

1. Parenting plan, parental responsibility order, and time-sharing schedule

1.1 Jurisdiction **The parties' children are X and Y.** This court has subject matter jurisdiction and personal jurisdiction over the parties and the children. This court has jurisdiction over all parenting issues under the Uniform Child Custody Jurisdiction and Enforcement Act, the International Child Abduction Remedies Act, 42 U.S.C. ss. 11601 et seq., the Parental Kidnaping Prevention Act, and the Convention on the Civil Aspects of International Child Abduction enacted at the Hague on October 25, 1980. Under Florida law, an order for a parenting plan, parental responsibility order, and a time-sharing schedule is a "custody" order under those laws. Florida law does not use the terms "custody", "visitation", or "primary residential parent" in a proceeding between separated parents. Those terms have no meaning under Florida law in a case between separated parents.

1.2 Legal duty of both parents Both parents have a legal duty to promote the other parent to the children, and the children have a right to regular and frequent contact with both parents:

"It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing." §61.13(2)(b)

Both parents are ordered to "go the extra mile" with the other parent and make an extra effort to promote the other parent to the children. Both parents must work to solve any parenting difficulties that may arise. The Supreme Court of Florida has explained that both parents have an

"...affirmative obligation to encourage and nurture the relationship between the child and the [other] parent... This duty is owed to both the [other] parent and the child. This obligation may be met by encouraging the child to interact with the [other] parent, taking good faith measures to insure that the child visit and otherwise have frequent and continuing contact with the [other] parent and refraining from doing anything likely to undermine the relationship naturally fostered by such interaction." *Schutz v Schutz*, 581 So. 2d 1290 (Fla. 1991).

Florida law also provides:

"When a parent who is ordered to pay child support ... fails to pay child support ... , the parent who should have received the child support ... may not refuse to honor the time-sharing schedule presently in effect between the parents." §61.13(4)(a)

"When a parent refuses to honor the other parent's rights under the time-sharing

schedule, the parent whose time-sharing rights were violated shall continue to pay any ordered child support ...” §61.13(4)(b).

The point is that a child has a right of contact with both parents and a failure to pay child support does not take away the child’s right of contact with both parents. Likewise, child support must be paid regularly and on time even if the parent owing child support is not in contact with the child because the child has a right to be supported by both parents all of the time.

1.3 All factors considered In deciding a parental responsibility order, a parenting plan and a time-sharing schedule, the court must make the children’s best interest the “primary consideration” and the court must consider all of the factors in §61.13(3). The court must also consider the “expressed desires” of the parents in these decisions, but the interests of the parents are not a consideration, §61.13(2)(c)2.,a. The parents do not have a right to any particular parental responsibility order, parenting plan, or time-sharing schedule, while the children have a right to “frequent and continuing contact with both parents after the parents separate.” §61.13(2)(c)1. The court has reviewed and considered all of those factors in making a decision about the parenting plan, the parental responsibility order, and the time-sharing schedule. The court declines to make findings under each of the factors because the court finds this would not be in the children’s best interest.

1.4 The parental responsibility order is separate from the time-sharing order Since 1982, Florida law has separated the child’s time-sharing schedule, that is, the calendar schedule detailing where the child will be living from time to time during the year, from “parental responsibility.” *Session Law 82-96* effective July 1, 1982. “Parental responsibility” means parenting decision-making. “Parental responsibility” has nothing to do with where the child will be living from time to time during the year. *See, e.g.,* F.S. §61.046(17) & (18) (2009):

“(17) “Shared parental responsibility” means a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which *both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly.*

(18) “Sole parental responsibility” means a court-ordered relationship in which *one parent makes decisions regarding the minor child.*” (*Emphasis supplied.*)

So, “parental responsibility” is concerned with how parenting decisions will be made after parents separate and the parental responsibility order is not concerned with where the child will be living from day to day during the calendar year.

The order detailing where the child will be living from day to day is now called the “time-sharing order.” Formerly, the “time-sharing order” was the order that named a “custodial parent” or “primary residential parent”, which meant “the parent with whom the child maintains his or her primary residence.” F.S. §61.046(3)(2004). However, on October 1, 2008 the terms

“custody”, “visitation”, “custodial parent”, and “primary residential parent” were deleted from all Florida statutes dealing with separated parents. *Session Law* 2000-61 effective 10/1/2008. Before that change in the statutes, the terms “custody and visitation” were generally used to describe the time-sharing order, but those terms are now obsolete. “Primary parent,” “custodial parent”, “noncustodial parent” or “primary residential parent” are also now meaningless terms under Florida law.

F.S. §61.13(2)(b)(2009) now requires the court to order a “parenting plan” that includes a “time-sharing schedule” and a “designation of who will be responsible for” parenting decisions. Therefore, since 1982 and under the current statute the “time-sharing” order and the “parental responsibility” order must be two, separate orders.

Regarding the parental responsibility order under §61.13(2) the court can order (1) the parents must share parental responsibility for all decisions; or (2) the parents must share parental responsibility and one parent may have ultimate responsibility over some or all aspects of the child’s life, *see, e.g., Watt v Watt*, 966 So.2d 455 (Fla. 4<sup>th</sup> DCA 2007); *Hancock v Hancock*, 915 So.2d 1277 (Fla. 4<sup>th</sup> DCA 2005); *Schneider v. Schneider*, 864 So.2d 1193 (Fla. 4<sup>th</sup> DCA 2004); or (3) one parent may have sole parental responsibility over all parenting decisions. Those are the only three options under Florida law for allocating parental responsibility between the parents after the parents separate.

Further, §61.13(2)(c)2, requires the court to order shared parental responsibility unless that would be detrimental to the child. So, sole parental responsibility can be ordered only if it is pled and proven that a shared parenting order would be detrimental to the child. *See, e.g., Furman v. Furman*, 707 So.2d 1183 (Fla. 2d DCA 1998).

1.5 Parental responsibility; detriment The law requires the court to “order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.” F.S. §61.13(2)(c)2.

The law defines “shared parental responsibility” as:

*“...a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly.”* §61.046(17). (*Emphasis supplied.*)

Many petitions ask for “shared parenting” or, more properly, “shared parental responsibility.” However, “to share” means “to confer ... so that major decisions ... will be determined jointly.” So, if shared parental responsibility is ordered, this means that each parent has an equal say in major decisions concerning the child if “shared parenting” is ordered. So, if the parents have a disagreement on a major decision, it is not for the court to say who is right or who is wrong if each has a reason to support their decision that is

acceptable to a reasonable person. Put another way, a decision is not arbitrary if it is “fairly debatable.” *See, e.g., Island, Inc., v. City of Bradenton Beach*, 884 So.2d 107 (Fla. 2d DCA 2004) and *Martin County v. Section 28 Partnership, Ltd.*, 772 So.2d 616 (Fla. 4<sup>th</sup> DCA 2000). In such a situation, nothing happens, so long as a risk to the child’s life, health, or safety is not at stake. It is not for the court to decide the winner of the debate, only to find that there is a debate with reason on both sides. The court cannot substitute its judgment for the rationally based decision of either parent because this is a proceeding under Chapter 61, not Chapter 39, and the child has two competent parents. The judge in a Chapter 39 case is a “super parent” empowered to make parenting decisions if there is no competent parent. *See, e.g.*, §39.407(2)(a)2. The judge in a Chapter 61 case has no such authority. Further, the goal of every litigation is to end the dispute, and in a Chapter 61 proceeding the court does not end the dispute if it is open to endlessly hear and overrule one parent or the other whenever they do not agree on decisions they were ordered to “share.”

Further, a parent seeking sole parental responsibility over some aspect or all aspects of the child’s life must plead for this in a petition. [In this case, both parents’s petitions plead for shared parental responsibility and neither parent’s petition asks for sole parental responsibility. ]

A finding that the parents are unable to confer together and share parenting decisions is a detriment to the child sufficient for a sole parental responsibility order to one parent, *see, e.g., Roski v. Roski*, 730 So.2d 413 (Fla. 2d DCA 1999). [However, because neither parent pled for sole parental responsibility in a petition the court cannot order sole parental responsibility and the court must order shared parental responsibility even if the evidence demonstrates that the parents cannot confer together and share parental responsibility for their children. Due process of law prevents the court from ordering something that neither party asked for in a petition. *See, e.g., McDonald v. McDonald*, 732 So.2d 505 (Fla. 4<sup>th</sup> DCA 1999). ]

[Therefore, the court hereby orders shared parental responsibility because the due process requires the court to do so and not because it is in the children’s best interest to do so. The court has considered all of the factors in §61.13(3) in making this parental responsibility order. ]

Regarding a shared parental responsibility order, §61.13(2)(c)2., a. provides:

“In ordering shared parental responsibility, the court may consider the expressed desires of the parents and *may grant to one party the ultimate responsibility over specific aspects of the child’s welfare or may divide those responsibilities between the parties based on the best interests of the child.* Areas of responsibility may include education, health care, and any other responsibilities that the court finds unique to a particular family.” (*Emphasis supplied.*)

So, when the parties plead for shared parental responsibility, or, at least, fail to properly plead for sole parental responsibility, the court must order the parties to share parental responsibility and as part of the shared parental responsibility order the court may grant ultimate responsibility to one parent or the other over some or all aspects of the

children's lives.

In this particular family, from the evidence presented the court finds (1) the parents do not confer and consult together about parenting decisions; (2) the parents have no communication at all concerning their children; (3) the parties have not demonstrated a capacity to share parental responsibility; (4) on the contrary, this record demonstrates that these parents cannot share parental responsibility, (5) an unlimited shared parenting order would be detrimental to the children because such an order would require these parents to confer with each other over all major parenting decisions but these parents would argue and bicker in these consultations, which is detrimental to the children; and (6) ordering these parents to share parental responsibility without granting one of them ultimate responsibility when they have demonstrated they are incapable of sharing parental responsibility is not in the children's best interest because at least one parent needs the authority to make parenting decisions and these parents cannot make parenting decisions together.

Therefore, pursuant to §61.13(2)(c)2. the court hereby orders that :

**(1) The parties are ordered to share parental responsibility but the PPP shall have the ultimate responsibility for the children's (a) education, including change of schools and school choice, (b) health care, including health insurance provider, dental, orthodontic, optical and mental health care, elective and emergency, (c) the choice of the employment day care provider and whether the children will be taken to a day care provider on any day, (d) extracurricular activities including sports, religious training, and summer camps and summer activities even though these might encroach on the children's attached time-sharing schedule with the mother or the father, and (e) whether the children will participate in religious ceremonies, services, training and education during portions of the time-sharing schedule when the children are with him. When the children are with the PPP, the PPP may take them to such religious activities as the PPP deems appropriate. Likewise, the SSS may do so during the time the children spend with her under the schedule** §61.13(2)(c)2., a. (2008) ; *Watt v Watt*, 966 So.2d 455 (Fla. 4<sup>th</sup> DCA 2007); *Hancock v Hancock*, 915 So.2d 1277 (Fla. 4<sup>th</sup> DCA 2005); *Schneider v. Schneider*, 864 So.2d 1193 (Fla. 4<sup>th</sup> DCA 2004). The SSS shall have the authority to consent to emergency medical care when the children are with the SSS.

(2) The **PPP shall consult and confer with the SSS** about all important decisions pertaining to the aspects of the children's lives specified above, so that the parties share parental responsibility, but in the event that the parties are unable to agree on an issue on these aspects of the children's lives, the PPP is hereby granted the ultimate responsibility to make the decisions in these aspects without obtaining the SSS's consent and without court approval before making the decision. The best interests of the children require that one parent be able to make prompt decisions for the children if the parties do not agree. The SSS may seek the court's review and modification of a decision made by the PPP by a motion and a hearing on the motion.

**(3) [The court does not reserve jurisdiction over this shared parental responsibility**

**order.** This is a final order of shared parental responsibility.]

1.6 Both parents have equal parental rights to information - Access to records and information pertaining to a minor child, including, but not limited to, medical, dental, and school records, may not be denied to either parent. Either parent has the same rights upon request as to form, substance, and manner of access as are available to the other parent of a child, including, without limitation, the right to in-person communication with medical, dental, and education providers. §61.13(2)(b)3. **However, this is not a final order of equal access to records and information and the court hereby reserves jurisdiction over this right of access.**

1.7 Time-sharing schedule; jurisdiction

After considering all of the factors in §61.13(3) **the court finds the children's best interests are served by having the children live most of the days during the year with the PPP.** The court declines to make findings under all of the factors in the statute because these findings would not be in the children's best interest.

The court also notes that the law requires the court to give little weight to the temporary time-sharing arrangement after the parents separate and until trial. When the parents separate, a children have a time-sharing schedule by formal or informal agreement, a temporary order, or acquiescence. The temporary time-sharing arrangement does not determine what is in the children's best interest over the long term. The court must decide the best interest of the children over the long term. **The time-sharing plan now ordered by the court is attached to this Final Judgment.**

The court finds that the foregoing parenting plan and time-sharing schedule are in the children's best interests after considering all of the factors in §61.13(3). The court orders that the parents shall follow this plan and time-sharing schedule.

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[Alternative]

However, the **court hereby specifically reserves jurisdiction to review and modify the time-sharing schedule as the child grows older.** The evidence at trial did not address the age appropriate needs of the children as the children grow older, start school, and otherwise develops over time. If the parents cannot agree upon appropriate changes to the time-sharing schedule as the children grow older, it will nevertheless have to be changed as the children grow up. Therefore, the court reserves jurisdiction to change the time-sharing schedule. Consequently, the parties may request the court to change the time-sharing schedule by motion and a notice of hearing rather than a supplemental petition alleging a substantial change in circumstances.