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

A. X.,
Father & petitioner,

vs. **Case No. YY DR XXXX N**

L. X.,
Mother & respondent,

ORDER DENYING FATHER'S EXCEPTIONS

This matter having come before the court on (*Date*) 2013 on the father's Exceptions served and filed (*Date*), listing exceptions to the magistrate's report and recommended judgment served and filed (*Date*), it is ordered:

1. The Record

It is commonly thought that under estimating the time that a trial will require in a Notice for Trial will result in a trail date that is earlier rather than later. However, the opposite is more often the case, as is demonstrated in this case. Under estimating the time often means the unfinished trial will have to be continued for some months, which is a delay that could have been avoided if the time had been estimated accurately. With an accurate estimate from the lawyer, the correct amount of time can be set aside by the trial judge and the trial can be concluded within the time requested, without any need to continue it to another date. Further, with an accurate estimate, the court can plan ahead and reserve additional time to review the evidence and write up the judgment so the judgment can be rendered more quickly. A trial judge in the family division must reserve time on her calendar to write up the extensive findings of fact and statutory mandates that are now required in every judgment.

If a trial judge has a pretrial conference or a docket sounding to review the file with counsel before setting a case for trial, then the judge can get some idea of the time that will be required for the trial, but many short trials are set without a docket sounding or a pretrial conference. Presumably, if a lawyer requests an hour for a trial, the lawyer believes the evidence to be presented is short and simple.

So, when a lawyer requests an hour for a trial, the judge accepts that estimate of counsel and rarely holds a docket sounding or a pretrial conference for such a short trial. In such a case, the judge is relying on the lawyer who filed the Notice for Trial. The number of witnesses, the details of the anticipated testimony from each witness, the number of relevant documents, the issues the court must decide - none of this is known by the trial judge when the court sets aside time on its calendar for a trial.

However, all of this is known by the attorneys. Rule 1.440(b) requires: "The notice shall include an estimate of the time required ..." So, the Notice of Trial tells the trial judge how many hours or days the lawyer filing the notice believes will be required for the trial. The trial judge relies on that estimate when setting up her calendar and scheduling cases for trial. A trial judge's calendar is booked up for some months in advance and if a trial exceeds the time requested, there is usually no time available to hear the continued trial until some months later because all of the days in the near term are already occupied with other matters. If a day and a half is the time that will be needed to try the

case, then that is the time that should be estimated and requested. A trial judge can just as easily schedule a day and a half trial as she can a one or two hour trial when she is setting up her trial schedule months in advance, but once the book is full then it is full and a trial that exceeds its time must be continued to the next available time, which is usually some months away. This is a disservice to the parties and the judge. The parties need a quick resolution to their litigation and the judge needs to hear all of the evidence at one time.

And a trial judge's work does not end when the trial is concluded; rather, it has only begun. A trial judge in the family division must set aside additional time to review the documents and the case law submitted at a trial and then prepare the final judgment. Extensive findings of fact are now required of a trial judge in a Chapter 61 case, so the judge must set aside time outside of the courtroom to review the evidence, prepare the findings and make the rulings that the law requires. It is now almost impossible to make a ruling in the courtroom at the close of the evidence, as was the custom many years ago. For instance, a basic child support calculation under §61.30 now requires more than forty findings of fact, and in a contested case each of the findings must be gleaned from conflicting, incomplete, and inconsistent evidence, which often includes many documents, such as pay stubs, W-2 statements, tax returns, bank account statements, credit card bills, and financial affidavits. Once the findings are made they must be inserted into a computer program that calculates the child support amount. All of this cannot be done in the courtroom at the close of the evidence. It takes time and deliberation to sort through the evidence, make the findings, and produce a child support order. Likewise, when deciding a time-sharing schedule, the trial judge must consider the twenty factors in §61.30(3) while reviewing the evidence. This cannot be done hastily or carelessly.

Appellate courts routinely reverse judgments in family cases that lack detailed and extensive findings of fact that track the factors and the requirements of the various provisions of Chapter 61. That statute has been changed and rewritten in the last thirty years to add more and more findings and requirements for trial judges to comply with. *See, e.g., Longo v. Longo*, 576 So.2d 402, 403 (Fla. 2d DCA 1991): "The trial court did not make this specified finding of detriment in the final judgment;" *and Margaretten v. Margaretten,* 101 So.3d 395, 397 (Fla. 1st DCA 2012): "...the trial court was required to determine whether permanent alimony was the most fair and reasonable type of alimony under the circumstances and it was obligated to include sufficient findings in its order to explain its decision." So, trial judges must carefully review the evidence and the law and must make their written findings and rulings as the law requires, and the law changes all the time.

This matter came to a trial before the magistrate on four different dates: 12/22/2011, 3/22/2012, 5/25/2012, and 5/31/2012. The pleadings consisted of the father's petition filed 8/22/2011 and the mother's amended answer filed 11/28/2011. The father's petition requested a determination of paternity, a parenting plan, and a child support order. Earlier, on the Department of Revenue had filed an administrative child support petition against the father on 8/4/2011, but the department dismissed that petition when the father filed his petition on 8/22/2011.

When the pleadings were at issue, the father served a Notice for Trial on 11/17/2011 that requested "one (1) hour" for trial. The magistrate relied on that estimate when she set up her calendar. She anticipated that "one (1) hour" was all that was needed to try the case. For all she knew, the parties may have settled everything except for some minor issue that had to be tried. Because only "one (1) hour" was estimated, she did not set the matter for a docket sounding or a pretrial conference.

In fact the trial on 12/22/2011 lasted "half a day," T 12/22/11, P 180, L 19. The transcript that day consists of 180 pages. The magistrate was able to extend the "one (1) hour" that same day for some additional hours, but the trial was still not concluded in that extended time. Indeed, the petitioner, that is, the father, had not concluded the presentation of his evidence in that half day and more time was required just for the presentation of his case. Certainly, therefore, it was impossible for him to present his case in the "one (1) hour" he had originally requested for the trial. If that original

request in his Notice for Trial had been accurate and realistic, the magistrate could have set the matter for a trial lasting a day and a half just as soon as she set it for one hour. Her calendar had many open days when she was arranging the cases for trial some months away but like any other trial judge she has none in the near term. Once the calendar is booked up with trials, it is booked up and there is no more time available for the trials that run over their allotted time until some more months down the road. So, it was in this case. This case was continued three times because the presentation of the evidence and argument exceeded the time requested.

At the end of the half day on 12/22/2011, the magistrate asked the lawyers to estimate the time required to conclude the matter and to contact her assistant so she could issue an order for the continued trial date. The lawyers did so and the magistrate promptly issued a second trial order on 1/10/2012 for a continued trial on 3/22/2012 at 9:00 a.m. Three hours were reserved on the magistrate's calendar for the trial that day. However, the parties appeared and announced they believed they could settle the issues and they requested time that morning to work out the details in the courtroom. The magistrate accommodated the parties and retired to her office but despite using the three hours that was available, no settlement was reached.

The magistrate then issued a third trial order setting the matter for trial on 5/25/2012 at 1:00 p.m., reserving three more hours to conclude the trial. The transcript that day runs to 240 pages and still the trial was not concluded when court adjourned that day at 5:30 p.m., four and a half hours later. The lawyers advised that they needed more time for final arguments.

The magistrate accommodated the parties and heard their final arguments on 5/31/2012. The transcript that day runs to another 98 pages, resulting in a total trial transcript of 518 pages for the trial that extended from 12/22/2011 to 5/31/2012. Quite a lot for a trial estimated to last for "one (1) hour." The magistrate's report on this record was served and filed on 11/14/2012. Given the fact that the trial dates were separated by some five months, the magistrate very likely had to listen to the recorded first day of the trial all over again in order to recall all of the evidence. She may have listened to the two days together, along with the argument on the third. In short, an inaccurate estimate of the time required for this trial seriously delayed the presentation of the evidence and argument to the court and also delayed the magistrate's work to review the evidence and write up the report and recommended order.

2. Ruling

The father's exceptions are denied, although the court does not approve the recommended time-sharing order in one respect, as explained below.

The magistrate's child support calculations are supported by competent, substantial evidence in the record, including her determination of the arrearage amount. His exception to the child support calculations and determination of the arrearage do not detail where or how the magistrate got it wrong. Of course, the father is entitled to any amounts he paid in child support as a credit against the arrearage, to the extent that he has not been given the credit by the magistrate. The magistrate's recommended an order that gives either party 60 days to make a motion to challenge her findings and calculations, which they may do, of course.

Regarding the recommended time-sharing order, the magistrate's findings of fact are well supported by competent, substantial evidence in the record. The mother is not "gatekeeping" as father's counsel insisted on many occasions. On the contrary, the record demonstrates that she is acting in the best interests of the child, while the father is acting on his own interests and his needs.

A parent is competent to testify about the parenting abilities of the other parent and about her own parenting abilities. A parent is competent to testify about "the developmental stages and needs of a child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs." §61.13(3)(s) Expert testimony is not required for these issues and a parent who

is living day in and day out with a child is competent to testify about her parenting abilities, the other parent's parenting abilities, and the child's developmental stages and needs. As the mother testified, in so many words, parenting is a learned skill. It is not an inborn trait. The mother's occupation as a social worker with a social service agency providing services to children and parents makes her especially qualified to recognize good parenting skills or the lack thereof. It makes her aware of the "developmental stages and needs of a child." There is competent, substantial evidence that the mother is concerned about the child's safety, security and freedom from anxiety if she is alone with the father or any other person that she is not familiar with.

The record makes clear that the mother has no confidence in the father's ability to take care of their small child, for good reason: he has never done it for this child or any other. He testified vaguely to helping care for cousins or nieces, the relationship changed from time to time in his testimony, that lived in a home with him and the parents of those children, it seems, when he was in high school. He was 37 at the time of the trial, so his experience 20 years earlier as a teenager living in a home with younger relatives is quite distant. The details of his caring for those children are sketchy in the record.

As the record makes clear, the father does not understand the developmental stages and needs of a small child. *See, e.g., "Shared Parenting Contact & Access Guidelines," 20th Judicial Circuit, 1998.* He only understands what he is interested in, that is, making contact with his child when and how he wants to and on his terms and minimizing his child support obligation.

As for the child support, he started paying money to the mother only after the D.O.R. filed its administrative action early in 8/2011 and then only the amount in their calculation, which was based on minimum wage, even though he was earning more than the minimum wage, and with no compensation for the mother's employment day care expense, even though he knew she was working 56 to 60 hours a week, by his own testimony, T 12/22/11, P 109, L 15-17, so he knew she had employment day care expense. At trial he insisted that a reasonable day care expense would be "$120" a week, but he never offered to pay the mother even what he admitted was a reasonable amount or to include it in a child support calculation. A reasonable inference from this behavior is that money is uppermost in his mind, not the care of the child while the parents worked. That is, where his treasure is, there is his heart also. If he cared for the child, if he wanted to help the mother take care of the child if he wanted the child to be taken care of while he worked and while the mother worked, he would have paid the mother at least what he estimated for day care or included that amount in a revised calculation. It is a reasonable inference from the facts that he is more concerned with minimizing what he must pay to the mother than he is with the care that is provided to his child.

The mother, on the other hand, was working two jobs to pay her way before the child was born and she is still working those two jobs, and she moved her mother down from Massachusetts so she could take care of the child while the mother worked up to 60 hours a week to provide for herself and the child.

The record does not demonstrate that the father knows that a small child needs a stable, reliable and predictable routine, as the mother testified. It does not appear that he knows that if a small child is out of her routine she is anxious and insecure, as the mother testified, unless she is with a trusted care giver. He is not aware that separating his toddler daughter from her primary care givers would be a trauma for his daughter, or if he is aware he is not concerned about it. He is not aware that a small child who is bonded to one parent and who has seen the other parent only a few times in her short life regards the other parent as a complete stranger and that introducing strangers into the life of a small child is a shock to the child, a shock that is magnified if the child is removed from his primary care giver by the stranger. The father appears to be quite ignorant of a child's stages and needs, or if he knows about her developmental stages or needs he is not concerned about them and he does not want to act on her needs, but rather on his own.

He offered no proof regarding a time-sharing schedule in the child's best interest. Rather, as the trial went on, his time-sharing demands increased until finally he demanded a "50/50" time-sharing schedule, even though the child is not bonded to him and does not accept him as a care giver, which demonstrates that his concern is with his own needs and not the needs of the child.

As the mother's testimony makes clear, a person must spend many hours every week with an infant and a toddler, consistently, continuously and reliably, taking care of the child, paying close attention to the child, and meeting the child's needs before the child will trust and accept that person as a care giver with whom the child is comfortable. The father has not done this.

The father blames the mother for the fact that he is a stranger to the child because he says he has seen the child only a few times since the child was born. However, the record makes clear that the father has done very little to be a consistent, secure and caring person in the child's life. There is competent, substantial evidence that the mother attempted to put him in contact with the child and tried to work out a consistent, regular, effective time-sharing schedule that increased his time with the child to the point that the child would be comfortable in his care overnight. However, the father chose not to follow through with her efforts because he was not "comfortable" being with the mother or her mother. Again, his comfort is his primary consideration, not the child's comfort.

The father here chose the path of aggressive litigation to assert his "rights," which he is entitled to do, of course, rather than a path of cooperating with and helping the mother to take care of the child and helping the child become comfortable with him. The record makes it clear that his choices have not helped the relationship between the parties and therefore his choices have not helped his relationship with the child. The best thing he can do for his child is to be nice to her mother and to help her mother to take care of her, financially and every other way, but he has chosen not to do this.

For her part, the mother minimized the litigation. She wanted to settle the matter in a manner consistent with the needs and stage of development of this small child. She did not file a counter claim. Although she works two jobs and, as the father said, she works 56 to 60 hours a week, T 12/22/11, P 109, L 15-17, Monday to Friday and Saturday and Sunday every weekend, she is not seeking every penny she might be entitled to, say for the child's birth expenses. The record makes clear that she wants the child to have a relationship with the father. She is not trying to deny him access to the child. She is not insisting on every one of her rights. She is insisting on a time-sharing schedule that is in the child's best interest.

As the mother said, in so many words, an infant and a toddler require continuous, reliable, consistent, minute by minute, care and attention. The father has played no part in this care and attention. He is an absent parent. The child does not know the father because he has not been around. He has not helped out. He has played no part in the care of the child by his own choice. He and the mother separated when she was pregnant and he did not show any interest in the child until he was served with the D.O.R. administrative petition in 8/2011, when the child was about 4 months old. He did not offer to help the mother with any prenatal or birth expenses. He did not make any inquiry about being present at the birth. Rather, he paid the minium amount of child support, based on figures that were insufficient, only when he had to and he insisted on a "50/50" time-sharing schedule. He knows that as the number of nights he spends with the child increase under a time-sharing schedule, his child support obligation will decrease to some degree, T 5/25/2012, P 226, L 18, so a reasonable inference from this evidence is that he is motivated to reduce his child support when asking for a "50/50" schedule, especially considering that he also testified that he works two jobs and he did not demonstrate that he has an alternative day care provider that can take care of the child while he is working during his 50% of the days and nights the child would be with him.

The record demonstrates that the mother's mother has helped with the care of the child extensively. The child trusts and accepts the mother and her mother as care givers. The mother's mother moved to Fort Myers from Massachusetts to help the mother when the child was born and she

is still living with the mother. She does not work outside of their home and she takes care of the child while the mother works. The mother pays her mother $200 a week for her day care of the child. Her mother reports the $200 as income on her income tax return. The magistrate's finding that this amount for day care is reasonable under the circumstances is supported by competent, substantial evidence.

Rather than being grateful that his daughter is being cared for consistently by a caring grandparent, the father objects to the mother paying her mother for day care and says that he, the absent parent, has a "right" to be the care giver, although when he would do this during his work schedule was not explained in his testimony. Again, he acts in his own interest, rather than the child's interest. Perhaps in time, if he and the mother can work together to introduce him to the child and to reduce her separation anxiety, as the mother wants and as she testified, he can become her care giver.

However, he also works two jobs, or perhaps three or four, it is not clear from the testimony, so the hours and days that he would be available to be that care giver and how those hours and days match up with the mother's work schedule is not proven in the record. Completely overlooked in the father's request that he be the mother's day care provider is the routine of the child and how the father's work schedule meshes with the child's schedule. Again, the child's schedule and her need for a routine, with regular nap times and regular meals in a safe, secure and familiar place, does not appear to be a concern of the father in this record. His concern is to aggressively assert his rights. However, in fashioning a time-sharing schedule, the best interests of the child, not the interests or rights of either parent, is the "primary consideration" that the court must follow. §61.13(3)

Also, the mother's schedule keeps her away from the home from early morning until early evening. There is no proof from the father of a commercial day care provider that is open for the hours that the mother works Monday to Friday, which is often as late as 9:00 p.m., or for her Saturday and Sunday job. In short, the mother's decision to bring her mother down from Massachusetts and to pay her for her services in this situation, in which the mother was abandoned by the father during her pregnancy and left on her own to deal with the birth of the child and to return to her two jobs as soon as possible, was reasonable and the magistrate's finding that the money she pays her mother amounts to reasonable and necessary employment day care expense is correct and supported by competent, substantial evidence in the record.

The parties, especially the father, offered considerable evidence of blame and grievance against each other as the explanation for the fact that the father has had little contact with the child. However, a court cannot decide a time-sharing schedule based on the parties' feelings of blame and their grievances against each other. The court must be concerned only with the best interests of the child, as the law requires.

The interests, needs or rights of the parents is not among the list of 20 factors for the court's consideration under §61.13(3)(a) - (t) in fashioning a parental responsibility order and a time-sharing schedule. There is no particular time-sharing schedule that is favored by the statute or assumed to be in the child's best interest. The is no presumption for or against the mother or the father. Every child is unique, every family is unique and every time-sharing schedule must also be unique. The parents do not have a right to any particular parental responsibility order, parenting plan, or time-sharing schedule. The child, on the other hand, has a right to "frequent and continuing contact with both parents after the parents separate," §61.13(2)(c)1., and a right to a time-sharing schedule that is in her best interest. In any case, the circumstances may require that the child's contact with a parent must be limited, supervised or ended altogether in order to promote the best interests of the child. *E.g., Hunter v. Hunter*, 540 So.2d 235 (Fla. 3d DCA 1989). The pleadings and the facts of each case determine what the court must order.

The magistrate here reviewed and considered all of those factors in making a decision about the parenting plan, the parental responsibility order, and the time-sharing schedule. Her decision is supported by competent, substantial evidence in the record.

The case law authority cited by father's attorney at the hearing on his exceptions, to the effect that the "tender years" doctrine no longer exists in Florida, is correct, but the magistrate's decision does not apply that doctrine. Rather, it applies the factors in §61.13(3)(a) - (t) and in particular (s): "the developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs."

On 10/1/2008 *Session Law* 2008-61 amended §61.13(3) and revised completely the factors that a trial court must consider in fashioning a time-sharing schedule. That revision to the statute, and in particular subsection (s), rendered obsolete the decisions cited by father's attorney because those decisions give no consideration whatsoever to "the developmental stages and needs of the child and the demonstrated capacity and disposition of each parent to meet the child's developmental needs" because that factor was not a consideration in the older, out-of-date statute at issue in the cited cases. Those cases treated a child rather like a sack of potatoes that can be passed around without any regard for her needs, her fears, her comfort, her anxiety, and her stage of development. Fulfilling a parent's "rights" was all that mattered in those cases. Fortunately, the legislature saw fit to abrogate those cases and their disregard for a child's well being and best interests. *See, e.g.,* §61.13(2)(c)(1): "There is no presumption for or against the father or mother of the child or for or against any specific time-sharing schedule..." *adopted by Session Law* 2009-180, §3, effective 10/1/2009, *and Mudafort v. Lee*, 62 So.3d 1196 (Fla. 4th DCA 2011).

So, there is no time-sharing schedule, "50/50" or otherwise, that is presumed to be in a child's best interest, and there is no presumption that a child should reside most of the nights each year with the father or the mother, and the right of a parent to have company with his child must give way to the best interests of a child when the parents separate.

However, in one respect the report and recommended order regarding the time-sharing schedule do not comply with the law.

A time-sharing schedule cannot set an arbitrary age of "three years of age" as a time when the schedule must change. The changes required by the magistrate's recommended order at that age for this child in this family may not be in the child's best interest then. It is speculation and conjecture to say now that the changes required then will be in the child's best interest.

Therefore, the court does not approve any time-sharing schedule for this child other than every Wednesday from noon to 6:00 p.m., as recommended by the magistrate, which recommendation is supported by competent, substantial evidence. No other time-sharing schedule is now appropriate for this child on this record at this time. No other time-sharing schedule appears to be workable given the parties' work schedules or, at least, none was presented to the magistrate.

Further, neither parent presented a realistic time-sharing schedule to the court, a schedule that was in the child's best interest now and in the years before the child begins attending kindergarten, but this is not surprising. The situations of these parents and the child's rapid development in the next few years means that a future schedule in her best interest would only be conjecture and speculation at this time.

Therefore, the court will not order a permanent time-sharing schedule in the judgment because there was no competent, substantial evidence of a permanent schedule that would be in the child's best interest. Rather, the court will reserve jurisdiction over the time-sharing order so there is no final, permanent time-sharing order. So, by motion and notice of hearing either party may present evidence and argument of a realistic time-sharing schedule that is in the child's best interest, considering the factors in §61.13(3), from time to time, and at any time hereafter the court may order a final, permanent time-sharing order upon such motion and notice of hearing or may continue the temporary order or may modify the temporary order.

Temporarily, the court orders that the parties facilitate and encourage a relationship

between the child and her father by the means that are available to them. This temporary time-sharing order does not deny the child contact with the father. The temporary schedule ordered above, Wednesday from noon to 6:00 p.m., may, of course, be modified by the parties, formally or informally, and the parties may formally or informally agree upon other days and other times for time-sharing of the child.

This order is not a suspension of time-sharing between the father and the child. As required by *Grisgby v. Grigsby*, 39 So.3d 453 (Fla. 2d DCA 2010) the court advises the father of what he can do to increase his time with the child: become a familiar care giver to the child so that she is comfortable to be with him and free from separation anxiety when away from the mother and her mother. The mother is agreeable to this occurring. She wants this to occur. It has not occurred because the father was not comfortable learning how to do this with the help of the mother and her mother. It has not occurred because the parties have been tied up in this aggressive litigation rather than in learning how to communicate, cooperate and take care of their child together.

Hereafter, as provided above, by motion and hearing noticed according to law either party may present competent, substantial evidence of a specific time-sharing order that would be in the child's best interest and request a permanent time-sharing schedule or a modification of the temporary order. It is the parties' burden to bring evidence of a realistic schedule. The court has no authority to make up a schedule from the court's own imagination.

Finally, the court does not approve the magistrate's denial of attorney's fees to both parties. The mother, at least, filed a motion for attorney's fees on 12/21/2011. The motion was not heard by the magistrate or litigated during the trial. The father's petition does not request fees.

The magistrate is ordered to amend the report and recommended order to conform to this order and to submit the amended report and recommended order to the court.

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

_____
R. Thomas Corbin, Circuit Judge

Copies provided to:
, Esq.
, Esq.