

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

**J. O.,  
Former husband,**

**vs.  
S. O.,  
Former wife,**

**Case No. 00 DR XXXX N**

**ORDER DENYING MOTIONS WITHOUT PREJUDICE**

This matter having come before the court on 5/3/2011 on the parties' respective motions for emergency relief, the former wife's filed on 4/13/2011 and the former husband's filed 4/26/2011 and amended motion filed 4/27/2011, it is ordered:

**1. Findings**

The parties have a minor child, M. J. O., born (*Omitted*). The parties were divorced by a judgment entered 7/8/2010, which incorporated a marital settlement agreement that provides for shared parental responsibility and a time-sharing schedule.

On 3/23/2011 the former wife filed a supplemental petition to modify but that petition has not been served on the former husband by process according to law and the former husband has not made a voluntary appearance to the former wife's supplemental petition. The former husband has not filed a supplemental petition to modify.

The two operative motions, that is, the mother's motion and the father's amended motion, ask for "temporary" relief. The former wife's motion asks for "one hundred percent timesharing to the Former Wife," and the former husband's motion also asks for "100% of the Parenting Time." Both motions say the other parent's contact with the child should be limited to supervised contact. Both motions allege an "emergency."

The former husband's motion also asks for temporary sole parental responsibility or temporary shared responsibility with ultimate decision making to him. The former husband's motion does not say how long this "temporary" change to the time-sharing schedule or parental responsibility order should last, while the former wife's motion asks that it stay in place until a trial on her supplemental petition.

Neither of the two motions allege facts that demonstrate there has been a substantial change in circumstances since the judgment was entered that was not contemplated at the time of the judgment. The former husband's motion, in the first paragraph, claims that the relief he seeks "is in the best interest of the child," while the former wife's motion does not mention "best interest" of the child at all. It mentions "heartache and anguish," presumably to the child. Nevertheless, it appears that her motion claims that the relief she seeks is in the best interest of the

child without actually saying so.

Both motions consist of a list of allegations against the other parent. The motions do not state how the various allegations alone or all together amount to a substantial change in the circumstances that were existing at the time of the Final Judgment that were not contemplated or anticipated at the time of the judgment. The motions state that all of the various allegations together require a temporary change in the time-sharing schedule, and, in the former husband's motion, a temporary change to the shared parental responsibility order that they believe will be in the child's best interest.

The former wife's motion alleges principally that (a) the former husband is breaching the marital settlement agreement because he has not agreed to amend the time-sharing schedule as the parties agreed in the settlement agreement, (b) the former husband's new wife has behaved badly toward the former wife and the child, and (c) the former husband is not sharing major and minor parenting decisions. Therefore, the former wife asks for "one hundred percent of the timesharing."

The former husband's motion alleges principally that the former wife is making inappropriate personal and parenting decisions, so, therefore, the court should temporarily grant the former husband (a) sole parental responsibility or shared responsibility with ultimate decision making to the former husband, and (b) "100% of the Parenting Time, and Former Wife's Parenting Time should be limited to supervised time-sharing."

## 2. Ruling

The court does not have jurisdiction to hear these post judgment motions because: (1) there are no allegations of facts in either motion that amount to a substantial change in circumstances since the Final Judgment, which change in circumstances was not contemplated or anticipated at the time of the judgment; (2) the father has not filed a supplemental petition to modify the judgment and his motion does not state the circumstances by which his temporary relief would end; and (3) the mother's supplemental petition has not been served so the court has no personal jurisdiction over the father with regard to the allegations of that petition.

"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).

*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.

*See, e.g., Cooper v. Gress*, 854 So.2d 262 (Fla. 1<sup>st</sup> DCA 2003), in which the issue was the legal standard for deciding a parent’s supplemental petition to modify a time-sharing schedule. The appellate court held that “best interest” of the children is not the standard. Rather, the standard is whether a substantial change in circumstances has occurred since the final judgment was entered and also whether a modification would be in the children’s best interest. The court ruled:

“Although the former wife’s supplemental petition for modification invoked the ‘magic words,’ alleging a substantial change of circumstances since the final judgment, in fact the general allegations are insufficient as a matter of law to satisfy the ‘substantial change’ prong, and the trial court reversibly erred ... The custody evaluation ... clearly documented the pattern of friction between the parties. The parties’ mutual inability to get along is evident also from the testimony presented at the hearing. ... The doctor [the evaluator] ... opined that the parties’ problems communicating with each other would exist irrespective of the particular custody plan in place. ... Although this record is replete with instances of the parties’ mutual failure to communicate effectively, unanticipated substantial, material change in circumstances since the entry of the final judgment. ... The posture of a modification proceeding is entirely different from that of an initial custody determination, and the party seeking to modify custody has a much heavier burden to show a property ground for the change. ... Thus the pertinent question before the trial court ... was whether *any* modification was warranted, not whether the former wife is the better primary custodial parent. The court ... opined that both parties are fit, loving parents who simply cannot seem to carry out the terms of their original custody agreement without acrimony. ... It is telling that the children’s pediatrician observed that their place of residence is not the issue; that is, changing the custody arrangement will not resolve the underlying parental communications problems. ... [T]he ‘illness,’ comprising the parties’ mistrust and miscommunication, is likely to persist ... for the real problem has not been resolved.”

In *Gielchinsky v. Gielchinsky*, 662 So.2d 732 (Fla. 4<sup>th</sup> DCA 1995) the father filed a

supplemental petition to modify a final judgment and an emergency motion that alleged the “mother was hindering his visitation rights and hampering his relationship with the children.” *Id.* At the hearing on the emergency motion, the trial court found there was no emergency but the court nevertheless granted temporary relief on the motion and “changed custody from the mother to the father and gave the mother visitation rights.”

The fourth district reversed and held:

“We conclude that the trial court abuses its discretion in temporarily changing custody where, as here, custody was already established by a judgment and a petition to permanently change custody is pending, *unless there is a real emergency*. ... We do not intend to discourage trial courts from taking appropriate action where there is *a true emergency, where, for example, a child is threatened with physical harm or is about to be improperly removed from the state.*” *Id.* at 733. (*Emphasis supplied.*)

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 motions are denied, without prejudice to file amended motions that comply with law and otherwise proceed according to law.

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

R. Thomas Corbin, Circuit Judge

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