

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

D. S.,  
Former wife & respondent,  
vs.

Case No. 0X DR xxxx N

F. S.,  
Former husband & petitioner,

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ORDER GRANTING FORMER HUSBAND'S MOTION FOR  
POST JUDGMENT TEMPORARY RELIEF

This matter having come before the court on the former husband's motion for post judgment temporary relief filed *Date omitted* / 2014, it is ordered:

1. Findings

The father filed a supplemental petition to modify on *Date omitted* /2014. Pursuant to that petition, he filed the motion for temporary relief on 7/18/2014.

The parties have two daughters, now ages 17 and 15. There is no doubt that the allegations of the motion concerning *facts omitted*.

The father reports that because of what happened *facts omitted* the children are afraid to live at the mother's house, they are uncomfortable there, and they do not want to live there. He also believes the mother has "harder discipline" than he does and this is another reason they do not want to live with her. The mother agrees that she is more strict than the father and she also believes this is a reason they do not want to live with her. The children have not telephoned the mother or otherwise made any contact with her since 6/7/2014 when they came to live at the father's house.

The mother testified that before 6/2014 the children were routinely leaving her home at night surreptitiously. She said they were "leaving my house at night through the bedroom window," and she was upset about this. She said they would not obey her, so on 6/7/2014 she took them to the father's house and asked him to keep them. She was concerned that they were not safe at night when they were out of her house and she did not know they were gone or where they went. She was upset because they were disobeying her. They have been living with the father full time since then. Now she wants them to come back to live with her pursuant to the final time-sharing order previously entered.

She did not "abandon" the children on 6/7/2014 when she took them to the father's house, as the father alleged in his motion. She took them to a safe place where she knew they would be taken care of. This is not "abandonment." This was the responsible thing to do when she felt that she could not keep them at her house.

From the fact that the children were routinely absconding from the mother's house at night the court infers that they do not want to be there or that they are uncomfortable being there. If they liked her house and were happy living there, they would stay there.

So, from the evidence today there is no doubt that the children do not want to live at the mother's house.

DCF reported to the parents that the mother's home is now "low risk" for *facts omitted*.

Regarding child support, the mother said that if the children do not want to live with her, then she does not believe she should have to pay child support.

The mother is a customer service representative working for *omitted*. She earns \$1,876.80

gross per month. She pays \$336 a month for her own health insurance according to her financial affidavit. She pays no premium for the children's health insurance.

The father is a sales representative for a *omitted* company. He earns \$3,200 gross per month. He pays \$120 per month for his health insurance according to his financial affidavit. He pays no premium for the children's health insurance coverage.

## 2. Ruling

2.1 The father's motion is granted    **The father's motion for temporary relief is granted.**  
The court finds that an emergency exists concerning the children and the emergency justifies a temporary modification of the existing, final time-sharing order.

The court has jurisdiction to temporarily modify a time-sharing order in a final judgment if: (1) there are allegations and proof of facts that amount to a substantial change in circumstances since the final judgment; (2) the temporary modification is in the best interests of the children; and (3) the circumstances of the case amount to an emergency so that the final time-sharing schedule must be amended temporarily pending a trial on a supplemental petition to modify the final judgment.

"In order to obtain a temporary custody modification, the moving party must satisfy a two part test by establishing through competent, substantial evidence that (1) there has been a substantial or material change in circumstances and (2) the modification is in the best interest of the child..." *Bon v. Rivera*, 10 So.3d 193, 195 (Fla. 4<sup>th</sup> DCA 2009). *See also Wade v. Hirshmann*, 903 So.2d 928 (Fla. 2005).

To comply with due process, before a party may bring proof on an issue at a hearing, the party raising the issue must make allegations so that the other party has prior notice that the issue will be raised and an opportunity challenge and be heard on the issue. *See, e.g., Walls v. Sebastian*, 914 So.2d 1110 (Fla. 4<sup>th</sup> DCA 2005); *Todaro v. Todaro*, 704 So.2d 138 (Fla. 4<sup>th</sup> DCA 1997).

In this context, that is, a request to modify a time-sharing order in a final judgment, the party requesting the change must file a supplemental petition as well as a motion for temporary relief. The father has filed such a pleading and such a motion, so the mother has notice of the relief requested.

*See, e.g., Braswell v. Braswell*, 935 So.2d 604, 606 (Fla. 3d DCA 2006), in which the court said:

"It appears that the father's motion was merely a post-judgment attempt to modify custody by way of an emergency motion. ... Florida law unequivocally requires that dissolution judgment modifications assert any change of circumstances in a petition."

*See, e.g., §61.13(3)(2010):*

"(3) ... A determination of parental responsibility, a parenting plan, or a time-sharing schedule *may not be modified without a showing of a substantial, material, and unanticipated change in circumstances and a determination that the modification is in the best interests of the child.* ..." (*Emphasis supplied.*)

This statute, which is a restatement of the principle in *Wade, supra*, applies to post judgment temporary motions to modify as well as post judgment supplemental petitions to modify.

Here, the father's supplemental petition and his motion for temporary relief allege a substantial change in circumstances and a change that is in the best interests of the children. They also allege facts that amount to an emergency. These allegations were proven at this hearing. A substantial change in

circumstances has occurred and a time-sharing schedule in which the children reside at his house full time is in their best interests. The emergency in the circumstances of this case is that the children are not staying at the mother's house. They are routinely absconding from her house without her permission or knowledge. There is no evidence that they are not staying as they should at the father's house since 6/7/2014 or otherwise not living by his rules.

In *Smith v. Crider*, 932 So.2d 393 (Fla. 2d DCA 2006) the second district held:

"Generally a court may not modify a final judgment of dissolution of marriage on a temporary basis pending a final hearing on a petition for modification unless there is an actual, demonstrated emergency. (*Citation omitted.*) This rule is founded upon the principles of res judicata arising from the entry of a final judgment and upon the due process concerns raised by altering the rights of the parties affected by the judgment." *Id.* at 398.

**For the foregoing reasons, the father's motion is granted temporarily pending further temporary hearings or trial on the merits of his supplemental petition.**

**2.2 Temporary time-sharing schedule Temporarily, the children shall reside 100% of the overnights at the father's house pending further order of the court.** The court has considered all of the factors in §61.13(3)(a) - (t) in making this temporary order.

The children shall make such time-sharing with the mother as the parties may agree from time to time.

The court has not heard from the children concerning their preferences in a time-sharing schedule. The preferences of children of this age under these circumstances is a significant consideration in fashioning a time-sharing schedule for these children. *See* §61.13(3)(i). This temporary order is based on the evidence at this hearing on the father's motion for temporary relief.

**2.3 Temporary parental responsibility order Temporarily, the father is granted sole parental responsibility for the children.**

The court finds the parents are now unable to communicate and make joint parenting decisions concerning the children and this is not in the children's best interests. One parents needs legal authority to make parenting decisions.

**2.4 Temporary suspension of existing child support order Temporarily, any child support order entered in this case or any other case that requires the father to pay child support to the mother is hereby suspended pending further order in this case effective 6/1/2014.** The children have been living with the father full time since June 2014.

**Any income deduction order requiring any employer of the father to deduct child support from his wages or salary or other compensation is also canceled as of 6/1/2014.**

**Any sums received by the depository from the father or on his account from any employer after this date or before this date if still in the control of the depository shall be returned to the payor of the funds.**

**2.5 Temporary child support order Temporarily, the court enters the following child support order.**

**2.6 Fla. Stat. §61.29(1) provides: "Each parent has a fundamental obligation to support his or her minor or legally dependent child."**

2.7 Child support calculation The court's child support calculation is attached as Exhibit A. As required by §61.30, the calculation is based on the following findings of fact:

- (1) the child spending 365 days each year, or 100% of the year, with the father and zero overnights with the mother;
- (2) \$1,876.80 gross income per month for the mother;
- (3) \$3,200 gross income per month for the father;
- (4) with the father paying \$120 for his health insurance per month;
- (5) the mother paying \$336 for her health insurance per month;
- (6) the children's health insurance costing \$0 per month;
- (7) being paid by neither parent;
- (8) the parties have a reasonable employment day care expense of \$0;
- (9) the parent with whom the children live most of the time under the time sharing schedule ordered qualifying for the dependent's exemption for the children and qualifying for the Earned Income Tax Credit;
- (10) the "net income" of each party as determined by §61.30(3), obtained by subtracting allowable deductions from gross income. Allowable deductions include:
  - (a) Federal, state and local income tax deductions, adjusted for actual filing status and allowable dependents and income tax liabilities.
    1. The actual filing status of the mother is: Single. The allowable dependents of the mother is: 1.
    2. The actual filing status of the father is: Head of Household. The allowable dependents of the father is: 3.
    3. The income tax liabilities of the parties is shown on Schedule A.
      - (b) Federal insurance contributions or self employment tax is shown on Schedule A.
      - (c) Mandatory union dues.
      - (d) Mandatory retirement payments.
      - (e) Health insurance payments, excluding payments for coverage of the minor children.
      - (f) Court-ordered support for other children which is actually paid.
      - (g) Spousal support paid pursuant to a court order from a previous marriage or the marriage before the court.

Resulting in net monthly income of \$1,317.64 for the mother and \$2,835.87 for the father;

all of which the court hereby finds and orders.

2.8 Dependent's exemption order

(1) Regarding the dependent's exemption, at this time the court finds that under the attached time-sharing schedule the children reside with the father for 365 days out of the year and with the mother the balance of the year, so the children are with the father most of the days out of each calendar

year.

(2) Therefore, under the Internal Revenue Code, the father is entitled to the dependent's exemption for the children on the federal income tax return.

2.9. Monthly current minimum child support amount **Therefore, as shown on Exhibit A attached, the monthly amount of the current minimum child support due from the mother to the father is \$423**, plus a collection fee of \$5.25 or 4% with each payment but not less than \$1.25, whichever is less.

2.10 Retroactive child support The court orders that child support was payable from 6/1/2014, because there is no competent, substantial evidence that justifies the nonpayment of child support since that date.

2.11 Retroactive Child Support Order The total amount of the retroactive child support owed is reflected in the case history for this case maintained by the depository after these child support orders are entered by the clerk or D.O.R.

The retroactive shall be paid at the rate of \$40 per month, which amount is included in the sum paid below.

2.12 Current Support and Retroactive Amount Per Month **Therefore, the mother shall pay to the father the total of:**

**(1) current child support per month, \$423;**

**(2) an retroactive payment per month, \$40 until the retroactive support is paid in full and when it is paid, then this retroactive payment stops; and**

**(3) collection fee of \$5.25 or 4% with each payment but not less than \$1.25, whichever is less, if required by law.**

**All payments shall be paid to the Department of Revenue in Tallahassee, as provided below.**

The court hereby reserves jurisdiction to modify the interval for which support is payable to weekly, biweekly, bimonthly or any other interval at any time hereafter upon motion by either party or the court's own motion.

2.13 First Payment Due Date The first payment of child support is due 6/1/2014 and on a like day of each month thereafter.

2.14 Termination of child support; schedule of the amount of child support Pursuant to §61.13(1)(a)1., assuming that no supplemental petition alleging a substantial change in circumstances is filed and taken to trial after this date or that no agreement between the parties is reached modifying the child support after this date, the child support ordered here shall terminate on the 18<sup>th</sup> birthday of the older child, so the last support payment under this order is due on 3/1/2015, subject to proceedings under §743.07(2) or §61.13(1)(a)2., as provided below.

The court's child support calculation for the remaining child is attached as Exhibit B.

At the time of this order, as required by §61.13(1)(a)1.,b., the amount of child support that will be owed for the child remaining after the first child's 18<sup>th</sup> birthday is \$271 beginning 4/1/2015 and the

last payment will be 12/1/2016, which is the month in which the next child turns 18, unless that amount is changed by a final judgment after the date of this order after a trial on a supplemental petition to modify the child support or it is changed by the agreement of the parties after this date, subject to proceedings for relief allowed by §743.07(2), as provided below.

The court makes no finding that §743.07(2) or §61.13(1)(a)2. applies in this case because there was no competent, substantial evidence in the record that this statute will apply to these children or any of them as they turn 18 years old and there is no agreement between the parties that it will apply. This finding is without prejudice to either party to have the court determine whether this statute does apply at any time hereafter by a motion. Therefore, the court reserves jurisdiction over this child support order in order to determine whether this statute applies to one or more of the children.

**2.15 Income Deduction Order** As required by F.S. §61.1301, a separate Income Deduction Order ("IDO") shall be signed by the judge assigned to this case that directs the payor's employer and any future employer to deduct the child support due under this order from any income due to the payor and to forward it to the depository, the "Florida Support Disbursement Unit." The form of the IDO must comply with the form required by the United States Office of Management and Budget. That agency calls an "Income Deduction Order" an "Income Withholding Order" or IWO, but either name refers to the same thing: an order to take the child support out of the payor's pay to the extent allowed by law. The IDO or IWO form shall be prepared by the payee or the payor and sent to the undersigned judge for signing and filing. *The undersigned judge will not prepare the form of IDO or IWO.* Delivering a copy of the IDO or IWO to the payor's employer is the responsibility of the payee and the payor. The court hereby orders the payor to give a copy of the IDO or IWO to his or her employer immediately upon receiving a copy of it, and if the payor does not do so then the payee must give a copy of it to the payor's employer. *It is not the responsibility of the undersigned judge to find the payor's employer from time to time and deliver a copy of the IDO or IWO to that employer.*

**2.16 Place of Payment** Child support shall be paid by check or money order payable to and sent to the "Florida Support Disbursement Unit", P.O. Box 8500, Tallahassee, FL 32314-8500. **The payor must write on each check (1) the case number of this case and also the words (2) "Lee County case".**

**2.17 Addresses and Social Security numbers** As required by §61.13(8)(a), F.S., within 30 days of this order both parties are ordered to write to the "State Case Registry", P.O. Box 8500, Tallahassee, FL 32314-8500 and advise that agency of this Case Number in Lee County, Florida, and their current names, addresses, social security numbers, telephone numbers, driver's license numbers, and their employer's name, address, and telephone number, as these presently exist and as they change in the future. A copy of any letter with that information sent to the "State Case Registry" must also be delivered or mailed to the Clerk of the Court, Lee County, Florida, 1700 Monroe Street, Fort Myers, FL 33901.

**2.18. Health Insurance**

(A) **Health Insurance** The court finds the health insurance the parties have on the children is reasonable and affordable to the parties. This coverage shall not be canceled and shall be maintained on the children as long as possible or until the parties agree otherwise. The parties shall promptly provide each other with cards or other proof of the coverage when these are made available by the insurer.

(B) **Uncovered Medical Bills** The parties shall be responsible for any uncovered reasonable and necessary medical bills of the children incurred since the separation date in an amount

equal to the ratio of their net incomes reflected on Exhibit "A" attached. §61.13(1)(b); *Forrest v. Ron*, 821 So.2d 1163 (Fla. 3d DCA 2002); *Morrow v. Frommer*, 913 So.2d 1195 (Fla. 4<sup>th</sup> DCA 2005); *Salazar v. Salazar*, 976 So.2d 1155 (Fla. 4<sup>th</sup> DCA 2008).

**The ratio of their net incomes now is: Father 68% and Mother 32%.**

**After support is not owed for the first, the ratio will be: Father 67% and Mother 33%.**

"Medical bills" includes counseling, psychological, psychiatric, orthodontic, dental, optical, prescription, physician, hospital and other medical expenses. If either parent pays for any such treatment or bill, they shall be reimbursed for any amount paid beyond their share of it by the other parent. They shall be reimbursed only for treatments that are reasonable and necessary.

(C) Prompt Request and Prompt Payment If either parent incurs or has incurred a medical bill on the children, he or she shall send a copy of it to the other parent with a cover note asking for payment of the parent's share of the bill. He or she must keep a copy of the bill and the note asking for payment. Upon receipt of such correspondence, the parent receiving it shall promptly reimburse the other parent for the parent's share of the bill to the other parent, or he or she shall promptly send a written objection or explanation to the other parent explaining why the payment is not being made.

Each item on the list shall (1) state the name of the medical provider, (2) the date the treatment happened, (3) what the bill was for, (4) the amount of the bill, and (5) whether it has been paid in full or in part.

The parents shall reimburse the other only by check or money order and shall keep all cancelled checks or money order receipts.

(D) Record Keeping During the minority of the children, each parent must maintain a chronological, serial list of all uncovered medical bills they incur until the children are 18, if he or she expects to be reimbursed for such medical bills, along with copies of each bill on the list, which bill copies shall be attached to the list with a staple in the same order as the items on the list. The list of bills shall be in chronological order and must be serially numbered on the list, that is, "1", "2", "3", and so on until the children are 18. The same number must be written on each copy of the bills attached to the list so that each copy of an attached bill matches the correct item on the list.

Each item on the list shall (1) state the name of the medical provider, (2) the date the treatment happened, (3) what the bill was for, (4) the amount of the bill, and (5) whether it has been paid in full or in part.

The parents shall reimburse the other only by check or money order and shall keep all cancelled checks or money order receipts.

(E) Enforcement; Mediation If either parent hereafter seeks enforcement of this order for reimbursement, they shall first seek mediation with a mediator provided by court administration. They shall bring three copies of the list and each numbered bill for which they seek reimbursement to the mediation for use in the mediation. If mediation is unsuccessful and either parent thereafter files a motion to enforce reimbursement of medical bills on the child, he or she must bring three copies of list and each numbered bill for which they seek reimbursement to the hearing on the motion. The parent claiming payment for a disputed item must bring three copies of his or her proof of payment, such as cancelled checks, money order receipts, or receipts from insurance companies for payments, to mediation and any hearing.

Done and ordered in Fort Myers, Lee County, Florida, this \_\_\_\_\_

\_\_\_\_\_  
R. Thomas Corbin, Circuit Judge

Copies provided to: