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

S. M. R.,
Former husband,
vs. **Case No. 00 DR 0000 N**

M. A. S.,
Former wife,

ORDER DENYING FATHER'S MOTION FOR ENFORCEMENT

This matter having come before the court on 7/25/2011 on the father's "Motion for Enforcement of Parenting Schedule," filed 5/5/2011, it is ordered:

1. Findings

The parties have two children: (*Name omitted*.), born (*Date omitted*), and (*Name omitted*), born (*Date omitted*.) The Final Judgment was entered on 4/1/2003, so the children were then 8 and 6 years old. The judgment incorporated the parties' settlement agreement, which was preceded by a stipulation that appointed a mental health therapist to conduct a "parenting assessment." No report of that therapist was filed.

In their agreement the parties agreed to "shared parental responsibility." The agreement to share parental responsibility took up one paragraph. The time-sharing schedule that followed took up the next eight pages of their agreement. The schedule is stated in considerable detail. By July 2004 the parties were litigating about the time-sharing schedule, by motions and supplemental petitions, and showing a tendency toward litigation as the way to resolve parenting issues, with some mediated agreements, such as the last one on 11/22/2006, which established the current time-sharing order.

The father's motion does not allege that the mother is in willful contempt of the current time-sharing order. Rather, it asks the court to "enforce" that order. The problem alleged is that D. has not been coming to the father's house for some months, as required by that order. He comes occasionally, but not strictly according to the schedule.

The motion and the father's argument offers no solution to this problem. The father's motion makes no suggestion of what the court might do to "enforce" the order. The motion is also silent about what might be in D.'s best interest when it comes to "enforcement." It says D. is "not going to the father's house" for many months and that he has "the tacit and implicit approval of his mother" to stay away from the father's house. The motion cites case authority for the proposition that separated parents have an "affirmative obligation" to encourage and nurture the

relationship with the other parent. He also cites F.S. §61.13(4)(c) that provides: "When a parent refuses to honor the time-sharing schedule in the parenting plan without proper cause, the court ..." may order certain sanctions that are listed in the statute.

Three facts stand out in this case: First, the antipathy between these parents is intense and long-standing. It borders on hostility, with little or no communication between the parties about the children or anything else. Second, D. is alienated from his father, for a long time. There is no point in having D. testify about his preference, it is unmistakable. His conduct is sufficient evidence of his preference. He resists making contact with his father. He avoids contact with his father. Third, the source of the antipathy between the parties and the source of D.'s alienation are unknown, but the antipathy and the alienation are connected. The connection is complex, profound, and unique to the unhappiness of this family.

The father is convinced that D.'s alienation is the mother's doing and that the court must do something about it. His argument is that "she's not going to make him go spend time with his dad," that "the [time-sharing order] is enforceable somehow," without specifying how or what is in D.'s best interest, that "mother [must] get it done somehow," that "I don't have a solution, so we ask for your help," because "we have a boy who is able to exploit" the situation between his parents, that is, their antipathy bordering on hostility and little or no communication about the children or anything else for many, many years. The father says he needs the court's "assistance to unravel" the tangle skeins of this family's history.

The mother agrees that D. is alienated from his father and that he often does not want to make the scheduled contact. She testified that she encourages him to make contact with his father, by word and deed, but that she cannot control D. She also testified that she does not know what to do about his alienation, just as the father does not know what to do.

A child's alienation from a parent is detrimental to the child. It is not good for the child. The reasons for D.'s alienation are unknown, but there is no question that they are long-standing and complex. The father says the mother's behavior and words are the reasons. The mother says the father's behavior, words, and "situation" at the father's house are the reasons. In short, each blames the other, which illustrates the fundamental problem in this family: antipathy between the parents and little or no communication or cooperation concerning their children.

2. Ruling

First, the court cannot find that granting the father's motion is in the child's best interest. An order "enforcing" a time-sharing schedule must be in the child's best interest, but the motion does not mention what order might be in the child's best interest and there is no competent, substantial evidence at the hearing of a specific "enforcement" order that would be in the child's best interest. *See, e.g., Rahall v Cheaib-Rahall*, 937 So.2d 1223 (Fla. 2d DCA 2006), in which the court said at 1225: "The ... law requires courts to decide child custody issues based solely on the children's best interests and that this consideration must govern even in the face of a party's procedural defaults or contumacious conduct," citing *Barnett v. Barnett*, 718 So.2d 302, 304 (Fla. 2d DCA 1998).

Second, although the father says he is asking the court to "enforce" the time-sharing order, that there is some distinction between "enforcement" and "willful contempt of a prior court order," in his testimony and his argument he blames the mother for D.'s reluctance to come to his house and he appears to be asking the court to find the mother in willful contempt of the time-sharing order. He cites §61.13(4)(c), which is a statute that lists sanctions for a parent who is in willful contempt of a time-sharing order.

However, to the extent that the father is asking for a finding of willful contempt, the court cannot find that the mother is willfully refusing to obey the time-sharing order. The evidence of the mother's contempt for a prior order is conflicting, contradictory and inconsistent. There is no substantial, competent evidence that she is willfully violating the time-sharing order. Therefore, by the preponderance of the evidence, the court finds she is not in willful contempt of the time-sharing order.

Third, regarding the father's request to "enforce" the time-sharing order, the court denies the father's motion for two reasons. The first is procedural, the second substantive.

First, his argument violates due process because it asks the court to fashion an "enforcement" remedy with no notice to the opposing party about what that remedy might be. The opponent has no opportunity to be heard against the proposed remedy because there is no remedy proposed in the father's motion.

Second, the father is asking the court to make a parenting decision. The father asks the court to do "something" about D.'s problem. However, a judge in a Chapter 61 case has no authority to make parenting decisions.

D. is experiencing a very significant problem in his childhood development, alienation from a parent, yet the father and the mother have no idea what to do about it. This is an abdication of their parental responsibility, a responsibility they agreed to share. If D. needed surgery, their need to come together and make a decision would be more obvious. His present problem, while not acute, may affect him for the rest of his life. Mental health therapists can acquaint the parents with the lifetime consequences of alienation. The consequences can be severe, which is why the parental responsibility law, §61.13(2), is written to favor shared decision making and to require parents to stay involved in decision making after separation if shared parental responsibility is ordered.

In *Martinez v. Martinez*, 573 So.2d 37 (Fla. 1st DCA 1990) the court said: "[§61.13(2), the parental responsibility statute] contemplates that parents, not the courts, have the responsibility" to raise their children, whether the issue is picking the school they will attend, the religion they will follow, the medical treatment they will receive, or any other parenting decision. *The statute places parental responsibility squarely on the shoulders of the parents. It does not give parental responsibility to a judge*. There is no provision in Chapter 61 that allows the judge to fashion orders from time to time in an effort to "somehow" address a child's alienation from a parent or to address any other problem that the child of separated parents may be suffering. *It is the parents' responsibility to address their children's problems*. The statute allows the judge to choose the parental responsibility order that the parents must follow, either sole, shared or shared with

ultimate responsibility, but once that order is entered, the judge's role is finished, and if shared responsibility is ordered, then the separated parents must make joint parenting decisions and raise their children together. *Martinez, supra.*

Here the parties agreed to "shared parental responsibility," so that is what they must do. D. has two parents. Their parental rights *and responsibilities* have not been curtailed or terminated by a Chapter 39 proceeding or otherwise. On the contrary, they retain their full parental rights *and responsibilities*. Their parental responsibility cannot be shifted to a judge. "Shared parental responsibility" is defined 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*.)

A judge in a Chapter 39 case has the authority to make parenting decisions for a child when both parents are unfit. *See, e.g.,* §39.402(1)(a)(b)(c). However, if there is one fit parent, then that parent and not the judge makes the parenting decisions.

In a Chapter 61 case the child has two fit parents, so the parents make the parenting decisions together if they are ordered to share parental responsibility. The judge has no authority to craft a "solution" to their child's problems from time to time when they cannot agree upon a solution. *Martinez, supra.* Here, the parents agreed to share parental responsibility and that agreement was incorporated and ordered in the Final Judgment. So, if these parents cannot make a joint parenting decision about how to address D.'s problem, then D.'s problem will persist. As long as there is no danger to his life or safety, the state, which includes the judge in this case, cannot intervene in this family by ordering either parent "to do something."

For the foregoing reasons, the father's "Motion for Enforcement of Parenting Schedule" is denied.

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

R. Thomas Corbin, Circuit Judge

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