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

C. M.,
Husband,

vs. **Case No. XX DR YYYY N**
A. M.,
Wife,

ORDER DENYING MOTHER'S MOTION TO ALLOW TRAVEL

This matter having come before the court today on the mother's motion to allow the child to travel to Columbia, it is ordered:

1. Findings

The parties have a minor child, T. M., born (*Date omitted*). The mother's motion asks the court to order that the child may accompany the mother on a trip to Columbia. The mother is a U.S. citizen and a Columbian citizen. The mother plans to visit family members in Columbia. The father is opposed to this trip for the child.

On 4/28/2010 the parties filed a "Partial Mediated Settlement Agreement" in which they agreed to "share parental responsibility" for the child.

Foreign travel in this family is a major parenting decision. The mediated agreement provides that the parties "shall be entitled to take the child anywhere within the boundaries of the United States for vacation without the consent of the other parent." It also provides that foreign travel is an issue that is not resolved by their mediated agreement. The agreement notes that foreign travel for the child is not resolved by their mediated agreement: "Whether either party shall be entitled to take the child out of the country for vacation." Nevertheless, they did agree to share all major parenting decisions and foreign travel in this family is a major parenting decision.

The mother, at least, understands that she and the father agreed to share all major parenting decisions, but her understanding is not consistent. She has some understanding of what "shared parenting" means, but not thoroughly. Today, in argument, she complains that the father has taken the child to a mental health therapist without her participation in the decision, a complaint for which no motion is pending. Nevertheless, ironically, she argues that her unilateral decision about foreign travel should prevail.

2. Ruling

The motion is denied. The parties agreed to share parenting decisions. About the decision of the child making a trip to Columbia, they disagree. The child's life and safety are not at issue, so the court has no power to overrule either parent's decision regarding foreign travel.

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. Many parents and many courts confuse these two questions. Some reported decisions use the term "shared parenting" when referring to the time-sharing schedule, which is not helpful. "Shared parenting" is not a description of a time-sharing schedule. It is one of the alternatives for parental decision making allowed by §61.13(2).

"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. 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 has three alternatives:
(1) the parents must share parental responsibility for all decisions; or
(2) the parents must share parental responsibility and one parent or the other 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. 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); or
(3) one parent may have sole parental responsibility over all parenting decisions.

These are the only three alternatives 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 the first alternative, shared parental responsibility, unless that would be detrimental to the child, in which case the court can order sole parental responsibility. A pleading and finding of detriment to the child is not necessary if shared parental responsibility with ultimate responsibility is sought by a party.

Due process requires that a party must plead specifically for sole parental responsibility, if that is sought, and the petition must also allege ultimate facts that demonstrate detriment to the child. A party must also plead specifically for shared parental responsibility with ultimate responsibility to one parent over one or more aspects of the child's life, if that is sought. So, pleading and proving detriment if shared responsibility is ordered is not a requirement of the statute if ultimate authority is sought, but sole parental responsibility can be ordered only if a party pleads and proves that a shared parenting order would be detrimental to the child. §61.13(2) and *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).

Of course, a party may plead alternatively for all three alternatives allowed by law. Fla. Fam.`

L. R. P. 12.110; Fla. R. Civ. P. 1.110(b).

So, 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." Many settlement agreements agree upon "shared parenting." *However, "to share" means "to confer ... so that major decisions ... will be determined jointly."* So, if shared parental responsibility is ordered, then *each parent has an equal say* in major decisions concerning the child. So, if shared parenting is ordered and the parents have a disagreement on a major decision, it is not for the court to say who is right or who is wrong. They each have equal control over parenting decisions. In such a situation, nothing happens, so long as a risk to the child's life or safety is not at stake. It is not for the court to decide the winner of the debate. The court in a Chapter 61 case has no power to overrule a jointly made parenting decision or to make a parenting decision when the parents ordered to share parenting are at an impasse.

The court in a Chapter 61 case cannot substitute its judgment for the parenting decision of either parent because the child has two fit and competent parents, absent any allegations and proof that one or both of the parents are unfit because of abuse, abandonment or neglect. Chapter 61 does not give the judge the authority to become a "super parent" empowered to make parenting decisions for the child or overrule a parenting decision or decide a parenting decision when parents ordered to share parenting are at an impasse. *See Martinez v. Martinez*, 573 So.2d 37 (Fla. 1st DCA 1990), in which the court said: "[§61.13(2)] contemplates that parents, not the courts, have the responsibility of determining where their children will attend school. In situations where the parents are unable to agree on the education of their children, the court is required to designate, based on the best interests of the children, one parent to have the ultimate responsibility for making decisions regarding that specific aspect of the children's welfare. ... We decline to construe [§61.13(2)] as giving a trial court authority to direct which school the children shall attend; that section only authorizes the court to determine, based on competent substantial evidence, which parent shall make that decision based on the best interests of the children." *Id*. at 41.

In *Martinez*, the issue of the school the children would attend came up at trial on the merits of the initial petitions and no parental responsibility order had yet been entered, so the appellate court remanded for the trial court to conduct further proceedings and to pick a parent to decide upon the children's schools. Of course, before the trial court had the authority to do that, a party had to plead either for (1) sole parenting authority or (2) shared parenting authority with ultimate authority over education decisions to one parent. The court's authority to designate a parent to make unilateral parenting decisions is limited by traditional concepts of due process, that is, if a party does not plead for a certain relief, the court cannot order it even if the substantive law allows that relief. *See, e.g., Furman v. Furman, supra*, and *McDonald v. McDonald, supra*. In this case, however, the parties have already agreed to "shared parental responsibility" so the court in this case has no authority to pick a parent and no authority to grant either party unilateral parental decision making authority.

The reasoning in *Martinez* applies to every major parenting decision in this family. Foreign travel is a major parenting decision in this family. The parents, not a judge, make parenting decisions for their child and in this family the parents have agreed upon shared parental responsibility. Now, they do not agree about a trip to Columbia, so that is the end of the matter in this Chapter 61 case.

By comparison, Chapter 39 does give the judge the authority to make parenting decision for a dependent child. In a Chapter 39 case the issue is whether one or both parents are unfit because of abuse, abandonment or neglect of the child. In such a case if there is no fit parent, then the judge is a "super parent" empowered to make parenting decisions for the child. *See, e.g.,* §39.407(2)(a)2. The judge in a Chapter 61 case has no such authority.

The judge in a Chapter 61 case can only order one of the three alternatives for parental responsibility allowed by §61.13(2), and the judge can order sole parental responsibility or shared parenting with ultimate responsibility over aspects of the child's life only if there is a petition asking for that relief, and if sole parental responsibility is sought, then factual allegations of detriment to the child if shared responsibility is ordered must also be pled. Here, of course, the pleadings are closed on the issue of the parental responsibility order. The mediated agreement provides that shared parental responsibility is the order in this case.

For the foregoing reasons, the mother's motion is denied. Shared parental decision making having been agreed upon in this case, the court has no authority to overrule either parent's parenting decision and the parents must reach joint, shared decisions or they just disagree, just like parents in an intact marriage may agree or disagree about decisions concerning their child and a court cannot intervene so long as the child's life and safety are not threatened.

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

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R. Thomas Corbin, Circuit Judge

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