Comparing a Lawyer's and a Judge's Thoughts on Proving a Parenting Case

R. Thomas Corbin, Circuit Judge, 9/17/98

Recently a lawyer provided me with an outline of what he thought should be proven under the factors in '61.13(3)[1] Florida Statutes (1997), Florida's "shared parenting" statute. When I read over the lawyer's outline, I was struck by how differently I look at a parenting case from the way the lawyer looked at it.

In general, the lawyer=s ideas about the proof relevant to a parenting case focused on two questions: (1) which parent was closer to the children emotionally, and (2) which parent had spent more time taking direct care of the children before separation? This focus assumes the standard for deciding a parenting case is: "Which parent is emotionally closer to the children and which parent possesses superior skills and knowledge derived from taking care of the children?" But this is not the standard. The standard is the "best interests of the children" considering all of the factors in '61.13(3), not just the emotional closeness of the parent to the children and the skills and knowledge of a parent derived from taking care of the children. This evidence is relevant to some of the factors in the statute, but the law requires the judge to consider all of the factors.

The lawyer's proof should focus on the best interests of the children as defined by the statute. Every judge I have talked to about deciding a parenting case either has a copy of 61.13(3) taped to his or her bench or has a highlighted and underlined copy in a notebook on the bench. The judges are waiting to hear proof under all of the factors in the statute. A lawyer who ignores the statute will fall short. The lawyer should also prove that his or her client can carry out the public policy of the state: **"It is the public policy of this state to assure 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."**[2] In short, the public policy is (1) share the children's time and (2) make joint decisions concerning the children. The legislature believes that if this public policy is carried out the best interests of the children will be served. Note that the legislature has declared the children have the right of contact with both parents. Nowhere in Chapter 61 does it state that the parents have a right of contact with the children when the parents separate or divorce. The law is concerned with the best interests of the children, not the best interests of the parents.

Some lawyers and most parents mistakenly think the issue in a parenting case is "custody" and that a parent might "lose" custody of the children during a divorce.[3] Unfortunately, the words "custody" and "visitation" are in the statute but the issue is not winning or losing custody. A parent can lose his or her parental rights only in a Chapter 39 or Chapter 63 action. In a Chapter 61 case, the parties are the parents and they already have custody of their children. '61.13 requires "shared parenting." In the statutes of some states, this concept is referred to as "joint custody." The statute defines Ashared parenting:@

> A>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.@[4]

The statute requires the judge to order shared parenting unless it would be detrimental to the children to do so.[5] Therefore, "shared parenting" means (1) sharing the children's time and (2) making joint decisions together concerning the children. Neither parent can dictate to the other, least of all the

primary residential parent. When parents separate, both parents have an affirmative duty to foster a relationship between the children and the other parent.[6] It would perhaps be a good thing if the words "custody" and "visitation" were removed entirely from Chapter 61, and were replaced with terms consistent with the concept of shared parenting. "Custody" implies "possession" and "ownership" and this idea is directly opposed to the concept of shared parenting. Parents must share; they do not possess. Also, children do not "visit" with one parent. Prisoners have "visitation" time. With shared parenting, children spend time with both parents and both parents play an equal role in shared parenting. The children may live part of the time in each parent's home. If the children live most of the time at one parent's house, because this is in the children=s best interests, that does not give that parent any greater "right" to make decisions concerning the children. On the contrary, it gives that parent a greater obligation to promote the children to the other parent, simply because the children are with him or her most of the time.

The lawyer's approach assumes a "good parent" is a parent who loves and cares for the children. So far so good but what else constitutes a "good parent?" For instance, if a parent has been substantially involved with the children, knows a great deal about them and is very close to them, but is unable to separate himself or herself from the children sufficiently to allow them to develop a free and easy relationship with the other parent, is that parent a "good parent?" Is that parent acting in the children's best interest or in the parent's selfish interest? A child's genes come one-half from each parent; a child is one-half mother and one-half father; a child wants to be with both parents; a child wants to love both parents. A child is dependent on his or her parents for everything. What if one of the child's parents does not help the child have a relationship with the other parent? Worse, what if one of the child's parents is angry and hostile toward the other parent and denigrates and runs down the other parent to the child? This attack on the absent parent is an attack on the child and convinces the child that he or she is as inadequate as the parent under attack. The child's developing personality needs a healthy relationship with both parents, without interference from either parent, but must have the help of both parents to establish and maintain a relationship with both parents. How is it in the child's best interest to live most of the time with a parent who does not help the child develop a relationship with the other parent, even if that parent has been very involved with the child before separation and is better able to care for the child? Clearly, it is not. In short, when the proof assumes that caring for the child is all there is to a parenting case and stops short of demonstrating a parent is capable of sharing the child, the case for making that parent the primary residential parent may fail.

The lawyer's approach to the case is also a projection of the feelings of his or her client. Rage, anger, and rejection of the other spouse are a normal part of separation and divorce. Also, the parents want to cling to the children as the last vestige of their ideal of a family, which is now destroyed. Sharing the children is the last thing many parents want to do and is something many of them are unable to do. Many parents in divorce cases equate sharing with losing. It is easy for a lawyer to be drawn into the client's perceptions and to see the client=s agenda as the interests to be advanced, rather than the interests of the child. However, this is not good lawyering. By giving voice to the client's anger and hostility, the lawyer may be losing the case for the client. There are three sides in every parenting case, the child's point of view being the third side. The judge views the case from the child's point of view. The battling parents are often blind to the child's perspective. The pursuit to "win" the children, like the pursuit to "win" some property or alimony, is an effort to

vindicate a party's agenda, not an effort to promote the best interests of the children. Children are not a prize to be "won;" they are a responsibility to be borne.

When lawyers project their clients= emotions into the litigation, the process is turned into an extension of the parties' hostilities for each other, not a search for the best interests of the child. Further, the children know their parents are fighting, in court and out of court. Parents who testify that the children are unaware of arguments and disputes between the couple or are unaffected by the parents= anger and hostility are demonstrating their ignorance to the court. Conflict between the parents, in an intact marriage or during or after a divorce, is, to quote one court, "intolerable" for the children.[7]

A parent who can see and say nothing good about the other parent may find it impossible to promote the other parent to the children and to facilitate that parent's relationship with the children. Is there nothing worthwhile in the other parent? Of course, in cases where it will be detrimental to the children to be with a parent or have that parent share in parenting decisions, the faults of that parent must be proven. But the campaign to prove the other parent is a detriment should be carefully considered before being launched. If the detriment to the children is not proven, the effort itself may prove the party launching the campaign cannot carry out the public policy and is himself or herself the greater detriment to the children because of his or her irrational hostility and hatred for the other parent. Good lawyering requires attorneys to determine if there is a basis in fact for their client's perception of detriment to the children and to dissuade the client from the attempt if there is no basis in fact, despite the perception, and to direct the client to counseling to deal with anger and hostility because that anger and hostility for the other parent will surely damage the children and the judge will duly note the anger and hostility in making a parenting decision. In short, lawyers and their clients need to carefully count the cost of a campaign for sole parental responsibility and the impact of their client's attitude toward the other parent on the judge's decision. Sometimes it is not what is said but how it is said that impresses the judge. Further, if the campaign is to be designated the primary residential parent, lawyers and their clients must understand what shared parenting means and that the primary residential parent has the burden of carrying out shared parenting. If the proof does not demonstrate an ability to do this, all other things being equal, the judge should not designate that parent as the primary residential parent.

If the parents are angry and hostile toward each other, one parent may see the damage and he or she may take the children to counseling. In doing so, the parent is ignoring that the parents, not the children, need counseling. The parents need to learn how to deal with their anger and how to stop the cycles of dysfunction that brought them to a divorce in the first place and how to stop denigrating each other and start cooperating and raising their children jointly. When the parents' anger subsides and their cooperation increases the children usually recover. Of course, in some cases, the children may need counseling, sometimes just to assure them that they are not the reason their parents are breaking up, but the decision to take the children to counseling is a significant parenting decision that the parents must make jointly and neither parent can make alone. Again, the law requires joint decision making. A parent making a unilateral decision to take the children to counseling, without consulting the other parent or seeking an order from the court, demonstrates a disrespect for the law and an inability to share parenting of the children. If the parents cannot agree, then the court will decide what is in the children's best interests.

Therefore, the law's definition of a "better parent" is a parent ready, willing and able to

promote the other parent to the child and to facilitate a relationship between the other parent and the child, and ready, willing and able to make joint decisions with the other parent concerning the child, as well as a parent who loves and cares for the children. That is the parent this judge is looking for. The interests of the children, and the policy of the state, are promoted by presenting a plan for **sharing** the children as well as a plan for caring for the children. The better parent will present and carry out a plan for sharing the children and sharing decision making concerning the children. The lawyer's proof does not follow the factors in the statute. The law wants the children to have a relationship with both parents and the primary residential parent should be the parent who is better able to accomplish this goal, all other factors being equal.

Understanding these thoughts and that '61.13 requires the court to order "shared parenting" what is the evidence a judge thinks relevant to a parenting case? First, the questions to be answered must be stated. The questions are: (1) Where will the children be day to day during the week and during the year? and (2) Did the parties plead for shared parenting, sole parental responsibility, or split parental responsibility?[8] If pleaded for and proven at trial, the court can tailor parental responsibilities by giving one parent sole authority over some areas, say education, but not over others, say medical care.[9] If the court grants sole parental responsibility to one parent, the court may or may not award parenting time to the other parent.[10] All of these variations must be specifically pleaded and proven before the court can order these. Here are some questions to consider in analyzing a parenting case:

I.. ***"The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent."***

1.. Nearly all lawyers ignore this factor in a parenting case and present no evidence at all of the likelihood that their client will allow the child frequent and continuing contact with the other parent. Probably they do so because most parents in a parenting case cannot imagine anything worse than having to promote the other parent to the children and having to arrange and carry out a plan for putting the children in frequent and continuing contact with the other parent. They have decided to divorce the other parent and they expect the children to do likewise, ignoring that if the children do so they will suffer severe psychological damage. It is odd that many lawyers buy into their client's feelings and fail to teach their clients what the judge will be looking for to decide this case. The legislature regards a determination of the parent who is more likely to allow the child frequent and continuing contact with the other parent as the number one factor a judge must consider in deciding a parenting case. Lawyers should advise their clients on the law and should not allow the client=s emotions to decide the client=s conduct or the proof presented to the court. The tenth factor below is similar if not identical to the first factor. Therefore, the legislature believes the ability to promote the other parent to the children and to facilitate frequent and continuing contact between the children and the other parent is twice as important as any other factor the judge must consider. Failing to prove the client can promote the other parent to the children and can allow frequent and continuing contact with the children may lead the court to name the other parent as the primary residential parent.

Proof of what the parents have done since separation is the proof needed under factors one and ten. Past conduct is the clearest indicator of future behavior. For example: Does the parent drive the children to and from the other parent's house since separation? Lawyers and parties asking to be

the primary residential parent are sometimes surprised to see this judge thinks the primary residential parent should do the driving to and from the other parent's house. The typical attitude of a hostile parent is "I want 'custody' (suggesting 'ownership'). I won't drive the children to the other parent=s house. The other parent must pick them up from me." Is this parent likely to allow frequent and continuing contact with the other parent? No. If he or she won't drive the children to and from the other parent's house, it is hard to see how they fulfill this factor. Does the parent at least meet the other parent half way by driving one leg of the trip? A parent who would be primary residential parent should want to drive the children to and from the other parent's house. The better parent is the parent who sacrifices himself or herself for the children, even to the point of promoting the children to the one person he or she may dislike the most, the other parent. The primary residential parent has no rights, only the obligation to act in the best interests of the children.

2.. Has the parent promptly provided his or her address and telephone number to the other parent? If not, why not? Is the other parent angry and hostile? Are they both angry and hostile to each other? If so, they need counseling. Anger and hostility for the other parent are the worst thing any parent can do for his or her children. Remember: the children are composed of genes from each parent; they <u>are</u> each parent and if the parents are at war, the child is at war with itself. If there is a good reason for keeping the address and phone number private, it must be proven.

3.. Has the parent encouraged and welcomed the other parent's efforts to discuss parenting issues? How?

4.. How far apart do the parents live? Has one parent intentionally moved far from the other parent, without considering how this will affect contact between the children and the other parent? Why did one parent move far away from the other parent after separation, if they live some distance from each other? Out of a desire to interfere with contact between the children and the other parent or without considering the impact on the children?

5.. Has the parent contacted the other parent's mother and father to arrange grandparent visitation? The children have two families, not one.

6.. Has the parent encouraged the children to telephone the other parent frequently and continuously?

7.. Has the parent sent the children's school work, copies of report cards, letters, etc., to the other parent? Note: if a parent expects the children to do this the parent is using the children as a conduit for information. This is the parent's responsibility not the children's. Also, if a parent testifies that "He or she can get it from the school," this is a clear indication that parent cannot promote the other parent to the children and cannot help the children develop their relationship with the other parent.

8.. Has the parent has completed the required parenting course? Did that parent learn anything? What? Tell the judge what he or she learned in the course. Can the parent write a short essay on "How to carry out the duties of a primary residential parent?"

9.. Has the parent allowed and encouraged the children to speak openly in his or her presence about the other parent, without comment, condemnation or characterization and to share whatever the child wants to share concerning the other parent, good, bad or indifferent?

II.. **"*The love, affection, and other emotional ties existing between the parents and the child.*"**

1.. The proof of this factor will probably be entirely subjective. Corroboration of these

claims is unlikely. Thus, a "swearing contest" ensues on this point usually supported by the testimony of day care workers, neighbors, and friends aligned with one party or the other. Also, the division of labor established during the marriage may be part of the testimony under this factor. However, after the parents separate both parents will be doing things they never did before and most parents quickly learn to take care of the children even if they have not been doing so primarily in the past.

2.. Sometimes psychological proof is offered under this factor but this judge has never seen a scientific basis for some of the assumptions that are frequently offered. For instance, the term "psychological parent" is sometimes used by lawyers in legal argument as if it carries special import and the mantle of "science." Is there a test to measure the "psychological attachments" of a child to a parent or which parent is the "psychological parent?" Have scientifically sound studies verified the test? Are the studies and the test generally accepted by the psychological community?

The use of this term is often used by lawyers and mental health professionals as a leap to a conclusion that circumvents a consideration of all of the factors in the statute. Even if a parent is the "psychological parent" or the "primary care giver," if that parent is so hostile to the other parent that he or she cannot promote the children to the other parent and cannot facilitate frequent and continuing contact, that parent should not be the primary residential parent. Otherwise, the children will grow up with one, angry, hostile, parent with whom they are allied psychologically and they will never develop a relationship with the other parent.

As a practical matter, haven't both parents been a "care giver" if called upon in the past? Why should the decision of the best interests of the children be based entirely upon the division of labor during the marriage, as is often urged in these cases? Haven't both parents cared for the children from time to time in the past? Haven't both parents been emotionally close to the children in the past? Why is one now supposed to be incapable of caring for the children? Why is one now supposed to be emotionally distant? Is the claim that one cannot care for the children really a reflection of a parent's anger and hostility which makes him or her unsuitable as a primary residential parent? Perhaps a parent is now incapable of caring for the children or is emotionally withdrawn from the children. If so, this must be proven.

3.. Arguments of special "bonding" between the parent and the children often comes up in connection with this factor and is nearly always subjective. Does "psychological parent" = "bonded parent?" What does that mean? Can't either parent bond to the children? Aren't the children bonded to both parents? If not why not?

If the children are not bonded to one parent, this seems like a problem the children are experiencing that the "bonded" parent should anxiously want to remedy, if that parent is truly "bonded" and interested in the children's best interest. The public policy of this state is that children should have "frequent and continuing contact" with both parents. The psychologists say children need a relationship with both parents, not just one. If the children are less bonded to one parent, why not put the children with the less bonded parent to strengthen that relationship? Is the "bonded" parent actually an "enmeshed" parent who cannot separate his or her feelings from those of the child and who projects his feelings onto the child, thus suffocating the child from expressing his or her own feelings?

If one parent has no interest or ability to promote the other parent, to improve the children's bond with the other parent, it is difficult to see how making that parent the primary residential parent

would be in the child's best interest, all other things being equal.

4.. In summary, the conclusion that a particular parent is the "primary care giver" or "bonded parent" or "psychological parent" does not fully determine the children's best interest. It is only part of the answer.

III.. ***"The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs."***

1.. This factor focuses on the parent=s ability to meet the material needs of the children. Can either parent take care of the children if called upon? If one hasn't done this primarily in the past, because of a division of labor and responsibilities in the relationship, can't he or she learn to do so now? In most cases, both parents have cared for the children, perhaps one more than the other. What has suddenly caused one of them to become entirely unsuitable where previously he or she was an acceptable care giver for the children? Is a parent's anger and hostility the basis for the claim that other parent cannot care for the children? When presenting evidence under this factor, most lawyers omit mundane considerations from their proof that the judge is thinking about:

2.. Do both parents have a car? A car seat for small children?

3.. Do both parents have a place to live suitable for children? Do they live in a house, an apartment, a mobile home? How many rooms? How many bedrooms? Is there a place for the children to play outside? Nearby?

4.. Do the parents give the children time and sanction to be themselves? Does the parent schedule activities every hour for the children? Is this good or bad?

5.. Has one parent taken the children to a mental health counselor without consulting with the other parent? Does this parent believe the conduct of the other parent is responsible for the children's emotional problems? Is there any basis in fact for this belief? Is the accusing parent's own anger and hostility toward the other parent a source of the children's emotional problems?

6.. Do both parents have clothes for the children? Are the parents able to share the children's clothes and toys as the children shuttle from place to place? Are they able to share in this parenting decision? Has either parent made the effort to share this decision? Once and given up or over and over?

7.. Do the parents have roommates or other adults or children living with them?

8.. Is he or she so involved in a new relationship that the children will be neglected?

9.. Will a parent's alcoholism or drug addiction lead to the neglect or abuse of the children?

10.. Does the parent have a job? What are the parents' hours of employment? When is the child in school?

11.. Do both parents have beds, sheets, cribs, furniture, appliances, necessary to care for the children?

12.. How far apart are the parents' homes?

13.. How far is it to the children's schools, the church or synagogue?

14.. Do the children have any friends living near the residence of either parent?

15.. Do the children have any relatives - grandparents, aunts, uncles, cousins - living near either parent?

16.. What are the parents' arrangements for day care? Are the parents willing to talk to each

other and coordinate day care? Can either parent share in this parenting decision? Has either parent made the effort to share in this decision? Once and gave up or over and over?

17.. Can the parents cook, prepare nutritious meals? Can they shop for groceries? What do the children eat? What does the parent eat?

18.. Do the parents clean the house? Do laundry? What is the parent's plan for doing the laundry and housekeeping? Does the parent have a washer and dryer or do they use a laundromat?

19.. Is the house and pool, if any, safeguarded for occupancy by small children?

20.. Are the parents mentally capable of attending to the children's emotional and material needs?

21.. What are each parent's ideas about discipline, homework, and bedtimes for the children?

22.. What are each parent's abilities to pay child support?

23.. Do the parents agree about "medical care" for the children? Dental care? Eye glasses? Orthodontia? Can either parent share in the decisions about the medical treatment the children need?

24.. Do the parents agree about medical insurance on the children? Have they talked about it? If not, why not? Has the parent with coverage for the children provided proof of coverage to the other parent? Can this be corroborated? Have they each purchased coverage on the children? Is one parent more responsible than the other for the lack of communication that led to this? Is either parent able to share in this parenting decision? Has either parent made the effort to share this decision? Once and given up or over and over?

IV.. **"*The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.*"**

1.. Note: The law requires the court to give little weight to the temporary arrangement after the parents separate. When the parents separate, a child usually lives with one parent primarily, by agreement, order, or acquiescence. The temporary arrangement does not determine what is in the child's best interest over the long term.

2.. Therefore, in considering this factor, the court looks to the situation before the couple separated and whether this can be approximated now, understanding that the temporary arrangement is only temporary. The final judgment will fix a permanent arrangement.

V.. **"*The permanence, as a family unit, of the existing or proposed custodial home.*"**

1.. Has the parent only recently settled in one location?

2.. Is the parent's home a permanent or a temporary situation?

3.. How suitable is the parent's home for children?

VI.. **"*The moral fitness of the parents.*"**

1.. Is the parent willing to sacrifice his or her own interests to those of the children? How is this demonstrated?

2.. Is the parent living with another person in a sexual relationship without considering the impact this may have on the children?

3.. Did the parent commit adultery?

4.. Does the parent respect the law? Does the parent file tax returns and report all income?

Will the parent respect an order for shared parenting?

5.. Does the parent feel a moral responsibility to follow the law, including the law of shared parenting? From what conduct since separation is this demonstrated?

6.. Does the parent have any record of drug or alcohol abuse? The evidence may be that this is a disease rather than a moral shortcoming. Psychological opinions about the origins of drug or alcohol abuse differ. To the judge, however, a more important question is whether the other parent wants the drug abusing or alcoholic parent to receive treatment so he or she will stop this behavior and become a better parent? Is the nonabusing parent willing to help pay for the abusing parent's treatment? What is in the children's best interests? Also, if the accusation of drug or alcohol abuse has no basis, leveling a baseless accusation speaks volumes about the accusing parent's ability to share the children and to participate in joint parenting decisions.

7.. Does the parent have any criminal record?

8.. Is the parent forthcoming and honest with financial disclosure? Is the parent's financial affidavit accurate and complete? Did the parent exaggerate his or her expenses and minimize his or her income?

9.. If the parent owes child support, is the parent paying it? Regularly? On time? Did her or she start promptly upon separation or pursuant to a court order?

10.. Is either parent manipulating the payment of child support or access to the children to further a personal agenda of the parent?

VII.. **"*The mental and physical health of the parents.*"**

1.. If there is no evidence, the court assumes both parents are mentally and physically healthy enough to take care of the children.

2.. If there is some evidence of poor mental health - e.g., manic depressive disease, drug or alcohol abuse, etc., - a psychological evaluation or alcohol or drug abuse evaluation and recommendation may be called for. In cases where one party is claiming the other party abuses alcohol or drugs, if that party was serious about wanting to carry out this state's public policy, that the children should have a relationship with both parents and that parents should jointly raise their children, he or she should be asking the court for an evaluation of the other party and ordering the other party to drug or alcohol counseling and rehabilitation and offering to help pay for it. These cases usually consist of the accusing parent assuming accusation is the end of the matter. Again, making a baseless accusation may prove the profundity of the accuser's hatred for the other spouse and conclusively demonstrate he or she cannot perform the duties of a primary residential parent. If the accusation is proven, it is the beginning of a further question. The public policy is that the children should have contact with both parents. Therefore, having identified the problem, what does the accusing parent propose should be done to remedy the problem so that the children grow up with two parents, if the accusing parent is sincere about wanting to promote the best interests of the children? Proposing nothing may mean the accusing parent is unwilling and cannot facilitate and promote a relationship between the other parent and the children, which is relevant to factors (1) and (10). Also, is the alcoholic or drug abusing parent willing to do anything about his or her behavior? Will he or she take periodic drug tests? Will he or she enter drug and alcohol abuse programs and complete the course? Proposing nothing may mean the affected parent is unsuitable as a primary residential parent.

VIII.. **"*The home, school, and community record of the child.*"**

1.. What are the child's grades and school attendance records?

2.. Is the child involved in church or synagogue activities?

IX.. **"*The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.*"**

1.. In small children, under 12?, under 11?, this judge gives this factor very little weight. All children, especially small ones, are dependent on their parents for support, material and emotional. They will tell a parent what they perceive the parent wants to hear, in order to not be cut off from that support. Interestingly, old and infirm people do the same, except they are telling their adult children what they think they want to hear to keep from being cut off from their emotional and material support. There are many reported cases where old and infirm people are unduly influenced by those on whom they are dependent for support. Children are no different. Children do not always tell the truth. Like adults, they speak from self-interest. Indeed, small children do not always understand the difference between truth and falsity. In older children, 13?, 14?, the court might give this factor more weight. Consider also that if one parent wants a child to testify so that he or she can "win," what does that say about that parent's ability to promote the other parent and facilitate a relationship with the other parent? What does it say about that parent's willingness and ability to share parenting decisions?

2.. In general, we don't let children decide what is in their best interest. If we did, they would not go to school, bathe, eat vegetables, or go to bed. We don't let them decide whether they will go to school and we don't let them decide if they will spend time with both parents. The public policy is that children must go to school whether they like it or not. The public policy when parents separate is that children spend time with both parents, whether they like it or not. The legislature believes this is in the best interests of the children. Judges are government officials obliged to follow the law. A "good parent" wants the children to spend time with the other parent, unless there is something so wrong with the other parent it would be detrimental for the children to do so.

3.. Spending thousands of dollars to prove the preference of a small child may be a misguided effort. If Johnny and Susie are saying they don't want to live with mother or father or one day several months ago he or she said: "I like it better at your house," the judge is wondering whether they have been manipulated, cajoled, or pressured into making the desired statement, whether contrary statements have been conveniently forgotten, whether they are still saying this today, and whether they have made the same statement to each parent, in a pathetic effort to say what the child thinks the parent wants to hear. Therefore, proof of the statement proves very little. The time and effort spent on proving the hearsay statements of the children, sometimes with very expensive "parenting evaluations," might be better spent on learning how to share the children and promote the other parent to the children, with counseling if necessary.

4.. Remember: Hearsay is (1) self-serving (you only present the hearsay you like); (2) violates the other party's right of confrontation (he or she can't cross examine the out of court declarant); (3) is unreliable because it depends upon the selective memory of the witness; (4) legally inadmissible. A persistent effort to bring hearsay evidence to court may indicate a lack of respect for the law, which is relevant to factor number six.

5.. Also note there are two rules, 12.363 "Evaluation of Minor Child" and Rule 12.407 "Testimony and Attendance of Minor Child" designed to protect children in these cases.

X.. ***"The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent."***

1.. This factor, along with the first factor, is largely ignored in the proof presented in a parenting case, even though the legislature regards this as significant to a determination of the best interests of the children. Again, this is ignored because facilitating and encouraging a relationship between the children and the other parent is very hard to do, almost unthinkable for many parents. That it is hard to do is no excuse for not doing it. Not doing it is proof that the parent cannot do it and if the parent cannot do it, the parent should not be the primary residential parent, all other things being equal. Some questions to consider:

2.. Does the parent keep a framed photo of the other parent prominently displayed in the house or at least in the children's rooms?

3.. Does the parent drive the children to and from the other parent's house or at least meet the other parent halfway?

4.. Does the parent speak about the other parent respectfully and keep negative thoughts to himself or herself?

5.. Does the parent encourage the children to call the other parent on the phone frequently?

6.. If the hostility of the other parent is great, does the parent have an answering machine and a fax machine for sending and receiving messages?

7.. Is the parent willing to attend counseling with the other parent from time to time until the children are grown to work out any parenting problems that may arise? *E.g.*, my job requires me to move to Tampa, what can we work out to be sure the children spend time with both parents? When should we let the child date? When should we let the child drive a car? Should the child have a car? What should we do to help the child's grades improve? etc.

8.. Does the parent encourage the children, and provide them with the means, to send letters, birthday cards, and Mother's Day or Father's Day cards to the other parent?

9.. Does the parent keep a calendar of upcoming events involving the children at school, church or the synagogue and provide this to the other parent so the other parent can participate with the child?

10.. Does the parent send copies of report cards promptly after they were issued and the children's schoolwork to the other parent?

11.. Does the parent discuss parenting problems with the other parent and work out joint decisions? If not, why not?

12.. Does the other parent encourage the children to keep photo albums and scrap books of time spent with the other parent?

13.. Does the parent keep the school, church, or synagogue informed of the other parent's name, address, and phone number?

XI.. ***"Evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to '741.30."***

1.. This is specific instance of a moral shortcoming, which is factor #6. It is also perjury

since the petition for domestic violence is under oath.

XII.. ***"Evidence of domestic violence or child abuse."***

1.. The filing of a petition for an injunction and the issuance of an injunction is not proof of domestic violence in a dissolution action. Some petitions are false. Many injunctions are entered by consent and without a finding of violence. Many are entered after a hearing on evidence that justifies an injunction but may not justify any restrictions on parenting time with the children.

2.. Evidence of domestic violence directed toward one parent is a sufficient basis for restricting the battering parent's contact with the children. The court can order supervised visitation or terminate all contact between the children and the battering parent. Conviction of a third degree or higher felony involving domestic violence creates a rebuttable presumption of detriment to the child.[11] Therefore, a conviction of misdemeanor domestic battery does not create a presumption.

XIII.. **"*Any other fact considered by the court to be relevant.*"**

1.. In summary, a lawyer wanting to prove his or her client should be the primary residential parent should present a detailed, written plan signed by the client explaining where the children will be during the week and during the year and how the client will carry out the duties of the primary residential parent, sacrificing his or her interests to the best interests of the children. **The plan must show how the parent will <u>care</u> for the children <u>and</u> how the parent will <u>share</u> the children=s time and make joint parenting decisions with the other parent.**

2.. What are the primary residential parent's obligations? The primary residential parent has the affirmative obligation and duty to (1) keep the other parent informed and involved with the children; (2) encourage and foster frequent and continuing contact with the child and the other parent; (3) encourage and foster the parent-child relationship between the other parent and the child; and (4) consult with the other parent to make joint decisions regarding the child. The alternate residential parent has these same obligations. The primary residential parent has the greater obligation only because the children live at his or her house most of the time. *See,* Hon. Renee Goldenberg, *Practical Aspects of Parenting Conflicts: Preparing Parents for Litigation, The Florida Bar Journal, January 1998.*

3.. Consider also the factors suggested by Dr. T. Berry Brazelton in a column in the Fort Myers *NewsPress,* 3/1/98:

A.. The development needs and age of the child.

B.. The psychological attachments of the child.

C.. The way the child-rearing tasks were shared during the marriage.

D.. The preservation or development of a close relationship with each parent.

E.. Development of a consistent and predictable schedule that minimizes the transition between the households.

F.. Each child's temperament and ability to handle change.

G.. The parents career demands and work schedules.

H.. The need for periodic review of the plan, noting trouble signs and making changes as each child's needs and circumstances of the family change.

1. Florida Statute '61.13(3)(1998): "For purposes of shared parental responsibility and primary residence, the best interests of the child shall include an evaluation of all factors affecting the welfare and interest of the child, including, but not limited to:

(a) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent.

(b) The love, affection, and other emotional ties existing between the parents and the child.

(c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the parents.

(g) The mental and physical health of the parents.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(j) The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(k) Evidence that any party has knowingly provided false information to the court regarding a domestic violence proceeding pursuant to '741.30.

(l) Evidence of domestic violence or child abuse.

(m) Any other fact considered by the court to be relevant."

2. '61.13(2)(b), Florida Statutes (1997)

3. It is easy to see why many lawyers are confused. Many appellate courts also apparently do not understand that the trial court is required to order shared parenting, not custody, and must consider all of the factors in the statute, not just those dealing with care of the children. A quick pass through recent advance sheets illustrates this: *See, e.g., Vaughn v. Vaughn*, 23 FLW D1780 (Fla. 5th DCA 1998) in which the appellate court said, concerning the trial court's ruling: "Custody of the minor child was given to the wife." This sounds like the way a car or a boat would be distributed, but the statute requires the trial court to order shared parenting, not "give custody." Or, *see, e.g., Young v. Hector*, 23 FLW D1529 (Fla. 3d DCA 1998) in which the appellate court seems to believe the "past caretaking roles" of the parties is the sole determining factor the trial court should consider in making a decision about "which parent should be awarded primary residential custody of the children," thus overlooking the fact that the statute requires the trial judge to order shared parenting, not custody, and to consider of all of the factors listed in '61.13(3), not just those dealing with "past caretaking roles," that is, '61.13(3)(c), which is only one of the 13 factors listed in the statute. The persistent use of the terms "custody" and "visitation" in trial court and appellate opinions is all the more surprising considering the statute was first adopted in 1982. *See* note 1 above for the text of the statute.

4. '61.046(11) Florida Statutes (1997)

5. '61.13(2)(b)2.: "The court shall order that the parental responsibility for a minor child shall be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."

6. *Schutz v Schutz,* 581 So. 2d 1290 (Fla. 1991)

7. *Cummings v. Cummings,* 22 Fla. L. Weekly D510 (4th DCA Fla. 2/18/98)

8. '61.13(2)(b)2

9. '61.13(2)(b)2., a.

10. *Id.*

11. '61.13(2)(b)2.