

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CIVIL ACTION**

XXX,
Petitioner & father,

vs.

Case No. 0 DR N

YYY,
Respondent & mother,

ORDER FINDING FACTS

This matter having come before the court at trial on DDD and DDD, it is ordered:

1. Findings

The parties have one minor child: ZZZ., born DDD. The parties agreed that XXX. is the biological father of this child. Therefore, the court finds and orders that XXX. is the biological father of ZZZ., born DDD.

In deciding a parental responsibility order, a parenting plan and a time-sharing schedule, the court must make the child'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 child has 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 child's best interest.

The salient facts in this case are: (1) The child will be 5 years old this fall so she will soon begin kindergarten and grammar school, which means that she should live during the week in the same county as the school that she attends; (2) the mother lives in Sarasota and the father lives in Lee County, a distance of at least an hour's drive between their homes, so there is no way to accommodate the interests of both parents in a time-sharing schedule and meet the needs and best interest of the child; (3) the mother and father were both living in Lee County from 6/2007 to 8/2008; the father assumed parental responsibility for the child in 8/2008; the child came to live with him at this time; in the summer of 2008 the mother lost her job largely because of her drug addiction; she entered a residential drug treatment program in Collier County in 8/2008; in 9/2008 she moved to Sarasota to live with her grandmother, who raised her and with whom she was living

when the child was born; and she has stayed in Sarasota living with her grandmother since 9/2008, for good and sufficient reasons, but the good reasons do not shorten the distance; (4) both parents were significantly involved with Z. before 8/2008, because this is what both of them wanted; and (5) since 8/2008, due to their history and personalities, these parents have not demonstrated a capacity to share parental responsibility for their child, even if they have been able to work out frequent and continuing contact between the child and both parents, that is, time-sharing of the child.

The parties met in Sarasota. The father was then living in Venice and the mother was living in Sarasota with her grandmother. Her grandmother is now 90 years old. The mother was raised by her grandmother and grandfather. Her grandfather is now deceased. The mother was attending nursing school while she was pregnant with ZZ. ZZ. was born on DDD. Between that date and 6/2007, when the mother graduated from nursing school, ZZ. and the mother lived in the mother's grandmother's house in Sarasota. In this time, the father came to Sarasota every weekend and lived in the grandmother's house. The mother encouraged the relationship between T. and her father. She was pleased that the father bonded with the child. The mother kept the father informed of ZZ.'s medical care and appointments. The father paid all of the mother's medical bills attendant to the pregnancy and birth that were not paid by insurance. He also paid some of ZZ.'s uncovered medical bills. The mother's grandmother had a health insurance policy on the mother while she was a student and during and after the pregnancy. She also purchased a policy on ZZ. when she was born. The father provided more funds for the support of the mother and the child.

In 6/2007 the mother graduated from nursing school in Sarasota and she and the child moved to an apartment in Lee County. The mother got a job with Lee Memorial system but she lost that job after a few months. She was unemployed for a time before she got another job with a hospital in Naples, but she lost that job after some months. The mother found that she could not handle the work load required of a nurse in a hospital setting. At this time, her drug addiction was out of control.

The mother has a history of using substances of abuse, in particular, alcohol, opiates and benzodiazepines, and being out of control in her use of these substances. She has served a DUI probation since ZZ. was born. She has a history of one other DUI arrest before ZZ. was born. Her driver's license was suspended for a time before 2/2009 when her license was restored. She is a recovering addict. She cannot control her use of substances without working on her recovery. She is successful in her recovery since 9/2008. She attends meetings and helps other people stay sober. She sincerely works the 12 steps of AA. She is holding a full time job since 9/2009, as a home health nurse in a division of a hospital system in Venice. She is now capable of taking care of ZZ.

After completing nursing school in 6/2007, the mother moved to Lee County and worked for some months for Lee Memorial hospital system but she lost that job. She next worked for a hospital in Naples but she also lost that job. She was not able to handle the number of patients required of a nurse in a hospital. By 8/2008 her addiction made her unable to hold a job or take care of ZZ. In 8/2008 she entered a residential substance abuse program at the David Lawrence

Center in Collier County.

In the summer of 2007 after the mother and ZZ. moved to Lee County, her grandmother closed up her house and came to Lee County to live in an assisted living facility, but she did not like that arrangement, and she next rented an apartment in Bonita Springs, in south Lee County. In 8/2008 the mother's grandmother moved back to her house in Sarasota and the mother stayed in Lee County. About the time she went back to Sarasota, the mother's grandmother told the father that the mother was not capable of taking care of ZZ. because her addiction was out of control and that he would have to take the child to his house, which he did. The child had been spending about 50% of the days at the father's house and 50% at the mother's or grandmother's residence since 6/2007. The grandmother took care of ZZ. for half of the days in June and July of 2008. T. has lived with the father since 8/2008.

In 8/2008 and for some months before 8/2008 the mother's addiction was out of control and she voluntarily entered a residential drug treatment program at the David Lawrence Center in that month. She was there for about a month, until mid September 2008. For some months before and after that time the mother was not capable of taking care of T. The father had been very involved with ZZ. and the mother before she went into the David Lawrence Center.

The father has a history of abusing alcohol, but he is not an addict. He can control his use of alcohol. He has a history of using illegal substances, that is, marijuana and cocaine. He has a history of a DUI arrest in 2003. His license was suspended as a result. The father says he was "OCD while [he] was growing up." He believes he has overcome this condition because of treatment he received as a child. There is no evidence to the contrary.

Since 8/2008, the child has had regular, frequent and continuous contact with both parents, despite their significant difficulties and even if the contact and the exchanges have not been to the complete satisfaction of the mother or the father. The father is mainly responsible for the child staying in continuous and frequent contact with the mother in this time because after 8/2008 the mother was in drug treatment and working on her recovery and she did not have a driver's license until 2/2009. The father drove the child back and forth to Sarasota so that she could make contact with the mother, even though the contact was not as often as the mother wished and never to her satisfaction.

After the mother finished the residential program at David Lawrence Center she did not have a job and she could not support herself in Lee County. She moved back to her grandmother's house in Sarasota. She is still living with her grandmother. After returning to Sarasota she worked a few months as a waitress but she soon started looking for work as a home health nurse. She looked for work from Tampa to Venice. She found temporary work as a nurse in a hospice. She now has a full time job as a home health nurse with a hospital system in Venice. She believes she is better suited to the work of a home health nurse than to the work of a nurse in a hospital.

The child has lived most of the days since 8/2008 with the father. Given the distance between the father's residence in Lee County and the mother's residence with her grandmother in Sarasota and given the fact that the mother did not have a driver's license until 2/2009, the father did a good job of keeping ZZ. in contact with the mother after the mother moved back to Sarasota

in 9/2008. He was working full time and taking care of ZZ. The mother is, nevertheless, critical of his efforts because they were not to her satisfaction, even though her decision to move back Sarasota was determined by the fact that she did not have a job in Lee County, that she needed to focus on her recovery, that she needed the support of her grandmother and her friends in Sarasota, and that she did not have a driver's license. In short, the reasons for the reduction in her contact with ZZ. after 8/2008 were due to issues in her life.

Her interest and desire regarding ZZ. after she moved back to Sarasota was "to have more time with ZZ" For some days during the months between 8/2008 and 9/2009 the mother came to Lee County and lived in the apartment of a boyfriend. During these visits she was able to spend more time with ZZ. This period was a difficult time for the parties because they could not reach any agreement concerning the time-sharing of ZZ. The father was understandably apprehensive of the mother's ability to take care of ZZ. They each struggled to control the other. In this time the mother made calls to law enforcement officers and filed complaints of battery by the father on her, and the father responded by requiring the exchange of the child at a sheriff's substation because he did not trust the mother. The father was never arrested by law enforcement officers as a result of the mother's complaints.

The father, who had filed this case in 8/2008, insisted on a time-sharing schedule in his interest, just as the mother insisted on one in her interest. The mother resisted his demands. The father resisted her demands. Thus, they cannot function together as parents. The parties' difficulties between 8/2008 and 9/2009 do not determine the best interests of ZZ. over the long term. Rather, they demonstrate the dysfunction between these parents and their promotion of their own interests rather than ZZ's best interest.

Despite their dysfunction, the child is doing well in the present arrangement, in which she lives most of the time with the father. She has been in the same day care since the summer of 2008. The father has a stable family life with his wife and her daughter. Meanwhile, the mother has developed a stable support group in AA. She is living with her grandmother in a house that she owns with her grandmother. She has held a full time job since 9/2009. She has worked hard on her recovery and she is now succeeding in her recovery.

The father has demonstrated some capacity and disposition to facilitate and encourage a close and continuing parent-child relationship between the mother and the child, to honor the temporary time-sharing schedule ordered by the court, and to be reasonable when changes were required. He has not always done this perfectly or to the mother's satisfaction, but in the main he has demonstrated a capacity to do this. He has also demonstrated a capacity and disposition to determine, consider and act upon the needs of the child as opposed to his needs or desires, again, not always perfectly or to the satisfaction of the mother but he has done this. The mother has also demonstrated some capacity and disposition to facilitate and encourage a close and continuing parent-child relationship between the father and the child, to honor the temporary time-sharing schedule ordered by the court, and to be reasonable when changes were required. The problem between them is that each wants the child living with them most of the time, which is impossible. Each parent is focused on their interest and desires, while the court must decide based on the

child's best interest.

Regarding domestic violence, the court has considered the parties' testimony concerning domestic violence. Their testimony is conflicting, contradictory, and inconsistent so the court has reconciled the testimony. Each blames the other for the alleged violence between them. The court finds that the mother has been aggressive and physically violent with the father, that she has hit him and pushed him, and that on at least one occasion she falsely called out law enforcement officers after an exchange of the child at her residence in Sarasota, in which she attempted to force the father to talk to her and in which she attempted to gain control of the child. She did this by standing in the open driver's door of the father's car after he had put the child into the car seat in the back seat, thus attempting to block him from getting into the car and driving away. He had come to Sarasota to pick up the child pursuant to an earlier agreement of the parties, but for unknown reasons the mother impulsively decided to block him from getting into his car after he had put the child in the back seat. She wanted him to talk to her about something but he did not want to talk to her. He wanted to leave. So that he could get into the car, he put his hands on her arms, moved her out of the open driver's door of his car where she was standing, got into the car and drove away. After he left, the mother called law enforcement officers because the father touched her to move her out of the open door of his car so he could get into the car and drive away. She was not injured in any way. The father was not arrested or charged in this episode but after this episode he insisted on exchanging the child at a sheriff's substation after this incident.

It is true that the father tends to take control of a situation, as the mother contends. He once removed the child from the mother's apartment in Lee County because he believed the mother was too intoxicated to take care of the child. Whether that was true or not, he took control of the situation. He also enrolled the child in a day care in Lee County without consulting with the mother. These instances and others that the mother brings up do demonstrate controlling behavior by the father, but the court cannot find that any of these behaviors have been detrimental to the child or failed to promote her best interest, even if they greatly annoyed the mother. Further, in her own way, the mother can be equally controlling and insistent on having what she wants. The result in this family is bickering and disputes over nearly everything. Sharing parental responsibility between these two parents is an impossibility.

The court finds the father has been made physical contact with the mother by moving her out of the open door of his car, by blocking her from hitting him, and by pushing her to the ground as she was trying to strike him or push by him. In general, the court finds that the father's physical contact with the mother has been in reaction to her initiating physical contact with him. In general, before she was in recovery the mother was occasionally impulsive and out of control. For instance, one night before 8/2008, after the father had taken the child from her residence because he thought she was too intoxicated to take care of the child, the mother "keyed" his car, which caused significant damage to the car.

The mother can be very unpleasant when she does not get what she wants. She can react violently, destructively, and hostilely when her desires concerning ZZ. are unfulfilled, yet the reality is that no separated parent can ever get everything he or she wants concerning the child that

he or she shares with the other parent. So, they just have to get used to not getting what they want. Meanwhile, although the court “may ... consider the desires” of the parents, §61.13(2)(c)2.,a., in deciding on a parental responsibility order and a time-sharing schedule, “the best interest of the child shall be the primary consideration” that the court must consider. §61.13(3) So, what the parents want in connection with their child is not the primary consideration; what is best for the child is the primary consideration.

In this particular family, from all of the evidence presented the court finds: (1) the parents do not consistently confer and consult together about major parenting decisions, for example, health insurance for ZZ, which the mother wants to purchase through her work and the father is purchasing, or, for example, whether the child needs shoe inserts; (2) the parents do communicate somewhat concerning their child but not consistently; (3) the parties have not demonstrated a capacity to share parental responsibility, although before 8/2008 the mother kept the father informed and he was involved with ZZ. since she was born and since 8/2008 the father has informed the mother and the mother has been involved in the child’s life; (4) this record demonstrates that these parents have not shared parental responsibility, *see, e.g.*, mother’s Exhibits 13 and 14, being a series of emails; (5) an unlimited shared parental responsibility order would be detrimental to the child 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 would be detrimental to the child; (6) because of the hostility and low level of communication between these parents, one parent or the other would simply take action and make major decisions concerning the child while the child was with one parent or the other, especially about medical decisions and school decisions, without consulting with the other parent, which would mean that parent violated a shared parental responsibility order if one were entered and would lead to more disputes, arguing and litigation between these parents, *see, e.g.*, mother’s Exhibits 13 and 14; and (7) ordering these parents to share parental responsibility without granting one of them sole responsibility when they have demonstrated they are incapable of sharing parental responsibility is not in the child’s best interest because at least one parent needs the authority to make parenting decisions and these parents cannot make parenting decisions together.

In this situation, it is imperative that the court pick one parent to have sole parental responsibility for ZZ because they cannot share parental responsibility.

The mother is now employed with a hospital system in Venice earning \$Z gross per month. She has been working at with this hospital since 9/2009. She works in their home health division. She worked as a waitress for some time after 8/2008 and held some part time nursing jobs before 9/2009, but exactly what time periods and what she earned is unknown. The father is self-employed as a real estate investor and agent and he earns \$Z per month. The father pays \$X per month for employment day care of ZZ. and \$X a month for her health insurance premium. He pays \$X per month for his own health insurance. The mother pays \$X a month for her health insurance. The mother paid the father \$X in child support since ZZ was born. The father’s Exhibit 2 contains records of payments that the father paid to the mother or her grandmother or on ZZ’s behalf, totaling thousands of dollars. The total, however, is not in evidence.

Regarding an arrearage in child support, the mother was unemployed for some periods after ZZ. was born on DDD and until she found her present full time job in Venice. Her exact income month to month in this time is not clearly established by the evidence. Likewise, the father's income month to month in this time is not clearly established by the evidence. The court finds the father paid the mother's grandmother \$X in 2005 and 1/2006, to reimburse her for unpaid hospital and doctor bills attendant to ZZ.'s birth and for support of the mother and the child. The father paid the mother \$X in 2006, \$X in 2007 and \$X in 2008. The court finds the child was living with the father for 50% of the time beginning in 6/2007 and that he appropriately reduced the support he was paying to the mother in 7/2007. Since 8/2008 the mother has paid the father \$300 in child support. For a month after 8/2008 she was in the residential drug treatment program and until 2/2009 she did not have a driver's license and she found only part time work as a waitress. After 2/2009 she began looking for work as a home health nurse. She found some part time jobs and a full time job in 9/2009.

The father is now married. His wife, AAA, presently is a homemaker. She formerly worked outside of the home. She has a daughter, BBB, who is now X years old and in first grade. ZZ. is close to her stepsister. His wife's family - parents, sibling, grandparents - reside in Lee County. The father's family lives in North Carolina, where he grew up, and they have significant involvement and contact with the father and ZZ. The father owns the house that he and his family live in.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
_____, Esq.