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

M. L., f/k/a M. G.
Former wife,

vs. **Case No. 00 DR 0000 N**
J. G.,
Former husband,

FINAL JUDGMENT DENYING MOTHER'S SUPPLEMENTAL PETITION

This matter having come before the court on 11/2/2011 on the former wife's "Supplemental Petition for Modification, Etc." filed 9/29/2010, it is ordered:

1. Findings

The parties were divorced by a judgment entered on 7/18/2008. The judgment incorporated a marital settlement agreement of the parties.

The mother's "Supplemental Petition" filed 9/29/2010 asks for a modification to the time-sharing schedule and the parental responsibility order and also the child support order. If the court changes the time-sharing schedule, she asks for a child support order. She alleges that a substantial change in circumstances has occurred. The father has not filed a counter petition.

The parties have two children, J. G., born (*Date omitted*), now age 11, and H. G., born (*Date omitted*), now age 8. The father is 38 now, the mother 31. The father remarried on 1/30/2009. He now has another daughter, J., born in 2009, now age 3. The mother is not remarried.

The mother is a legal assistant working in a law firm in Cape Coral. She works 8:30 a.m. to 5:00 p.m., although she gets off work at 3:30 p.m. on some days when she is to be with the children after school on those days. She earned $36,842 gross in 2009.

The father is a painter. He works as an independent contractor for his father's painting business. He reported $15,464 gross income on his 2009 income tax return. He has some flexibility in his work hours.

In general, at trial the parties were remarkably calm and reasoned. They were not hostile and not emotional, although the trial was a very stressful event for both of them, as it is for most parties in family litigation. Neither had any gratuitously derogatory remarks to make about the other, even though in their testimony they disagreed about their religious beliefs, the time-sharing schedule and the parental responsibility order.

The mother is not remarried. She is living with a man for some years. The father knows the mother is living with another man, "Jared," but he does not know his last name. He says this is

"her business" and it does not concern him, that she lives with a man to whom she is not married. This testimony is not credible. The father has great self-control, in court and out of court.

The other man, Jared B., admitted in his testimony that he has become frustrated with the father on occasions and that he has said less than kind things to him and he has sent him "texts" that were less than gracious.

Under the original settlement agreement the parties each take one child as a dependent's exemption on their federal income tax returns, the father claiming J. and the mother claiming H. Their original time-sharing schedule in their original settlement agreement is very detailed. It was intended to be an "equal" time-sharing schedule. The parties also agreed in that settlement agreement that neither would owe any child support to the other.

The parties were both followers of a certain religious tradition during the intact marriage, but the mother is no longer a follower of that tradition. The mother stopped practicing and following the tradition in 11/2006, before the parties separated and before the divorce was final on 7/18/2008.

Since the divorce, the mother has begun celebrating birthdays and other holidays during the year, while the father does not celebrate any birthdays or other holidays during the year because his religious tradition prohibits this.

The mother has "disassociated" herself from the father's religious organization, so that she is now "severed" from the members of that organization. Nevertheless, the father can still meet with her and be in contact with her, under the rules of his religious organization, in order to parent their children and he may be in the same room with her at events involving the children.

The father became a member of his religious organization, that is, he was "baptized," when he was "17 or 18." As a child he was raised in this tradition by his parents and when he was of sufficient understanding and training, he made a decision to become a member. His parents are still married to each other and they go to the same services as the father.

The mother was also raised in this religious tradition. Her father is now deceased and the mother's mother, Ms. W., who lives in North Carolina and who raised her daughter in the tradition, has also "stopped going" to the services of this tradition. The mother's father died in 2003, but her parents divorced before then. Her mother remarried before the mother was 18 years old. The mother was raised in the tradition by her mother and her stepfather, Mr. R. Her mother is now divorced from Mr. R. Ms. W. has since remarried and her husband is not a member of this tradition.

The mother is still in touch with her former stepfather, James R., who lives in Pennsylvania and who testified at trial as a witness for the mother. He no longer follows this tradition.

The mother says that her "disassociation" from the father's religious organization amounts to a substantial change in the circumstances since the judgment was entered that was not contemplated when it was entered.

She says that the children are having difficulties and confusion due to the "day to day" and "equal" time-sharing schedule and that the difficulties and confusion experienced by the children

with the time-sharing schedule is also a substantial change in circumstances not contemplated when the judgment was entered.

The father's religion does not celebrate Christmas, birthdays, and other holidays that the mother now celebrates. The parties disagree about the children's religious upbringing, in general and about specific holidays and birthdays. The parties disagree about gift giving days such as Christmas and birthdays. The father's tradition "memorializes" a particular anniversary during the year, but no other days. The have disagreed about the children's religious upbringing since they separated.

Under the time-sharing schedule the children are always with the father on Sundays, either all day every other Sunday and also for "not to exceed 3 hours" on the alternate Sundays, so the father can take the children to his religious meetings and services on every Sunday. In fact he takes them to services in his religion every Sunday so the mother has no opportunity to take them to any other tradition on every Sunday because the father has them for "3 hours" on alternate Sundays and all day on the other Sundays, and the "3 hours" occupy the hours when most traditions hold services. This is what the original settlement agreement provides.

The father testified that the children are not "believers" and "members" of his religious tradition because they are not of sufficient age to become believers and members. There is no "set age" for a child to become a member. He said the age arrives when they are of a sufficient maturity and intelligence to "comprehend the teachings" and "understand it", which may not arrive until many years after they are legal adults or may arrive before they are adults.

The father teaches the children to be respectful of their mother and he encourages them to be with their mother. There is no evidence to the contrary. The time-sharing schedule in practice is an "equal" schedule. The father has backed up the mother on discipline issues so that they present a united front to the children. He encourages them to have a relationship with their mother. He also teaches them his religious beliefs, which includes a teaching that nonbelievers of his tradition, such as the children's mother, are not to be associated with and that "spiritual matters" should never be discussed with nonbelievers, including a nonbelieving parent.

The parties' agreed to participate in parenting coordination in the settlement agreement incorporated into the judgment, and they entered into a written "Stipulation & Order Appointing Parenting Coordinator" that was filed on 1/20/2010. A court order adopted that stipulation. However, this order was not followed. The mother went to see the coordinator but the father did not participate in the process. The process stopped because of the father's refusal to participate. He denied this, but his testimony was not credible. The father met once with the parenting coordinator per the stipulation. The mother did also. They were next to meet together with the coordinator, but that meeting never happened, due to the father's illness the first time and the father being out of town the second time. A third time did not happen because the father did not want it to happen.

The time-sharing schedule in the settlement agreement is intricate and detailed. The parties have made informal changes to that schedule, either by verbal agreement or by implied agreement shown by their course of dealing or by the mother's acquiescence in the father's conduct, such as his picking up the children from school every day, even though the schedule in the agreement does

not so provide.

The father has controlling tendencies. For instance, he testified that he is allowed to pick up the children from school "every day" and he will now begin doing this, but the time-sharing schedule provides otherwise.

Under the schedule as modified by informal verbal agreements, course of dealing, and acquiescence, the mother works until 5:00 p.m. every week day and after work she picks up the children from the father's residence on every Wednesday and every other Friday and one child or the other on Tuesdays, so that each parent has a "one-on-one" day with a child each week. Both parents enjoy and want to continue this "one-on-one" day, even though that is not part of the original settlement agreement.

The mother says the present schedule is "hard on the children" because they go back and forth every day and repeatedly during the week. The children are in a different home every night except for every other Friday and Saturday nights when they are in either the mother or the father's home for those two consecutive nights. Otherwise, they are in a different house every night, so there are frequent occasions that their clothes, shoes, books, homework, etc., are left in the other home and these are needed and a hurried trip is necessary to get these items before school starts at 8:05 a.m.

This schedule has been the life of the children since the judgment was final, as modified by the parties informally.

The parents' homes are about "7 minutes" apart and the school is less than 10 minutes from each house. The parties live in Cape Coral and the school is in Cape Coral.

The father says both children are being "taught" his religious tradition and they have been taught this tradition "for their whole lives." In particular, the children are taught to "shun" nonbelievers, even a parent who is a nonbeliever. The tradition teaches them that they must limit or end altogether all contact and associations with nonbelieving family members and friends.

The father does not prohibit the children from following the time-sharing schedule and there is no substantial, competent evidence that he interferes with the children going to the mother's house for about half of the time each week, but the father also teaches the children the beliefs of his religious tradition, which includes "shunning" and "disassociation" with nonbelievers, even nonbelieving family members. The mother's fear that in time the children will stop associating with her is a realistic fear. This is what has happened to the "disassociated" witnesses who testified as witnesses for the mother.

The father's religious tradition also requires that believers must not allow certain ordinary and generally accepted medical treatments to be performed on them or their children. The mother and the father disagree about this teaching, the mother believing that these medical treatments are acceptable for her and the children, while the father says these are prohibited for him and the children.

The mother did leave the father's religious tradition. She stopped practicing the tradition in 11/2006, before the parties separated and before the divorce was final. In the last "couple of years", according to the father, the mother decided to start celebrating birthdays and other holidays

during the year. The mother did not dispute this testimony.

The father works for his father, who is a painting contractor. The father does not have a contractor's license. He has worked for his father since he was 21 or 22. His father does not withhold taxes on his compensation. The father owns a "minority" equity position in his father's Sub S corporation, G. Finishing, Inc., which is the business entity for whom the father works as an independent contractor, not a W-2 employee, so he has income reported from that entity as a subcontractor and as an equity holder on his 2008 and 2009 income tax returns in evidence. He is not sure whether his interest in that company is "25%" or "45%."

The father says he is paid "hourly" and that "at the end of the year the accountant figures out" his percentage of the income of the business and that is reported as his equity interest in his father's Sub S corporation.

The father's financial affidavit shows he has gross monthly income of $1,000. He says the painting business of his father is doing poorly at this time and that his father "filed bankruptcy" recently, but he is not sure if that was a personal or corporate bankruptcy.

He reports on his affidavit that his total monthly living expenses total $2,647, so that he is losing $1,467 each month.

His testified that his wife works as a waitress and her net take home is "probably around $1,000, $1,000, $1200." She works in the evenings.

In general, the father's testimony about his income is not credible.

James R., a witness called by the mother, lives in Pennsylvania. He was formerly married to the mother's mother. He still regards the mother as "his stepdaughter." He was formerly a member of the father's religious organization. He was a "ministerial servant" for about "seven years," handling the general business of the group, and an "elder" for about "nine years." The "elders" determine spiritual and doctrinal questions of the group and individuals.

Mr. R. has not been associated with the organization for "five years" now. He left voluntarily, so he "disfellowshipped" himself from the organization. He did so because he disagreed with the "procedures" and "doctrines" of the organization, in particular the tradition's prohibition against certain medical treatments that are ordinary and generally accepted by nonbelieving physicians. He also disagreed with certain "prophetic" predictions of the group.

Mr. R.'s decision to "disassociate" from the tradition was accomplished when he "just left" and "informed them" that he was leaving the group, and not by any formal letter of "disassociation." As he sees it, this decision of his led directly to his divorce from the mother's mother because she did not also leave the tradition when he did. His ex-wife, Ms. W., the mother's mother, also testified; however, and she said his decision to leave the tradition was "a factor" in their separation and divorce, but not the principal reason. Sometime after their divorce she also left the tradition.

Mr. R. also disagreed with the practice of "disfellowshipping" and "disassociating" former members, which means a "complete cutting off" of a former member from other members of the group, seeing this as tearing families apart and a cruel practice. For example, when his oldest biological daughter decided to "leave the" organization, she was "shunned" by all members of her

"mother's family" and she lost all of those relationships. He said during the years he served as an elder he "never" saw the practice of "shunning" accomplish anything beneficial for a family, that only "terrible things" have happened to families and family members as a result of "disassociating" or "disfellowshipping" of former members.

The mother is concerned that her daughters will "shun" her if they become members of the father's religious tradition, at some point in the future, because this will be required of them by the organization given that she is now "disassociated" from the group. This is a realistic possibility, given the teachings of the tradition.

Mr. R. explained that if a child is living with a "disassociated" parent, or spending time with that parent, the child may discuss only mundane matters with the parent, "where are my books?", "please pass the bread," etc., and may not discuss any "spiritual" matter at all with that "disassociated" parent, just as they cannot discuss these matters with any unbeliever. He said a child is discouraged from spending time with that parent. However, the father denied that he does this and the evidence shows the children are spending half the time with the mother every week. Mr. R. explained, however, that in practice, a child of a father who is in the tradition and a mother who is out of the tradition absorbs the group's disassociation from the mother, and in his experience it is "rarely the case" that this child can maintain a relationship with the mother.

P. L. W., a witness called by the mother, testified. She is mother's mother. She was formerly a member of the father's religious tradition, but "about 5 years ago," she left that tradition. She left because she "disagreed" with certain doctrines and practices. She testified that she was "cut-off" from her "natural birth family" when she associated with the tradition because they were unbelievers. After she "stopped going" to the organization, her friends, including her "best friend," stopped associating with her.

Ms. W. raised the mother in this tradition. Children of members in the tradition are raised in the doctrines of the tradition. As the father testified, "by age 10," they are fully informed of the doctrines of the tradition.

Ms. W. says she fears that the children are quizzed by the father about the practices in the mother's home, particularly over celebrations of birthdays and holidays and presents received in connection with these. She has heard the father quizzing them about such matters.

Thus the children are stuck in the middle of their parents' dysfunction arising from the parents' different religious convictions.

As Ms. W. sees it, the children are "not allowed to love us without restraint" because of the father's and the mother's different religious convictions and she fears that the children's relationship with their mother and their mother's unbelieving or disassociated family members is less than free and easy.

Jared B. also testified, a witness called by the mother. He is 35 years old. He lives with the mother. They have been "in a relationship" for the last "four years." He was also raised in a family that followed the father's religious tradition. In his '20's he disassociated from that tradition, then rejoined, and a few years later left again, when he was "about 25." He has not gone back. Nevertheless, even after he no longer was in agreement with the "teachings," he was "faking" for a

while so he could continue to go to meetings and could associate with his mother, who was then diagnosed with cancer. After he finally left altogether, he has had minimal contact with his mother and his two sisters have not spoken to him "in 5 years." His mother has limited the contact because she felt that their "conversations would be too superficial."

His greatest disagreement with the tradition is the effect it had on his family. His father left the fellowship when Mr. B. was about 14 and Mr. B. was "strongly encouraged by his mother and the congregation" to limit his contact with his father. His younger sister also had minimal contact with their father. They were prohibited from having any "spiritual discussions" with their father.

Mr. B. sees the children when they are with the mother in the home and otherwise. The children love their mother, but they get upset and "cry" because they believe the "end times" will come shortly and then "mother and Jared" will die but the children will live on, in keeping with the doctrines of the father's tradition. The children "go back and forth" wanting to "celebrate their birthdays" and get gifts, consistent with the mother's practice, and rejecting this practice, to be consistent with the father's teachings.

Mr. B. has a business in Maryland, where he lives half the year, the warmer months, where he has a window washing business. He met the mother many years ago when they were both children attending services in the tradition of the father. He does not have any children of his own.

A. R. testified, a witness called by the mother. She lives in North Carolina. She was a believer of the father's tradition "for 30 years." She is now 37 years old. She has two daughters, ages 13 and 10. She is a hairstylist. She is not now married, but she was married formerly. She got divorced about "5 years ago," which was about the "same time [she] left the [tradition]."

She is the mother's stepsister. She is the biological daughter of James R. She related testimony similar to that of the mother's other witnesses, that as a child and an adult she was told by followers of the father's tradition to limit her communication and relationships with nonbelievers of the tradition, including close family members.

She explained that the mother does not limit their communication with the father, that she does not quiz them about what they do with the father.

Two years ago, when the children were visiting in her home in North Carolina during December, Ms. R. gave a gift to each of them. She handed them the gifts, which she did not regard as Christmas presents and which she told the children were not Christmas gifts, and they started crying because they were told by their father that they could receive presents from Ms. R. on this visit, that these were Christmas presents and they could not accept and open them.

She said that children are encouraged to be restricted in their relationship with parents and other family members who are outside of the father's tradition.

The father testified that he wants the children to have access to their mother, that he encourages the relationship, that he wants them to have a good relationship with their mother.

He also said that he teaches them his traditions and beliefs, which include "shunning" and "disassociation" with nonbelievers, including family members. He said that he talked to them about the December visit to Ms. R.'s home in North Carolina, but he said that he told them not to be "stressed out" about the celebrations that might take place and the presents they might receive.

Regardless of what he told them before and after that visit, it is noteworthy that the visit to the home of a nonbelieving family member in another state did take place, that the father did not oppose it, even though it is not strictly allowed by the time-sharing agreement in the original settlement agreement.

The father said he does not treat the mother any differently now that she is "outside" of his tradition. He says the children have "free will" and it is "their choice" if they adopt another religious tradition or none at all, but he also teaches them that they must accept his tradition. He says that if the mother decided to take them to services in another tradition on Sundays, he would "not like it," but he would not interfere or try to prevent this, even though under the time-sharing schedule the children are with him every Sunday during the year during the hours when most traditions hold services.

There is no substantial, competent evidence that the children are not doing well on the present schedule, despite the confusion and last-minute adjustments that must be made almost every day. The children have good grades, they have good relationships with their friends at school, their parents, their school teachers, etc.

2 Ruling

The mother's supplemental petition is denied, because there is no substantial change in circumstances not contemplated by the Final Judgment of Dissolution of Marriage, which is the first part of the legal standard for deciding a supplemental petition to modify. The court does not reach the second part of the standard, that is, whether a proposed change is in the best interests of the children, because the mother has not proven the first part. *See, Cooper, supra,* and *compare, e.g., Rossman v. Profera*, 67 So.3d 363 (Fla. 4th DCA 2011).

Regarding the time-sharing schedule, it was intended to be "equal" and that is what it is now, by informal agreement between the parties, acquiescence, and course of dealing between the parents.

This matter is not before the court on a motion for contempt of the time-sharing order or the parental responsibility order or the order for parenting coordination. This matter is now before the court at a trial on a supplemental petition to modify the time-sharing schedule and the parental responsibility order. So, the legal standard for such a petition is what the court must consider.

The legal standard for determining any supplemental petition to modify is (1) whether a substantial change in circumstances has occurred since the final judgment was entered that was not contemplated when the judgment was entered and also (2) whether a proposed modification would be in the children's best interest. *See, Cooper, supra.*

Changes and adjustments to the time-sharing schedule by informal agreements between the parents from time to time cannot amount to a substantial change in circumstances. *See, e.g., Sidman v. Marino*, 46 So.3d 1136 (Fla. 1st DCA 2010), in which the court said: "[A]llowing an agreement between the parents to provide a basis for modification would discourage parents from making informal, joint decisions for the benefit of their children", citing *Smoak v. Smoak*, 658

So.2d 568 (Fla. 1st DCA 1995). In other words, separated parents are expected to be flexible and accommodating to their children so that the children have frequent and continuing contact with both parents. Using their informal changes as a basis to change the schedule is not allowed by law.

Of course, in this case, the testimony of the parents revealed that they do not agree about what the present schedule is, that the father, for instance, asserted that he is entitled to pick up the children from school every day, even though that is not what their settlement agreement provides. Nevertheless, these parents have a working relationship, by informal agreement, acquiescence and a course of dealing, which has resulted in a time-sharing schedule that is substantially certain. In any event, the mother's pleading does not ask the court to declare what the schedule is; rather, she asks the court to modify it altogether.

The evidence is that the children are doing well under the schedule, that complications with exchanging of books, clothes, etc., on this "day to day" schedule are ironed out, even if this is frustrating and tedious for the mother, the father, the father's wife and Mr. B. There is no competent, substantial evidence that the children are experiencing any serious difficulties with the existing schedule. The father and his wife work with the mother and Mr. B. to work out any difficulties the children face day to day. The parties live close together and also near the children's school. Both parents participate in school activities.

It is true that the children have limited opportunity for after school activities, because of this "day to day" schedule, but that is a parenting decision to be worked out by the parents, not a matter to be taken over and dictated by a judge.

Regarding the parental responsibility order, the parties were ordered to share all major parenting decisions, pursuant to their agreement, and the parties are doing a fairly good job of sharing major parenting decisions, such as discipline of the children, medical decisions, choice of school, etc., even if they do not confer together and make joint decisions about the children's religious upbringing.

It is true that these parents cannot make joint decisions about their children's religious training. It is also true that they are each free to raise the children as they see fit in their own homes and to give them the religious instruction that they each believe their children need to receive. *See Abdo, supra*, and *Rogers v. Rogers*, 490 So.2d 1017 (Fla. 1st DCA 1986).

It is true that if the children need a medical treatment that the father's religious beliefs prohibit, the parents will certainly disagree about this major parenting decision. In that event, they may not return in this case and ask the judge to overrule one parent or the other.

The court in a Chapter 61 case cannot substitute its judgment for the parenting decision of either parent because the children have two fit and competent parents. There is no allegation or proof here that either parent is unfit because of abuse, abandonment or neglect. Further, the definition of "neglect" does not include withholding any medical treatment because of a religious belief. *See* §39.01(44) and *see, e.g., J.V. v. State*, 516 So.2d 1133 (Fla. 1st DCA 1987).

Chapter 61 is the statute that governs cases between separated parents, for paternity or dissolution of marriage. That statute does not give the judge the authority to become a "super

parent" empowered to make parenting decisions for the children when parents who were ordered to share parenting are at an impasse. *See Martinez v. Martinez*, 573 So.2d 37 (Fla. 1st DCA 1990), in which the court said: "[§61.13(2)] contemplates that parents, not the courts, have the responsibility of determining where their children will attend school. In situations where the parents are unable to agree on the education of their children, the court is required to designate, based on the best interests of the children, one parent to have the ultimate responsibility for making decisions regarding that specific aspect of the children's welfare. ... We decline to construe [§61.13(2)] as giving a trial court authority to direct which school the children shall attend; that section only authorizes the court to determine, based on competent substantial evidence, which parent shall make that decision based on the best interests of the children." *Id*. at 41.

Likewise, a judge in a Chapter 61 case cannot order one medical treatment over another, while the judge in a Chapter 39 case can do this, *see, e.g.,* §39.407(2)(a)2., when both parents are unfit. The judge in a Chapter 61 case has no such authority. The judge in a Chapter 61 case can only order one of the three alternatives for parental responsibility allowed by §61.13(2). Here shared parental responsibility was ordered because that was what the parties agreed upon.

The children's religious training is a major parenting decision. These parents certainly disagree about the children's religious training. However, the mother had already left the father's religious organization when the parties separated and before they were divorced, so their different religious convictions was a circumstance existing when the judgment was entered. It was contemplated at the time the judgment was entered that the parents would differ in their religious beliefs and practices and that they would disagree about the children's religious training and upbringing. This is nothing new or not contemplated, even if the details and particular day to day problems could not be foreseen.

A judge in a Chapter 61 case has no authority to tell either parent what religious tradition a child should be raised in, just as the judge cannot pick the school or decide on a medical treatment. Those are all parenting decisions. *See, e.g., Abbo v. Briskin*, 660 So.2d 1157 (Fla. 4th DCA 1995) and *Moore v. Wilson*, 16 So.3d 222 (Fla. 5th DCA 2009).

The record does not support a finding that the father or the mother is unduly interfering with the religious practices of the children when they are with the other parent, even though the father's tradition teaches that believers and the children of believers must avoid or limit association with unbelievers. That is part of his tradition, just as some religious traditions require their adherents to wear certain articles of clothing. A Chapter 61 court cannot tell parents how to dress their children just as the court cannot order their religious upbringing. Parents have the authority to raise their children without any court supervision, as long as there is no abuse, abandonment or neglect, but in that event, the cause of action is under Chapter 39, not Chapter 61. Any "...person who has knowledge of the facts alleged" as well as an attorney for the Department of Children and Family Services may file the petition allowed by §39.501(1).

Cooper v. Gress, 854 So.2d 262 (Fla. 1st DCA 2003) decides this case. The issue in *Cooper* was the legal standard for deciding a parent's supplemental petition to modify a time-sharing

schedule. The appellate court held that the "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, ... 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 proper 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 be resolved."

So it is in this case. The mother has not carried her burden of proof. She has not proven there is a substantial change in circumstances since the Final Judgment was entered that was not contemplated at the time of the judgment. The question is not whether the mother or the father is a better parent. The question is not whether the father's religious tradition and organization or the mother's religious convictions are appropriate for the children. *See also Sanchez v. Hernandez*, 45 So.3d 57 (Fla. 4th DCA 2010).

The question is whether there is a substantial change in circumstances since the judgment was entered that was not contemplated then and whether a change now proposed by the mother is in the children's best interest. The first part of this standard is not met by the mother's proof. The children are doing well under the schedule, and the parents have demonstrated a capacity to share major parenting decisions since they separated, even if they disagree about the religious training that the children should be given. They are now living out the consequences of their different religious convictions, a difference that existed before they separated and divorced. There is no substantial change in circumstances.

Regarding child support, the mother asked for child support in her supplemental petition if the court changed the time-sharing schedule, which the court cannot do under these facts and the law. So, this request is denied. The father also asked for child support at trial, but his request is also denied because he made no pleading for this relief. *See, e.g., Todaro v. Todaro*, 704 So.2d 138 (Fla. 4th DCA 1997).

Regarding the "Disney Time Share" asset owned by the parties, the original settlement agreement provided that the "Husband shall be entitled to exclusive ownership of the Disney Time Share and shall be responsible for all associated costs, provided that he remove Wife's name from the time share within 60 days from the date of this agreement. If Wife's name is not removed from the time share as provided herein, then the time share be immediately sold and the parties shall equally divide the sale proceeds, if any." The argument at trial is that nothing at all happened with regard to this "time share" asset. The former wife's name was not "removed" and it was not sold and the proceeds divided.

The former wife's supplemental petition has a count for partition of this property, pursuant to Chapter 64. However, her counsel's argument at trial is for breach of this contract provision, but breach of contract is not alleged in the supplemental petition.

The court continues the trial on this issue, grants the former wife 20 days leave to amend to state a cause of action for breach of contract, in the alternative, if she wants to do this, and ask for relief appropriate for breach of contract, that is, judgment for damages, if any, or specific performance, if allowed by law. If she amends then the former husband shall file a motion or responsive pleading within 20 days of the amended supplemental petition.

If she does or does not amend, then the parties shall return to the continued trial and the former wife's burden shall be to prove her cause or causes of action pleaded.

It shall be the responsibility of counsel for either party to advise the court after this date that the parties are at issue on the amended pleading, if any, by filing a notice for amended trial date. The court shall then issue an amended trial order setting the continued trial date.

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

R. Thomas Corbin, Circuit Judge

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