The Psychotherapist Witness

Association for Play Therapy, Lee County, Florida

SW Fla. Play Therapy Assoc. Legal Panel 2/12/2010, Hodges University

Hon. R. Thomas Corbin, Circuit Judge

1. Psychotherapist - Patient Privilege, F.S §90.503

1.1 **Privilege** - A privilege prevents confidential communications from being admitted into evidence. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction.

There is no privilege if (1) there is a proceeding to compel hospitalization and the psychotherapist believes the patient needs hospitalization; (2) the statements are made in the course of a court ordered examination of the mental or emotional condition of the patient; (3) if the patient relies upon an emotional or mental condition as an element of his or her claim or defense.

1.2 **Psychotherapist** - physician, psychologist, clinical social worker, marriage and family therapist, nurse practitioner, mental health counselor, or treatment personnel in facilities licensed under Chapters 394, 395 or 397.

1.3 **Who has the privilege** - The patient, not the psychotherapist. The psychotherapist must raise the privilege if questioned about confidential communications with a patient in a deposition, hearing or trial and cannot testify about the substance of the confidential communications if the privilege has not been waived by the patient.

However, if the patient is a child, then the psychotherapist is not required to assert the privilege and can waive the privilege for the child, as explained in the cases below.

1.4 **Waiver of the privilege** - The patient can waive the privilege and if it is waived then the psychotherapist must testify to what was said in confidence by the patient and the psychotherapist. *However, again, if the patient is a child and the psychotherapist is testifying in a case in which the parents are separated and a parenting plan and time-sharing schedule is at issue, then the psychotherapist can assert or waive the privilege for the child if he or she thinks it is in the child's best interest to do so.*

1.5 **Some essential background information**: Effective 10/1/08 the words "custody", "visitation" and "primary residential parent" were deleted from all Florida statutes involving separated parents, and the words "parenting plan" and "time-sharing schedule" were inserted. So, these deleted terms are no longer the correct terms to use in cases between separated parents.

Indeed, these never were the correct terms.

There never was any law that directed a judge to name a "primary residential parent" when parents separated, although lawyers and everyone else seems to have thought that was the law. It was also thought that "winning custody" meant being named the "primary residential parent" and that a "primary residential parent" had superior "rights" to "control" the child's life and contact with the other parent. This has never been the law. It is because of these misconceptions that the statutes were changed 10/1/08 to delete the misleading terms.

The issues between separated parents have always been (1) where will the child be from time to time, that is, a "time-sharing schedule", and (2) how will the parents take care of the child. So, in cases between separated parents now a "parenting plan" must be established that includes a "parental responsibility order" and a "time-sharing schedule". The parenting plan must be established either by the agreement of the parties or the order of the judge if the parties cannot agree.

The basic question in cases between separated parents is whether the parents can separate their own interests from the best interest of the child and whether they can put the child's needs ahead of their own. The time-sharing schedule must be in the "best interest of the child" and the 20 factors that the court must consider in deciding the best interest of the child are found in §61.13(3). A copy of §61.13 is in the Appendix at A-10, and §61.13(3) is at A-14. Note that many of the "best interest" factors at §61.13(3) focus on the "demonstrated capacity" of each parent. Sentiments and intentions do not count for much in the decision.

F.S. §61.13(2)(c)1. provides that the child is entitled to "frequent and continuing contact with both parents after the parents separate", unless that is not in the child's best interest for some reason. Appendix A-13. So, it is the child, not the parents, who has a right that must be protected, that is, the right to "frequent and continuing contact with both parents." The statute does not say the parents are entitled to any particular time-sharing schedule with their child. Based on the circumstances, the best interest of the child may require that a parent have no contact at all with a child. F.S. §61.13(2)(c)2., a., says the court "may" consider the "expressed desires" of the parents when establishing a parenting plan and a time-sharing schedule, Appendix A-14, but §61.13(3) requires the court to make the best interest of the child the "primary consideration," Appendix A-14, when deciding these.

Note that "shared parenting" or "shared parental responsibility," one of the options for the "parental responsibility order" that must be included in a parenting plan, *has nothing to do with the time-sharing schedule.* *See paragraph 7 below.*

1.6 **Caselaw about the psychotherapist patient privilege in which a child is the patient**

1.6.1 *Hughes v. Schatzberg*, 872 So.2d 996 (Fla. 4th DCA 2004) - A parent cannot assert the P-PT privilege on behalf of a child if the parent is involved in litigation over the child's welfare. This was a suit over a parenting plan and time-sharing. The PT may assert the privilege for the child if "she thought that it was in her patient's interest to do so. She did not, most likely because a young child's welfare was at stake, and the information she obtained regarding the

family ... was essential to the court for it to make a decision in the best interests of the child." *Id.* at 998. In the lawsuit, the PT was retained by the parents to counsel the child and the PT met with both parents and counseled the child. The PT testified that it was her opinion that the child was anxious because of the parents' disputes and that the child should live with the father because the mother needed psychotherapy and she was "unable to place the child's needs ahead of her own." *Id.* at 997. The child was 9. The PT waived the privilege for the child and testified about confidential communications with the child.

1.6.2 *D.K. v D.K.*, 780 So.2d 301 (Fla. 4th DCA 2001) - A child may assert her P-PT privilege to prevent the PT from testifying in a lawsuit between her parents over a parenting plan and time-sharing. The child was 17 and an attorney ad litem had been appointed for the child. The court had ordered a psychological evaluation of the child and the parents and the psychologist wanted to review the records of the child's mental health treatments saying that it was in the best interest of the child that he be allowed to review the records to make his evaluation of the family. Held: The child has a privilege to keep her treatment records confidential, even if it is in her best interest to make them available to the PT. The child is "competent" to make this decision and her parents cannot asset or waive the privilege for the child in the context of a lawsuit in which a parenting plan and time-sharing is at issue. The parents have a conflict of interest in asserting or waiving the privilege for the child.

1.6.3 *S.C. v. Guardian*, 845 So.2d 953 (Fla. 4th DCA 2003) - A "mature" 14 year old in a dependency proceeding could prevent the disclosure of the records of her former treating psychologist. So the best interest of the child gives way to the child's privilege to prevent disclosure of her medical records.

1.6.4 *Baron v Baron*, 941 So.2d 1233 (Fla. 2d DCA 2006) - If the patient is a child then the PT may assert or waive the privilege on behalf of the patient if the PT believes that is in the patient's best interest. Therefore, a trial court does not need to appoint an attorney or guardian ad litem for a child in a case in which a parenting plan and time-sharing were at issue because the PT could assert or waive the privilege if that were in the child's best interest.

1.6.5 *Koch v. Koch*, 961 So.2d 1134 (Fla. 4th DCA 2007) - wife could assert the P-PT privilege to prevent the husband from obtaining records of her treatment for mental illness. The wife was a recovering alcoholic. A parenting plan and a time-sharing schedule were at issue. Held: These issues do not mean that the parents' have waived the P-PT privilege. Note: a parent's drug or alcohol addiction is a factor for the court to consider in deciding the best interests of the child so the wife could be questioned about this but her medical records and her confidential communications with her PT were privileged and the privilege is not waived just because a parenting plan and time-sharing are at issue in a case.

1.6.6 *O'Neill v O'Neill*, 823 So.2d 837 (Fla. 5th DCA 2002) - the wife threatened

suicide and also to kill the children and she was later admitted to a psychiatric ward and a residential drug treatment facility. Held: In this circumstance, the P-PT privilege does not prevent the discovery of her mental therapy and other medical records and the judge may order a psychological evaluation of the wife.

2. Exception to the privilege: Abuse, Abandonment, or Neglect of a Child; No Privilege

2.1 F.S. §39.201 - Any person who knows or has reasonable cause to suspect that a child is abused, abandoned or neglected by a parent, legal custodian care giver or other person responsible for the child's welfare ... shall report such knowledge or suspicion to the Department of Children and Families. This includes psychotherapists, teachers, LEO's, and judges.

2.2 F.S. §39.204 - The psychotherapist patient privilege shall not apply to any communication involving the perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect.

3. What do you do if you are subpoenaed as an expert witness?

3.1 A subpoena is a court order - A subpoena is a court order to come to a deposition, hearing or trial and testify. Ignoring or disobeying a subpoena could result in a finding of contempt of court.

3.2 You can object - A witness may object to a subpoena by filing a motion for a protective order and a notice of hearing, which must be filed and heard before the appearance date set in the subpoena. Hearing time is obtained by calling the judge's office and speaking to the judge's judicial assistant. Objections can be that the time and place are inconvenient, the anticipated testimony may be covered by the privilege, or that the subpoenaing party has not agreed upon and been paid a reasonable fee for the expert's opinion.

3.3 You are entitled to be paid - The party subpoenaing an expert for an appearance to give an expert opinion must pay the expert a reasonable fee for his or her services. If the expert witness and the party cannot agree then the witness must file a motion for a protective order and set if for a hearing by calling the judge's office, getting hearing time and then preparing, filing and serving a notice of hearing.

3.4 . See Memo on Motion Practice with attachments - For an explanation of how to make a motion, get it heard by the judge and get an order entered on the motion.

4. How to testify

4.1 Listen to the question and answer the question. Do not volunteer information that goes beyond the question. Do not take sides. Stay neutral. Stay objective. Stay clinical. Stay independent. Don't bolster or puff your opinion. Don't be defensive. Don't get emotionally

invested.

4.2 . Definitions

A **trial** is the final hearing in a case in which a finder of facts determines the facts, applies the law to the facts and makes a decision. A judge or a jury is the finder of facts at a trial.

A **deposition** is an appearance before a court reporter in which the witness is questioned by the parties to a case. A judge is not present at a deposition. Typically, depositions do not take place in a courthouse. Usually they are done in a lawyer's office.

A **hearing** is a court appearance before a judge on a motion in which legal arguments are made and a witness may be questioned about the subject of the motion. Hearings can be evidentiary, in which testimony and other evidence is submitted to the judge and legal arguments are made, or non-evidentiary, in which only legal arguments are made.

Hearsay is a statement, oral or written, made outside of the courtroom that is offered to prove the truth of the matter asserted in the statement. E.g. Father wants to testify that his minor child told him one day: "I hate my mother." Father wants to testify that his minor child told him one day: "Mother keeps vodka in the refrigerator." Mother wants to testify that her minor child told her one day: "Joan (father's girlfriend) yelled at me and pulled my hair."

Hearsay statements are not admissible in evidence because they are unreliable and they cannot be cross examined. The witness who made the statement must be in the courtroom to testify about what they saw or heard. There are 29 exceptions to the rule that hearsay is inadmissible. So, statements made by a child outside of the courtroom are hearsay and are not admissible in evidence unless one of the 29 exceptions apply.

4.3 **In general, an expert witness gives opinions, not facts**

An expert's testimony cannot be a means for getting hearsay statements before the finder of fact. In general, expert witnesses give opinions, not facts, except they may testify to some facts on cross examination if they are asked what they did to arrive at their opinion. In general, they cannot repeat hearsay statements they relied upon in arriving at their opinion in their testimony. If experts in the field rely on hearsay to form their opinions then it is proper for an expert to rely on hearsay to form an opinion.

E.g., To form an opinion of the value of real estate, a real estate appraiser looks up information in the courthouse and on the Internet, which is entirely hearsay although some exceptions may apply, to find comparable sales to value a piece of real estate using the market approach to value. She might also talk to home owners, sellers and buyers, on the phone to verify the sale was an arms length sale and to verify the terms of the contract, also hearsay statements if offered in court. The appraiser can then give her opinion of value even though her opinion is based entirely on hearsay statements that are themselves inadmissible evidence because this is what appraisers do in their field of expertise. She can be questioned about the process she went through to arrive at value. She can be questioned about the comparable sales she used and why she thinks they are comparable to the subject parcel. She can state the prices paid for those and the features of those properties that are comparable, even though these facts are hearsay. She

cannot be asked to repeat what she was told by the people she talked to, that is, she cannot be used to get the hearsay into evidence.

E.g., a party is asked: "How much do you think your house is worth?" and the party begins the answer with: "Well, I talked to a real estate broker last week and the broker said …" "Objection: Hearsay." "Sustained." Note: In Florida, an owner can testify to the value of his or her property, real or personal, which is an opinion and not a fact. It's just a rule of Florida law. The hearsay the owner relies on to arrive at that opinion, if any, is not admissible.

E.g., To form an opinion about why Johnny is not doing well in school, a psychotherapist might talk to Johnny, Johnny's teachers, school counselor, resource officer, doctor, parents, friends, relatives, Johnny's siblings, and others, whose statements are all hearsay if offered in court. He might read school records and a court file to review the pleadings and the course of a lawsuit concerning a parenting plan and a time-sharing schedule for Johnny. He can explain the process he went through to form the opinion. He cannot bolster his opinion by repeating the hearsay statements of these people. Opinion: "Johnny is not doing well in school because his parents do not communicate and cooperate in the parenting decisions concerning Johnny, they are unkind to each other and they communicate their dislike for each other to Johnny, by word and deed. Johnny is distracted and upset by this behavior of his parents. Johnny is stuck in the middle of their disputes and he has been for many years." *Hearsay*: "Johnny told me …"; "Johnny's mother said …"; "The school counselor told me …"

E.g., "Parenting Plan Recommendation" or "Social Investigation" reports offered at trial that give an opinion but also repeat hearsay statements that the psychotherapist heard to arrive at his opinion may not be admitted into evidence because they contain inadmissible statements.

4.4 **In general, a nonexpert or lay witness gives facts, not opinions**

A lay witness can give an opinion if it is the type of opinion that does not require specialized knowledge or training.

Compare: "Was the defendant drunk?" with "How was the defendant behaving?" What is the witness' competence, predicate, to render an opinion? Has the witness ever seen a drunk person?

"Yes, he was drunk." "Describe what you saw." "The defendant's speech was slurred, his eyes were watery and unfocused, he could not walk straight, and he leaned on the wall."

"What do you think your house is worth?"

4.5 **Exception: F.S. §61.20 - Social investigation and recommendations regarding a parenting plan**

If a mental health professional is appointed in a case by an order under this statute he or she can do a "social investigation and study" which can include a "written statement of facts found in the social investigation on which the recommendations are based."

This statute is at Appendix A-25.

5. Some words about credibility, that is, whether a witness is believable

A finder of fact, a judge or a jury, as the case may be, is free to believe or disbelieve all or any part of the testimony of any witness, including the opinion of an expert witness. The finder of fact can consider how the witness acted as well as what the witness said. Some things the finder of fact considers in deciding if a witness is believable are:

(1) Did the witness seem to have an opportunity to see and know the things about which the witness testified? (Predicate.) (What did the psychotherapist do to arrive at her opinion?) (What are the qualifications of the expert?)

(2) Did the witness seem to have an accurate memory? (Selective memory.) (Can a parent find anything good about the other parent?)

(3) Was the witness honest and straightforward in answering the attorney's questions? (Evasive. Nonresponsive to the question asked. Responsive to the question or not answering the question. Bias of a witness.)

(4) Did the witness have some interest in how the case should be decided? (Bias.) (Dislike of one party.) (Can a parent find anything good about the other parent?) (Approval of one party.) (Emotionally invested witnesses are biased witnesses. Some psychotherapists are very emotionally invested in the outcome, which diminishes the weight of their opinions.)

(5) Does the witness' testimony agree with the other testimony and other evidence in the case? (Inconsistent, conflicting, contradictory testimony.)

(6) Has the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify? (The amount an expert has been paid or billed is always relevant and admissible evidence.)

(7) Had any pressure or threat been used against the witness that affected the truth of the witness' testimony? (Did one parent threaten the psychotherapist with an ethical complaint or a lawsuit? Was a parent rude and hostile to the psychotherapist and how did the psychotherapist handle a parent's bad behavior? Does the psychotherapist just dislike a parent and is this bias coloring the expert opinion?)

(8) Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court? (E.g., a party files several financial affidavits in the court file, none of which have the same numbers for income and expenses.)

6. <u>Parenting plan recommendation, mental health evaluation, social investigation, and parenting evaluation</u>

6.1 **Parenting plan recommendation** "means a nonbinding recommendation concerning one or more elements of a parenting plan made by a court-appointed mental health practitioner or other professional designated pursuant to s. 61.20, s. 61.401, or Florida Family Law Rules of Procedure 12.363." F.S. §61.046(15). Appendix page A-1.

6.2 **Guardian ad litem** F.S. §61.401 allows the court to appoint a guardian ad litem for a child in a Chapter 61 case, that is, a case between separated parents, and under F.S. §61.046(15) a guardian ad litem is authorized to make a parenting plan recommendation, along with the mental health practitioners allowed in §61.20 and Rule 12.363. F.S. §61.401 is attached as Appendix page A-26.

6.3 **Florida Rule of Civil Procedure 1.360** - This is the oldest rule regarding the mental or physical examination of a party or other person if the mental or physical health of a party or other person is "in controversy" in a lawsuit. There must be "good cause" for the physical or mental examination. Filing a lawsuit for a parenting plan does not make a party's physical or mental health "in controversy" and contesting a parenting plan is not a legally sufficient "good cause" justifying an order for a physical or mental examination.

6.4 **F.S. §61.20, Social Investigation** - In a dissolution of marriage or paternity case in which a parenting plan and a time-sharing schedule for children are at issue the court can order a "social investigation", which the case law says can include a psychological evaluation of the parties and the children.

Even so, is it necessary or helpful to the finder of fact? Will it make the litigation worse or better? Can the parties afford the cost? Also, what is a "social investigation"? The statute says the person doing the social study must "furnish the court and all parties of record in the proceeding a written study containing recommendations." Is this the same as a "parenting plan recommendation"? F.S. §61.20 is at Appendix page A-25.

6.5 **Rule 12.363 - Evaluation of a minor child** - *See* Appendix page A-26.

6.5.1 In a dissolution of marriage or paternity case in which a parenting plan and a time-sharing schedule are at issue, the court may "appoint a licensed mental health professional or other expert for an examination, evaluation, testing, or interview of any minor child or to conduct a social or home study investigation." So, this is very broad authority to appoint a psychotherapist to evaluate a child. There is no similar authority for a mental health evaluation of a parent. .

Consider: What is a "parenting evaluation"? What is a "psychological evaluation"? A "psychiatric evaluation"? These terms are not defined in this Rule or anywhere else. In my experience, mental health practitioners also do now have any accepted definition of these terms within the profession. As a result, the reports and testimony of mental health practitioners do not follow any uniform or consistent pattern.

6.5.2 The order "shall specify the issues to be addressed by the expert." The expert "shall prepare and provide a written report to the attorney for each party or the party if unrepresented ... a reasonable time before any evidentiary hearing on the matter at issue. The expert shall also send a written notice to the court that the report has been completed ..." ***So, <u>do not</u> send the report to the judge. Never send any report or letter to the judge, except you may send a letter saying a report is finished if you were appointed by an order under this Rule.*** This is basic "due process of law," that is, the judge cannot learn anything about a case except in the courtroom with both parties present. If one is absent, the court can proceed if the party received proper notice of the hearing or trial. "Secret" communications with the judge are prohibited by "due process." If a judge receives information about a case *ex parte*, that is, without both parties being present or noticed of the hearing, the judge may have to disqualify himself or herself from proceeding further in the case. If so, another judge will be appointed. Judges must be neutral and they must appear to be neutral at all times. The judge does not care which side prevails.

Note: If you think a child has been abused, abandoned or neglected, you must call the D.C.F. hotline. *Do not write a letter to a judge*. Judges decide factual and legal disputes. Judges do not conduct investigations.

6.5.3 The court "may order the expert to produce the expert's complete file to another qualified licensed mental health professional, at the initial cost of the requesting party, ..."

6.5.4 Further, "[n]o expert may communicate with the court without prior notice to the parties and their attorneys, who shall be afforded the opportunity to be present and heard during any such communication between the expert and the court." ***Again, this is "due process of law." Never send any report, letter or anything else to the judge except a letter saying the report is finished.*** The judge can consider only the documents admitted into evidence at a hearing.

6.5.5 "Due process" is what the law considers "fundamental fairness." "Due process of law" is "notice and an opportunity to be heard." Judges must learn everything they know about a case only in the courtroom at a trial or hearing for which both parties received notice and an opportunity to appear. Then the judge can consider only evidence that is properly admissible according to law. The report or anything else you think the judge needs to know may or may not be admissible in evidence according to law.

6.5.6 Finally, "[a]n expert appointed by the court shall be subject to the same examination as a privately retained expert and the court shall not entertain any presumption in favor of the appointed expert's findings."

6.6 **<u>F.S. §61.122 Parenting plan recommendation; presumption of psychologist's good faith; prerequisite to parent's filing suit; award of fees</u>**

This is a special statute passed in 2003 to insulate a "psychologist" from ethical

complaints and lawsuits from parents unhappy with a psychologists report or testimony in a Chapter 61 case, that is, a case between separated parents concerning a parenting plan. *See* Appendix page A-5.

Any other mental health professional does not enjoy the insulation from ethical complaints or lawsuits that this statute gives to psychologists.

Question: Why would any mental health professional do a parenting plan recommendation or a social investigation?

7. <u>A parenting plan must include a parental responsibility order and a time-sharing schedule</u>

<u>IF YOU READ NOTHING ELSE HERE, PLEASE READ THIS:</u>
<u>The "parental responsibility" order and the "time-sharing schedule" order are TWO SEPARATE AND DISTINCT ORDERS THAT MUST BE IN A PARENTING PLAN UNDER F.S. §61.13(2)</u>.
<u>So, a "shared parenting" order has nothing to do with the "time-sharing schedule" and a "sole parenting" order has nothing to do with the time-sharing schedule.</u>
<u>The facts of each case determine what is an appropriate parental responsibility order and what is an appropriate time-sharing order.</u>

7.1 **F.S. §61.046(14)** defines "Parenting plan" as "a document created to govern the relationship between the parents relating to decisions that must be made regarding the minor child and must contain a time-sharing schedule for the parents and the child."

7.2 **F.S. §61.046(14)(a)** requires the parenting plan to be "1. Developed and agreed to by the parents and approved by a court; or 2. Established by the court ... if the parents cannot agree to a plan or the parents agreed to a plan that is not approved by the court."

7.3 **F.S. §61.13(2)(b)** says a "parenting plan approved by the court must, at a minium, describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child; the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent; a designation of who will be responsible for any and all forms of health care, school-related matters including the address to be used to school-boundary determination and registration, and other activities; and the methods and technologies that the parents will use to communicate with the child."

So, it appears that an order for "parental responsibility" must be included in the "parenting plan," and the parental responsibility order has nothing to do with the time-sharing schedule, which is a separate concept and a separate order.

7.4 **"Parental responsibility" is not defined anywhere**. **However, "shared parental responsibility" is defined in F.S. §61.046(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*."** (*Emphasis supplied.)* Appendix page A-3 for definition of "shared parental responsibility"at §61.046(17). This concept is nothing new. It first entered Florida law in 1982.

7.5 **So, *"parental responsibility" means the responsibility to make parenting decisions for the child after the parents separate*** and the "parental responsibility" order must spell out how the parents will make parenting decisions now that they are separated.

7.6 **Since 1982 there are only three options for the "parental responsibility" order** allowed by §61.13(2)(c)2. & a. & b.:

(1) ***sole parental responsibility*** to one parent over some or all aspects of the child's life;

(2) ***shared parental responsibility***, in which the parents confer, consult and agree on all parenting decisions; or

(3) ***shared parental responsibility with ultimate responsibility*** to one parent or the other over certain named aspects of the child's life or over all aspects, such as education, extra-curricular activities, medical treatment, etc., if the parents do not agree on decisions in those aspects of the child's life.

7.7 **F.S. §61.13(2)(c)2., *requires the court to order "shared parental responsibility" in every case "unless the court finds that shared parental responsibility would be detrimental to the child."*** So, this statute assumes that nearly all separated parents are going to behave, cooperate, communicate, and be nice to each other when it comes to raising their children, because this law requires the court to order shared parental responsibility in every case, unless a party pleads and proves shared parenting would be detrimental to the child. It is, of course, nonsense to assume nearly all separated parents can do this. Although this is nonsense, most lawyers and parties indulge in this nonsense by routinely pleading only for "shared parenting" in their petitions. Nearly all petitions ask only for a "shared parenting" order and very few ask for "sole parenting" and very few allege a detriment to the child if "shared parenting" is ordered, even though in most litigated cases the parties have never demonstrated a capacity to share any parenting decisions.

7.8 **Shared parenting should not be agreed upon where the parents cannot in fact share parenting decisions**. Most mediators and almost all settlement agreements also indulge in the statute's nonsensical assumption by routinely providing in settlement agreements that the parties will "share parenting" even when there is considerable evidence that the parents are incapable of sharing a single parenting decision. Cases with these agreements often return to court post judgment because the parties cannot confer together and make joint parenting decisions.

7.9 **Parental responsibility after parents separate. It is not what you think**. In cases in which a settlement agreement or a judgment said the parents will "share parenting" family judges are frequently asked in post judgment motions to decide if a child should take medication for ADHD, depression, a bipolar condition, etc., or to decide which school the child will attend,or which church the child will attend, etc., because the parents cannot "confer with each other" and "share" these parenting decisions and neither one has any authority to make the decision alone because the order in their case requires them to "share parenting decisions."

In my experience, however, medical providers - doctors, hospitals, etc. - are not bothered by a "shared parenting" order, if they ever learn of it at all. They will generally take the consent of one parent if medical treatment is needed. It seems that most of them assume the parent presenting the child for treatment is the "custodial parent" or "primary residential parent", maybe because the child lives most of the days of the year with the presenting parent. *However, these terms do not exist in Florida law and they have no meaning under Florida law*. It seems that medical providers and many parents assume the "custodial parent" has "the right" to make all medical decisions for the child, but this is a false assumption.

Since 1982, Florida law, that is, §61.13(2), has required separated parents to "share parenting" decisions unless a court has ordered that would be detrimental to the child, in which case the court can order "sole parenting" to one parent or the other over some aspect of the child's life, say, medical care or education, or over all aspects of the child's life.

Occasionally, medical providers find themselves in a bind, when both parents appear and do not agree on a treatment, and then the parties must come to the court to argue their positions about the merits or demerits of a proposed treatment. Medication for a diagnosis of ADHD or a bipolar condition are very common post judgment disputes between parents.

However, there is no authority that a judge in a Chapter 61 case has the power to make such a parenting decision. A Chapter 61 judge has no authority to become a "super parent." On the contrary, the statute, §61.13(2), allows the judge only to "pick a parent" by making a "sole parenting" order over an aspect of the child's life, such as medical care, if the parents do not agree about parenting decisions in that aspect.

A Chapter 61 case is a case between separated parents. On the other hand, a Chapter 39 case is a case in which one or both parents are alleged to have abused, abandoned or neglected the child so that the child is dependent until the parents are rehabilitated or the parents' parental rights should be terminated. In a Chapter 39 case the judge is authorized to make parenting

decisions concerning the child, for medical treatment or otherwise, if the child does not have a functioning parent. *See, e.g.,* F.S. §39.407(2)(a). So, a Chapter 39 judge has the power to be the child's "super parent."

There is no similar provision in Chapter 61 because in a Chapter 61 case the child has two functioning parents. Therefore, one or both of the parents must make all parenting decisions after the parents separate. If the parents have a "shared parenting" order, in a settlement agreement or a judgment, and they do not agree on a parenting decision, then they cannot "share" a decision and they cannot make a "joint" parenting decision.

In this event one of them must return to court and file a supplemental petition that asks for a "sole parenting" order. The supplemental petition must allege the disagreement on a parenting decision, that the disagreement is detrimental to the child, and that the petitioner asks for "sole parental responsibility" over an aspect or all aspects of the child's life. After a trial on such a supplemental petition the judge in a Chapter 61 case has the authority to "pick a parent" to make the parenting decision. The Chapter 61 judge can only order either "shared parenting" or "sole parenting" and then only after "due process of law" has been complied with.

7.10 **"Due process of law" trumps the "best interest of the child"** Procedural law, that is, "due process of law", requires that a party must plead in a petition that shared parental responsibility would be detrimental to the child and plead facts demonstrating the detriment before the court has authority to order anything other than "shared parental responsibility," because the statute says the court must order shared parental responsibility in every case unless detriment to the child is proven if that is ordered. Further, a petition can be decided only after a trial on the merits of the petition.

"Due process" requires "notice and an opportunity to be heard", so if a party does not ask for a particular relief allowed by law in a complaint or petition, *the court has no authority to grant the relief even if it is obvious that the best interests of the child require shared parenting not be ordered, say because the parents bicker and fight and cannot talk to each other or behave civilly or politely around each other*.

7.11 **Case law says that 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). This is also common sense, for which no appellate decision is needed. If parents were ordered in a case to "share parenting" and in fact the parents do not share parenting decisions, the child might suffer because neither one of them has unilateral authority to make sole parenting decisions. The child might also suffer because, having been ordered to make joint parenting decisions, dysfunctional parents bicker and fight about parenting decisions. Any argument between the parents is detrimental to the child. No citations are necessary for that proposition. *See, e.g.,* <u>*Caught in the Middle: Protecting the Children of High-Conflict Divorce*</u> (Garrity & Baris, Lexington Books 1994).

7.12 **So, a parent seeking sole parental responsibility must plead for sole parental responsibility**. A trial court has no authority to order sole parenting if there is no pleading asking for sole parenting and an allegation of a detriment to the child if shared parenting is ordered. *See, e.g., Furman v. Furman*, 707 So.2d 1183 (Fla. 2d DCA 1998); *McDonald v. McDonald*, 732 So.2d 505 (Fla. 4th DCA 1999); *McKeever v. McKeever*, 792 So.2d 1234 (Fla. 4th DCA 2001).

7.13 **So, in every case that is litigated, the parties should both plead in the alternative for all three options for parental responsibility allowed by the law, that is, (1) sole parental responsibility over some or all parenting decisions to one parent or the other; (2) unlimited shared parental responsibility over all parenting decisions; or (3) shared parental responsibility with ultimate responsibility over some or all parenting decisions to one parent or the other.** §61.13(2)(c)2., a.

7.14 **Case law allows the third alternative and explains what it means**. *See Watt v Watt*, 966 So.2d 455 (Fla. 4th DCA 2007); *Hancock v Hancock*, 915 So.2d 1277 (Fla. 4th DCA 2005); *Schneider v. Schneider*, 864 So.2d 1193 (Fla. 4th DCA 2004). These cases say the court can give one parent "ultimate authority" over some or all aspects of the child's life as part of a "shared parenting" order, because this is literally what the statute says the court can do. An "ultimate responsibility shared parenting order" allows the parent given "ultimate authority" over an aspect of the child's life the authority to make a decision when the parents do not agree. The other parent can make a motion to have that parenting decision reviewed by the court.

Note: This third alternative may not in the child's best interest because it gives the parties a means to continue the lawsuit ad infinitum.

7.15 **A question not answered by the case law is whether a request for "shared parenting" in a petition is sufficient notice to the other side for an order for either (2) unlimited shared parental responsibility over all parenting decisions, or (3) shared parental responsibility with "ultimate responsibility" to one parent over some or all parenting decisions.** The better practice for lawyers and parties, of course, is to plead in the alternative for all three options so there is no question that the other side was put on notice and then the court has the authority to order one of the three alternatives allowed by §61.13(2).

7.16 **So, to summarize F.S. §61.13(2)** : The concept of "shared parenting" has nothing to do with the "time-sharing schedule." <u>"Shared parenting" does not mean "joint custody."</u>"<u>Joint custody" is NOT a concept under Florida law. "Shared parenting" does not mean "the child must live half the time with each parent."</u>

"Shared parental responsibility" or "shared parenting" and "sole parental responsibility" or "sole parenting" are concerned with parenting decision making and how parenting decisions will be made now that the parents are separated. If the parents cannot demonstrate a capacity to

share parenting decisions, for whatever reason, then the court should not order "shared parenting." Rather, the court should order either "sole parenting" or "shared parenting with ultimate responsibility" to one parent. The goal of every lawsuit is to end the dispute with a decision. Ordering dysfunctional parents to "share parenting" will not end the dispute. On the contrary, it will continue the disputes and the lawsuit. This is not in the child's best interest. *See, e.g., Roski v. Roski*, 730 So.2d 413 (Fla. 2d DCA 1999).

An inability of the parents to communicate and cooperate and share parenting decisions is a sufficient detriment to support a sole parenting order. *Roski, supra.*. Of course, a family judge inherits many cases in which the parties agreed in a settlement agreement to "share parenting", even though they cannot actually do that. These cases often return to court for post judgment disputes, such as asking the judge to approve a course of medical treatment, pick a school, approve an extracurricular activity, etc. When these case come back to court, the court's authority post judgment is the same as it was prejudgment. The court can only "pick a parent" to make a sole parenting decision that the parties cannot agree on, and the court can order "sole parenting" only after a trial on a supplemental petition in which a party asks for "sole parenting" and alleges a detriment to the child if "shared parenting" is ordered, e.g., an inability of the parents to agree on a parenting decision.

7.17 **The time-sharing schedule should be very detailed.** A parenting plan must also include a time-sharing schedule that spells out the child's contact with both parents throughout the year. My time-sharing schedules are typically three or four pages long, single spaced. If appropriate, the time-sharing schedule may order supervised contact or no contact at all with a parent.

F.S. §61.13(3) lists 20 factors that the court must consider in establishing a parenting plan and a time-sharing schedule.

The psychotherapist doing a "parenting evaluation" or a "social investigation" in which a parenting plan or time-sharing schedule are recommended must also consider these factors in the report. This statute is at Appendix page A-14.