

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

**M. M. M.,
Mother & petitioner,**

**vs.
A. R. B.,
Father & respondent,**

Case No. 0 DR 0 N

**FINAL JUDGMENT ON MOTHER'S SUPPLEMENTAL PETITION
AND ORDER ON MOTHER'S MOTION FOR CONTEMPT**

This matter having come before the court on 9/7/2010 on the mother's supplemental petition to modify filed 3/25/2010 and also the mother's "Motion for Contempt" filed 5/24/2010, it is ordered:

1. Findings

The parties are the parents of a minor child, C. A. B., born (*Date omitted.*). A Final Judgment of Paternity was entered on 5/27/2009. It adopted the parties' mediated settlement agreement dated 3/18/2009. That first mediated agreement agreed upon a child support order and a limited time-sharing schedule. Thereafter, the parties reached a second mediated agreement dated 9/11/2009 that changed the time-sharing schedule and made no change to the child support order of the first mediated agreement.

The mother's supplemental petition filed 3/25/2010 asks the court to change the time-sharing schedule agreed upon in their second mediation agreement dated 9/11/2009. That schedule provides the child with a schedule in which she is with the father three days a week and with the mother four days a week. The mother's supplemental petition also asks to modify the child support order by increasing the child support payable by the father because "the Father's income has increased." No other basis is alleged for increasing the child support payable by the father.

The father filed an answer to the mother's supplemental petition. His answer denies the essential allegations of the mother's petition. Therefore, the issues at the trial were framed by those pleadings, that is, her petition and his answer.

The mother also noticed for hearing at trial her "Motion for Contempt" filed 5/24/2010. That motion alleges that the father has not paid "his share of the child's medical expenses," as he agreed to do in the parties' first mediated agreement dated 3/18/2009. She alleges that agreement provides that the parties "shall equally share any of the child's medical expenses not covered by insurance..." Her motion asks that the court order the father to "pay his share" of the child's uncovered medical expenses. She also asks for her attorney's fees incurred to bring the motion.

The Trial Order dated 5/11/2010 set the mother's supplemental petition for trial on the

issues framed by the pleadings. The father says he served a supplemental petition on the mother by mail on 9/1/2010, but there is no such petition filed in the court file or noted in the clerk's computer as of 9/7/2010. Further, there is no return of service in the record that demonstrates service of a summons and a copy of a father's petition on the mother and there is no voluntary response by the mother to any petition of the father. In any event, a supplemental petition of the father was not extant in the record when the Trial Order was entered, so there cannot be a father's petition at issue at trial. Therefore, the only petition at issue at trial was the mother's supplemental petition filed 3/25/2010. No other allegations were tried by the consent of the parties.

The mother has a list of complaints about the father's care of the child. She first complains that for the "first 10 months" of the child's life the father was "uninvolved" with the child.

She next says that on Thursday 2/18/2010 the child ate "pills" while she was at the father's mother's house. The "pills" were lying about and she picked up some and ate them. The father had left the child unattended in a room where the pills were lying about. When he came back into the room he knew some pills were missing and he noticed the child was demonstrating symptoms consistent with having eaten some of the "pills." The father took the child to a hospital emergency room. He called the mother from there to ask her if the child had any allergies, because this was a question he was asked by the medical staff, but he did not then tell the mother where the child was located. The mother answered the question and the father then hung up. The mother was disturbed by the question and the hang up and she called him back. He then told her the child was at the hospital. The mother went to the hospital and stayed there with the child until she was discharged four days later. There is no evidence that the child suffered any permanent injury.

The parties both testified that a D.C.F. worker told the father that he cannot leave the child unattended at his mother's residence and that he must supervise the child while the child is at his mother's residence. The father is following this direction. There is no competent, substantial evidence to the contrary.

On 2/25/2010 the child was bitten by a dog while at the father's brother's house. The father treated this bite with an over the counter medication and bandages. When the mother saw the injury she took the child to the doctor, who prescribed an antibiotic.

About "two months ago" the mother picked up the child from the father and she had blood coming out of an ear. The doctor found no infection or injury and suggested the blood could have come from a foreign object in her ear.

On a Thursday near the end of June 2010 the father "forgot" to pick up the child at day care and the day care called the mother to come pick up the child. The father arrived at the same time as the mother. He said he had been at work and he "forgot" to pick up the child, thinking it was Wednesday, a mother's day to pick up the child, rather than Thursday, which is his day to pick up the child. Sometime after that incident, he was "late again."

The Sunday before the trial, the mother noticed "ant bites" on the child's legs and arms when she picked up the child. The father refused to talk to the mother about this.

In general, the parents have very poor communication and cooperation concerning their child. Both place their own interests, particularly their interest in being unpleasant to each other,

ahead of the child's best interest, particularly her interest in having parents who will communicate and cooperate for her best interest. The parties have no respect for each other.

Regarding the mother's request to increase the child support because "the Father's income has increased", the existing child support order dates from the parties' first mediated settlement agreement dated 3/18/2009, which was incorporated into the Final Judgment of Paternity dated 5/27/2009. It orders the father to pay the mother child support of \$303 per month. It is based on a child support calculation showing \$686 gross monthly income for the father, \$2,307 gross monthly income for the mother, an employment day care expense for the mother of \$540 per month ($\$405 = 75\%$, so $405/.75 = \$540$), no monthly premium for the mother's health insurance, and a monthly health insurance premium for the child of \$256 paid by the mother. At the time of that agreement, the child had limited time-sharing with the father. Not until the second mediated agreement dated 9/11/2009 did the parties agree upon the Thursday afternoon to 9 a.m. Sunday schedule for the child's time with the father.

Presently, the mother is the manager of a video game store. She earns \$16.35 an hour and she works 44 hours a week, so she earns \$720 gross per week and \$3,115 gross per month. ($\$16.35 \times 44 \times 4.33$) The mother has employment day care expense of \$130 per week, or \$563 per month. ($\$130 \times 4.33$) The mother pays \$30 per pay period for her health insurance and \$30 per pay period for the child's coverage. The mother is paid every two weeks or 26 times a year, so the monthly health insurance amount for the mother and the child is \$65 per month for each. ($\$30 \times 26/12 = \65)

Presently, the father works for 7- Eleven, Inc., he says "part time." He says that he earns \$330 every two weeks, or \$715 gross per month. ($\$330 \times 4.33/12$) His pay rate is \$8.25, which is confirmed by his pay stub filed 8/18/2010 for period ending 7/2/2010. That pay stub also shows that he worked 43.74 hours that week. Assuming he works 40 hours at that rate of pay, his gross monthly income would be \$1,430. ($40 \times \8.25×4.33)

Until around 7/20/2010 the father held two jobs, one at Baby's R Us and another at 7-Eleven. He said he has worked for both of those employers "off and on" since 2004. He says he quit the Baby's R Us job "in July" and started working "part time" at 7-Eleven so that he could attend F.G.C.U. full time in the current semester. This is his first semester as a college student. He is taking "five classes." The father is 23 years old. He says he wants to become a school teacher.

The father owes child support of \$303 per month or \$69.92 per week per the prior order. An income deduction order was in place but only Baby's R Us has deducted support from his wages. Apparently, 7-Eleven is not aware of the income deduction order. So, the last payment of child support occurred on 7/20/2010, which was the father's last pay period with Baby's R Us. The father has not himself paid the support to the depository and 7-11 is not deducting it from his pay as required by the income deduction order. A depository case history in evidence shows that the arrearage is \$559.18 as of 8/29/2010.

The father says he is now supporting himself from his job at 7-Eleven and "loans" of unspecified amounts from unspecified relatives. The father believes the parties' prior agreement requires the child support to be recalculated and reduced and that it requires the parties to agree to

an “equal” time-sharing schedule.

In fact, the parties’ first mediated agreement dated 3/18/2009 states that the parties have a “goal of obtaining an equal time-sharing arrangement” but it does not provide that the support will be reduced if that “goal” is achieved.

Further, in their second mediated agreement dated 9/11/2009 the issue of child support is not addressed at all. That agreement instead dealt only with time-sharing and it resulted in an agreement for the present schedule, in which the child is with the father from pick up at day care on Thursday afternoon to 9:00 a.m. on Sunday when the mother picks up the child from the father’s residence. This agreement also provides that “[i]t is anticipated that this schedule shall continue once regular school start. (*sic*)” Paragraph (19) of the agreement demonstrates that the unequal schedule agreed upon is a final resolution of the father’s argument for a “50/50” time-sharing schedule, and paragraph (20) of that agreement acknowledges “that child support needs to be modified and the parties agree to try to mediate this issue ...”, but apparently that effort was not successful and they never agreed to a modification of the child support order.

The father believes that if he can work as a teacher this would be “better” for Chloe than working as a clerk at 7- Eleven or at Baby’s R Us, that he would earn a higher income. Therefore, as he sees it, going to college is in the child’s best interest. The father goes to school this semester from Monday to Thursday and he is with the child on Thursday afternoon, Friday, Saturday and Sunday until 9 a.m. The father has a grant that covers his tuition. He pays for his books himself.

Pursuant to the existing child support order in the first mediated agreement, which was not modified by the second mediated agreement, the father owes the mother for his “equal” share of the child’s uncovered medical bills. The mother incurred uncovered bills for the child reflected in statements dated 6/11/2010 and 2/18/2010, of \$573.80 and \$50.15, respectively. Mother’s Exhibit 1. She has provided the father with copies of these bills but he has not reimbursed her for one-half as he agreed to do in the mediated agreement.

The mother incurred these bills so she is liable on these bills. She has already paid the first one. The father is obligated to promptly reimburse her for one-half of uncovered bills of the child that she incurs when she requests reimbursement, whether that is before or after she pays them. Likewise, the mother has the same obligation for uncovered medical bills that the father might incur. The father must reimburse the mother directly. The prior order requires the parties to “equally share” uncovered medical bills that either of them incurs for the child.

2. Ruling

2.1 Mother’s supplemental petition to modify the time-sharing schedule is denied The mother’s supplemental petition to modify the time-sharing schedule is without merit and it is denied. The incidents complained of by the mother do not amount to a substantial change in circumstances. *Wade v. Hirschmann*, 903 So.2d 928 (Fla. 2005); *Sanchez v. Hernandez*, ___ So.3d ___ (Fla. 4th DCA 2010).

Rather, the evidence demonstrates that the parents’ do not cooperate, do not communicate and do not have any respect for each other, to the detriment of their daughter, and that this has

been the situation since she was born, so nothing has changed.

The court observes that the parties might benefit from counseling with a master's level counselor, either one on one or, if possible, in couple's counseling, so they could learn to put aside their obstacles to working together for the benefit of their daughter. However, the court has no authority to order any counseling for the parties or the child and the court does not do so now.

2.2 Mother's supplemental petition to modify the child support order is denied Attached as Exhibit A is the court's child support calculation based on the allegations of the mother's petition, that is, that the father's income has increased and therefore the child support obligation has increased.

The court's jurisdiction to modify the child support is limited to the allegations of the mother's petition. *See, e.g., Causey v. Causey*, ___ So.3d ___ (Fla. 1st DCA 2010), in which the trial court was reversed for making changes to a child support order that were not requested in a pleading; *Todaro v. Todaro*, 704 So.2d 138 (Fla. 4th DCA 1997), in which the father filed a supplemental petition to reduce the child support payment and alleged as the basis for the reduction that the mother was "making more money," and at trial offered proof only that his income "had been reduced", and the appellate court reversed because his pleading did not put the mother on notice that the reduction in his income was a basis for reducing the child support; *Seiberlich v. Wolf*, 859 So.2d 570 (Fla. 5th DCA 2003), in which the court held that §61.30(1)(a) makes the application of §61.30(1)(b) mandatory and requires the trial court to reduce a child support obligation if the child spends a "substantial amount of time" with the payor under the time-sharing schedule.

Therefore, based on the mother's allegation in her supplemental petition, the attached calculation, Exhibit A, uses the time-sharing schedule now in effect and it uses the figures from the prior order, that is, the mother's monthly income of \$2,307, her day care expense of \$540 per month, her payment for the child's monthly health insurance expense, \$256 per month, her payment for her own health insurance premium of \$0.00 per month, and it changes only the father's income by increasing it to the present amount, \$1,430 per month. The result is a decrease in the support amount, to \$197.36 per month. Therefore, the mother's alleged basis for an increase in the child support amount, that the father's income has increased, has no merit and her petition to increase the child support is denied.

The court notes that a calculation based on current findings of all of the variables required for a present guideline calculation also does not increase the child support payable by the father, but it does not reduce a present calculation to less than zero, as argued by the father at trial. That calculation is not attached because that calculation is not required by the issues framed by the pleadings.

Because the mother's allegations are not proven the court does not decide the father's claim that the court should reduce the child support because his voluntary decision to attend college, which reduces his income, is in the child's best interest and therefore a legally sufficient basis to reduce the child support under the authority of *Overbey v. Overbey*, 698 So.2d 811 (Fla.

1997).

In passing, the court notes that the factual basis for the father's *Overbey* claim is not alleged by the father in a supplemental petition to reduce the child support. The father had no supplemental petition at issue at the trial.

The court also notes that there is no supplemental petition by either party at issue at trial that alleges a substantial increase or decrease in the child support amount because (1) the mother's income has increased, (2) the employment day care expense has changed, (3) the mother's health insurance premium for herself has changed, or (4) the premium for the child has changed, or that otherwise alleges a substantial change in circumstances based on changes in the variables required for a guideline calculation and which requests a final judgment that orders a new child support amount based on a guideline calculation that uses current findings of the variables required for a present guideline calculation.

2.3 Mother's motion for contempt is granted The court finds the father is in willful contempt of the prior order requiring him to pay an "equal" share of the child's uncovered medical expenses. The mother incurred uncovered bills for the child reflected in the statements dated 6/11/2010 and 2/18/2010, of \$573.80 and \$50.15, respectively. Mother's Exhibit 1. She provided the father with copies of these bills but he has not reimbursed her for one-half as he agreed to do in the first mediated agreement.

Therefore, the father is ordered to promptly reimburse the mother for one-half of these amounts, or \$311.98, by a check mailed directly to the mother. He has not paid his child support since July so he has the present ability to pay this amount.

The court reserves for further hearing the mother's request in her motion for attorney's fees to bring the motion before the court, both entitlement and amount.

The court reserves jurisdiction for further enforcement proceedings on the mother's motion for contempt in the event the father does not promptly reimburse the mother as ordered here, including but not limited to: (1) a fine, (2) payment of the mother's attorney's fees for further work to enforce her motion, (3) community service hours, and (4) an indirect criminal contempt proceeding under Rule 3.840.

3. Attorney's Fees, Costs, and Suit Money The court reserves jurisdiction over the issue of attorney's fees, costs, and suit money, both entitlement and amount, for further hearings. Any further hearing on these issues must be preceded by a motion by either party asking for fees, costs or suit money, and a notice of hearing on the motion.

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

Copies provided to:
 , Esq., and , Esq.

R. Thomas Corbin, Circuit Judge