, it completely failed to use any discretion. Instead, it just arbitrarily and capriciously denied Petitioner's motion. Therefore, the June 28, 2023 Order should be reversed.

CONCLUSION

The June 28, 2023 Order denying Petitioner's motion for unsupervised timesharing should be reversed, and this Court should find that Petitioner should have all of his unsupervised timesharing restored, award the Petitioner with make-time and that the case be remanded to the lower court to enter a judgment consistent with this Court's ruling.[6]

Respectfully submitted,

/s/ Samuel L. Smith

[6] This Court should also award Petitioner make-up timesharing, since make time sharing can be awarded to a parent who successfully proves that the other parent wrongfully withheld time-sharing. *See Eadie v. Gillis*, 5D22-2732 (Fla. 5th DCA 2023).

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