

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

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

1.2 Legal duty of both parents The court here advises both parties of Florida law regarding the legal duty of both parents when they are separated.

After parents separate, regardless of which of the three alternatives for parental responsibility that is ordered, **both parents have a legal duty to promote the other parent to the children, and the children have a right to frequent and continuing contact with both parents:**

"It is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing. ..." §61.13(2)(c)1.

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

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

This duty of both parents is especially the obligation of the parent with whom the children live most of the time. The children cannot have a relationship with the other parent without the continuous effort of the parent they live with most of the time to promote and encourage their relationship with the other parent.

Florida law also provides:

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

"When a parent refuses to honor the other parent's rights under the time-sharing schedule, the parent whose time-sharing rights were violated shall continue to pay any ordered child support ..." §61.13(4)(b).

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

Therefore, both parents must put aside their differences and interests, and they must both continuously encourage and promote a relationship between the children and the other parent. This is what the law requires and this is what the court now orders. If either of them fails to do this, the court has jurisdiction to enforce the parental responsibility order and the time-sharing order by a motion for contempt. *See, e.g.,* §61.13(4)(c)1., 2., 3., 4., 5., 6., and 7. *The sanctions suggested by that statute for a parent who violates those orders include an order to perform community hours, a fine, an order to pay the other party's attorney's fees, and an order for the children to live with the other parent.*

1.3 All factors considered In deciding a parental responsibility order, a parenting plan and a time-sharing schedule, the court must make the children's best interest the "primary consideration," §61.13(3), and the court must consider all of the factors in §61.13(3)(a) - (t). In the decisions in this judgment the court has made the children's best interest the primary consideration and the court has considered all of the statutory factors.

Regarding the parental responsibility order, the court may consider the "expressed desires" of the parents in making that order, §61.13(2)(c)2. The court has considered the parent's expressed desires in deciding on the parental responsibility order.

Regarding the time-sharing order, the interests or wishes of the parents are not listed among the factors in §61.13(3)(a)-(t). This is not surprising because when it comes to the children's day to day schedule, the interests of the parents are sometimes at odds with the best interests of the children. Nevertheless, the court has considered their interests, biases and wishes with regard to the children.

There is no particular time-sharing schedule that is favored by the statute or assumed to be in the children's best interest. Every child is unique, every family is unique and every time-sharing schedule must be unique. Separated parents do not have a right to any particular parental responsibility order, parenting plan, or time-sharing schedule.

The children, on the other hand, have a right to "frequent and continuing contact with both parents after the parents separate," §61.13(2)(c)1., although the circumstances may require that the child's contact with a parent must be limited, supervised or ended altogether in order to promote the best interests of the child. *E.g., Hunter v. Hunter*, 540 So.2d 235 (Fla. 3d DCA 1989). The pleadings and the facts of each case determine what the court must order.

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1.4 All factors considered In deciding a parental responsibility order, a parenting plan and a time-sharing schedule, the court must make the children's best interest the "primary consideration," §61.13(3), and the court must consider all of the factors in §61.13(3)(a) - (t). In the decisions in this judgment the court has made the children's best interest the primary consideration and the court has considered all of the statutory factors.

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1.5 The parental responsibility order is separate from the time-sharing order Since 1982, Florida law has separated the children's "time-sharing schedule," which is the calendar schedule detailing where the children will be living every night during the year, from "parental responsibility," which is concerned with how parenting decisions will be made now that the parents are separated. *Session Law 82-96* effective July 1, 1982.

"Shared parenting" is not a description of a time-sharing schedule. It is one of the three alternatives for parental decision making allowed by §61.13(2). Some courts use the term "joint custody" when referring to "shared parenting," which is also not helpful. "Joint custody" is not a term that has ever been used in Chapter 61.

The order detailing where the children 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 2008-61* 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)(2012) 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. So, under the current statute the "time-sharing" order and the "parental responsibility" order must be two, separate orders.

"Parental responsibility" means parenting decision-making. The "parental responsibility order" does not specify where the children will be living from time to time during the year. *See* F.S. §61.046(17) & (18) (2012):

"(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.*)

Further, F.S. §61.13(2)(c)2.,a., provides:

"In ordering *shared parental responsibility*, the court may consider the expressed desires of the parents and *may grant to one party the ultimate responsibility over specific aspects of the*

child's welfare or may divide those responsibilities between the parties based on the best interests of the child. Areas of responsibility may include education, health care, and any other responsibilities that the court finds unique to a particular family.” (Emphasis supplied.)

So, the “parental responsibility” order is concerned with how parenting decisions will be made after parents separate, and the statute gives the court three choices in that order:

- (1) unlimited shared parental responsibility between the parents;
- (2) sole parental responsibility to one parent for all parenting decisions; or
- (3) shared parental responsibility with ultimate responsibility over one or more aspects of the child’s life to one parent or divided between the parents. *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);

Further, §61.13(2)(c)2, requires the court to order the first alternative, shared parental responsibility, unless that would be detrimental to the children, in which case the court can order sole parental responsibility.

However, although the statute allows the judge to order one of these three choices in the parental responsibility order, the procedural law limits the judge’s choice to the particular choice pleaded by the parties in their petitions. If no particular parental responsibility order is sought in a pleading, then the court can only order shared parental responsibility, even if that is not in the children’s best interest. *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) The procedural law, that is due process of law, requires that a party must plead specifically for sole parental responsibility or shared responsibility with ultimate responsibility, if either of these is sought. F.S. §61.13(2)(c), 2., provides:

“The court shall 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.... If the court determines that shared parental responsibility would be detrimental to the child, it may order sole parental responsibility* and make such arrangements for time-sharing as specified in the parenting plan ...” *(Emphasis supplied)*

So, if a party wants sole parental responsibility that party must plead for this choice and if a party wants shared parental responsibility with ultimate responsibility that party must plead for this choice but that party does not have to plead and prove detriment to the child. F.S. §61.13(2)(c)2., a.. If a party wants shared parental responsibility, then this is what the court must order in every case unless sole parental or shared with ultimate is pleaded and then a factual basis for one of these choices is proven at trial.

Of course, a party may plead alternatively for all three choices allowed by law. Fla. Fam. L. R. P. 12.110; Fla. R. Civ. P. 1.110(b). A “pleading” is a petition and an answer to a petition. A motion is not a pleading. Fla. R. Civ. P. 1.110(a).

1.6 Parental responsibility; detriment As discussed above, 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 children have 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 children or overrule a parenting decision or decide a parenting decision when parents ordered to share parenting are at an impasse. *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 would have the authority to do that, one of the parties must 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 allowed by law, the court cannot order it even if the substantive law allows it. *See, e.g., Furman v. Furman, supra, and McDonald v. McDonald, supra.* The pleadings put the parties on notice of the issues that will be tried at trial.

So, in a Chapter 61 case parties must plead for the particular parental responsibility order requested at trial, and if shared parental responsibility is ordered in a case, after the judgment is entered the judge has no power to overrule either parent and make a parenting decision. By

comparison, Chapter 39 does give the judge the authority to make parenting decisions 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 children. In such a case if both parents are unfit, then the judge is a “super parent” empowered to make parenting decisions for the children. *See, e.g.*, §39.407(2)(a)2.

A finding that the parents do not confer together and share parenting decisions is a detriment to the children sufficient for a sole parental responsibility order, *see, e.g.*, *Hunter v. Hunter*, 540 So.2d 235 (Fla. 3d DCA 1989); *Roski v. Roski*, 730 So.2d 413 (Fla. 2d DCA 1999); *Grigsby v. Grigsby*, 39 So.3d 453 (Fla. 2d DCA 2010).

This is a detriment to the children because after the parents separate the best interests of the children require that someone have parental responsibility, that is, the authority to make a parenting decision. If shared parenting is ordered but in fact the parents cannot share parenting and make joint decisions together so that they are each equal participants, then no parenting decision at all can be made. But parenting decisions must be made for the children constantly. So, in a case in which the parents cannot share parenting decisions, sole parental responsibility or shared parental responsibility with ultimate responsibility to one parent or the other must be ordered so that one of them, at least, has the authority to make a parenting decision.

In addition to the need for at least one parent to have parenting authority when the parents cannot agree, the parents inability to share parenting decisions is a detriment to the children if shared parenting is ordered, because a shared parenting order when the parents demonstrate they cannot agree is an invitation for further discord and further litigation. A goal of litigation under Chapter 61 is to reduce discord in the family and to reduce the sources of litigation, not increase it. §61.001(2)(c) provides that one of the purposes of Chapter 61 is:

“To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.”

As the court said in *Roski, supra*:

“This was the type of custody battle that makes the term ‘embittered’ a complete understatement. ... The trial court found that shared parental responsibility would be detrimental to the children. ... The record makes it clear that these parties were unable to reach agreement on any subject. Joint custody (*sic*) would be an invitation for weekly journeys to family court. ...” *Id.* at 414.

So, when parents cannot communicate and cannot cooperate concerning their children, the court should not order the parents to do what they have demonstrated they cannot do. Ordering such parents to share major parenting decisions, requiring them to confer together and make joint decisions, creates a situation that will keep the lawsuit going on and on with motions for contempt or supplemental petitions to modify. Continuous litigation is not in the children’s best interest and it is a detriment to the children. An object of every legal proceeding is to bring the case to an end, not leave it open to endless litigation. The object is to render a judgment that is truly final.

1.7 The pleadings

In this case the mother’s petition asks for XXX. The father’s petition asks for YYY.

[However, because neither parent in this case pled for sole parental responsibility in a petition

the court cannot order sole parental responsibility and the court must order shared parental responsibility even if the evidence demonstrates that the parents cannot confer together and share parental responsibility for their children. Due process of law prevents the court from ordering something that neither party asked for in a petition. *See, e.g., McDonald v. McDonald*, 732 So.2d 505 (Fla. 4th DCA 1999).]

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

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

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

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

1.8 Findings regarding the parental responsibility order and time-sharing schedule

In this particular family, from the evidence presented at the hearing the court finds:

[(1) The parents do not confer and consult together about major parenting decisions, for example, for example, exchanging the children's clothes and books, discussing their homework and school assignments;

(2) The parents do not communicate concerning their children;

(3) The parties have not demonstrated a capacity to share parental responsibility,

(4) This record demonstrates that these parents have not shared parental responsibility in any significant way;

(5) An unlimited shared parental responsibility order would be detrimental to the children because such an order would require these parents to confer with each other over all major parenting decisions but these parents are likely to argue and bicker in these consultations, which would be detrimental to the children;

(6) Because of the potential hostility and low level of communication between these parents, one parent or the other would simply take action and make major decisions concerning the children while the children were 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 and would lead to more disputes,

arguing and litigation between these parents; and

(7) Ordering these parents to share all parenting decisions when they have not demonstrated they are capable of sharing all major parenting decisions is not in the children's best interest because at least one parent needs the authority to make parenting decisions without being subject to repeated motions for contempt for violating a shared parental responsibility order. In sum, ordering shared parental responsibility in this case would create an open invitation "for weekly journeys to family court." *Roski, supra*.

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

[(1) The parties are ordered to share parental responsibility so that the Mother and the Father retain full parental rights and responsibilities with respect to their children. They are ordered to share parental responsibility so that they make all major parenting decisions together and jointly, concerning but not limited to the children's (a) education, including change of schools and school choice, (b) health care, including health insurance provider, mental health therapy and counseling, dental, orthodontic, and optical care, elective and emergency, (c) the choice of the employment day care provider and whether the children will be taken to a day care provider on any day, (d) extracurricular activities including sports, religious training, and summer camps and summer activities, and (e) all other aspects of the parenting of their children.

So, neither parent has unilateral parental responsibility or authority to make a major parenting decision alone and all major parenting decisions must be made jointly.]

[(1) The parties are ordered to share parental responsibility but the PPP shall have the ultimate responsibility for all aspects of the children's lives in the event that the parties do not agree about any major parenting decision, including but not limited to:

(a) education, including change of schools and school choice, so his residence is the child's residence for purposes of school choice, regardless of the time-sharing schedule;

(b) health care, including health insurance provider, dental, orthodontic, optical and mental health care, elective and emergency;

(c) the choice of the employment day care provider and whether the children will be taken to a day care provider or a care giver other than the SSS on any day assigned to the PPP under the time-sharing schedule.

Martinez v. Martinez, 573 So.2d 37 (Fla. 1st DCA 1990); *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).

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

[(1) The PPP is granted sole and exclusive authority to make all parenting decisions for

the children concerning but not limited to the children's (a) education, including change of schools and school choice; (b) health care, including health insurance provider, mental health therapy and counseling, dental, orthodontic, and optical care, elective and emergency; (c) the choice of the employment day care provider or other day care or before or after school program or summer activity, and whether the children will be at a day care provider or program or activity on any day; (d) extracurricular activities including sports, religious training, and summer camps and summer activities; and (e) all other aspects of the parenting of the children. The PPP is not required to consult or confer with the SSS about any decision and the decision in any parenting issue belongs to the PPP solely and exclusively. The court has considered all of the factors in §61.13(3) and the expressed desires of the parents in making this sole parental responsibility order.]

(2) **The court does not reserve jurisdiction over this parental responsibility order.** This is a final order of parental responsibility.

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

1.10 Time-sharing schedule; jurisdiction

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

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

(3) Day care during a parent's assigned days Under the attached time-sharing schedule, the parents are not required to make use of each other for employment day care or as care givers for any other reason on his or her assigned days under the time-sharing schedule. So, the parents may make whatever child care arrangements he or she wishes with whomever they wish on his or her assigned days when he or she cannot personally take care of the children. Both parents are competent care givers and they will choose competent care givers for the children for the time that they cannot personally take care of the children, which may include each other but is not required to be each other.

The low level of communication and cooperation demonstrated by the parents makes this order necessary to eliminate a source of further litigation in this matter. Enforcement litigation and

much arguing and bickering would be the result in this case if the court ordered the parties to use each other for employment child care or for any other reason, which would not be in the best interests of the children. *Roski, supra*.

Of course, the parties may do this if they can work it out on any particular day. Sharing the children is what the statute presumes is in the children's best interest.

(4) No parent contact during the other parent's assigned days is required Under the attached time-sharing schedule, the parents are not required to make any telephone, text, email, Skype, Facebook, or other communication with the children while the children are with the other parent or under the other parent's direction on his or her assigned days under this time-sharing schedule or otherwise.

The low level of communication and cooperation demonstrated by the parents makes this order necessary to eliminate a source of further litigation in this matter. Enforcement litigation and much arguing and bickering would be the result in this case if the court ordered the parties to make the children have communication with the other parent when the children are with one of them during his or her assigned days under the time-sharing schedule, which would not be in the children's best interest. *Roski, supra*.

Of course, the parties may do this if they can work it out on any particular day. Sharing the children is what the statute presumes is in the children's best interest.

(5) No "first choice" child care order Under the attached time-sharing schedule there is no "first choice" child care order. The court now specifically orders that neither party has a right and neither party has an obligation to use the other party as a child care provider during any of his or her assigned days under the time-sharing schedule.

The low level of communication and cooperation demonstrated by the parents makes this order necessary to eliminate a source of further litigation in this matter. Enforcement litigation and much arguing and bickering would be the result in this case if the court ordered the parties to obey a "first choice" child care order, which would not be in the children's best interest. *Roski, supra*.

Of course, the parties may do this if they can work it out on any particular day. Sharing the children is what the statute presumes is in the children's best interest.

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

The court does not reserve jurisdiction over this time-sharing schedule. This is a final time-sharing order.