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

D. M.,
Former husband,
vs. **Case No. 00 DR 0000 N**
D. M.,
Former wife,

ORDER ON VARIOUS MOTIONS

This matter having come before the court on 11/29/2010 and 12/6/2010 for:

(1) a hearing on 11/29/2010 on the mother's "Emergency Motion to Allow Testimony of Minor Child," filed 10/29/2010;
(2) a hearing on 12/6/2010 on the mother's "Emergency Motion to Abate Time-Sharing," filed 10/26/2010,
(3) a hearing on 12/6/2010 on the mother's "Motion to Appoint Guardian Ad Litem," filed 10/26/2010, and
(4) a hearing on 12/6/2010 on the father's "Motion for Contempt," filed 9/21/2010,

It is ordered:

1. Findings

The parties have two children, Dn M., born 7/25/2000, and Dk M., born 5/1/2004.

The parties married on 5/15/1999, separated in 2006. The mother filed the initial petition on 3/22/2007. The father filed a counter petition on 5/21/2007. The father's first financial affidavit filed 6/13/2007 indicates he was then a "pool tech" earning $39,000 annually. The mother's financial affidavit filed on 3/26/2008 indicated that she was a paramedic and her income was $40,800 per year. The parties are still working at these occupations and the husband testified that their incomes are "the same."

Regarding the time-sharing of the children, the parties' initial petitions disputed the time-sharing schedule that should be ordered. The mother said the children should live with her most of the days during the year. The father said the children should equally divide their days between the two homes.

Regarding parenting decisions, both parents asked for a shared parental responsibility order. Neither parent asked for a sole parental responsibility order.

On 1/2/2008 the parties filed a mediated agreement that settled the equitable distribution of their assets and liabilities. In that agreement, among other things, the parties agreed that the husband was entitled to one-half of the portion of the wife's pension benefit from her job that she accrued during the marriage, that is, he was entitled to one-half of the marital portion of her

pension.

On 3/26/2008, the parties filed a "Partial Marital Settlement Agreement" that addressed time-sharing and parental responsibility. As for parental responsibility, the parties agreed to shared parental responsibility. Regarding weekly time-sharing, that agreement indicates the mother works "24 on, 48 off", while the father works Monday through Friday and some Saturdays. The parties agreed that when the wife was not working on her "two days" off, the children would be with her and with the husband on the one day on, with the children being with the husband every "third week" from Thursday until Monday morning because the wife worked on Thursday every "third week." This schedule results in the children being with the mother 16 days out of every 30 and 14 with the father.

At the recent hearings, the father testified that the mother complained to him some months ago that this weekly time-sharing schedule is hard on the children, that she would like to find another line of work with more regular hours and that if he would give up his portion of her pension benefit she could somehow cash in her pension benefit, and then she could afford to quit her present job, go back to school, train for another line of work, and find a job with regular hours. The father declined to release his share of her pension. He testified that the mother was displeased with his refusal to release his portion of her pension benefit.

In their time-sharing agreement of 3/26/2008 the parties also agreed to "equally share the holidays," without specifying the exact holidays that would be shared and how they would be shared. The agreement also has a loose provision about "vacation time with the children."

The court adopted the parties' settlement agreements in the Final Judgment so their agreements are now the order of the court.

On 9/21/2010 the father filed his motion for contempt. The mother has willfully refused to comply with the time-sharing schedule in the 3/26/2008 agreement. For at least six months before the father filed his motion, the mother has been making unilateral changes to the time-sharing schedule, which in themselves seem minor, but indicate a larger problem.

For instance, during the Easter weekend of 2010 the children were supposed to be with the father Friday night, Saturday and Sunday, but the mother took the children to visit her sister in Ocala with an unwritten agreement that the children would be returned to the father by 5:00 p.m. on Saturday. However, the children were not delivered to him until around 10 a.m. on Sunday morning because the mother did not arrive back in Lee County until midnight on Saturday and she kept the children at her house until Sunday morning. The mother ignored her agreement to return the children by 5:00 p.m. on Saturday because she did not want to return them at that time. She did not want to return them because the trip to and from Ocala would have left very little time for her visit with her sister if she had respected the agreement.

This episode illustrates the mother's pattern of dealing with the father for a long time before the Easter weekend of 2010 and since that weekend. *It illustrates the fundamental problem in this case, which is that the mother does not regard the father as an equal parent, as equal in ability or rights,* even though she agreed to shared parental responsibility and she agreed to a specific time-sharing schedule. For his part, the father naturally resents the mother's attitude and

behavior, and the children are caught in this conflict.

The mother generally dismisses the father and his interests. An interviewer could trace this pattern back into the intact marriage. The text messages and testimony show that the mother requests changes to the schedule on short notice and usually proposes changes as something the children want to do or that would be good for them, implying and communicating that the children's time with the father is not something they want to do or is not as good for them as the activity she proposes. She also often tells the children about a proposed change before discussing it with the father. By telling the children about a proposed change before discussing it with the father and obtaining the father's agreement, she places the father in the position of denying the children something they have been told will happen. This is what happened on the Friday evening before Dn's birthday last July. When the father does not do what she wants, she can refer to him as "stupid." She belittles him in the presence of the children. These are controlling behaviors, intended to get the father to do what she wants. She tells third persons that she has "sole custody," as she wrote on the consent form required by the "Redneck Yacht Club" where she has taken the children. She took Dn to a series of doctors before she filed her motions, culminating in treatment with Dr. C., all without asking for or obtaining the father's participation or consent. She refers the father as a "weekend dad," when in fact the children are with him for 14 days out of 30 under the time-sharing schedule. A reasonable inference from the evidence is that she communicates her attitude to the children that she, not the father, controls the children and they are better off with her and that she has communicated this to the children for a long time.

For instance, the mother is a vegetarian and she presumes to tell the father that she does not want the children eating meat when they are with him. For his part, the father does not tell the mother that the children must eat meat at her house. He does not presume the authority to do so. She quizzes the children about what they ate while they were at the father's house, putting them in the middle of this dispute, so that the children are anxious about what they are eating at the father's house. They ask him if they are eating meat in the spaghetti he gives them. For instance, the mother does not approve of corporal punishment, while the father believes it is appropriate. For instance, the father lets Dn mow his yard, which the mother does not approve of. On 8/8/2010 the mother threatened to call the Lee County Sheriff's Office because Dn mowed the yard. For instance, the mother insists that she speak to the children every day when they are with the father.

The mother's attitude of a superior ability and right to control the children even at the father's house culminated in her assumption of the authority to stop the children from seeing him around the end of August 2010, which is a willful violation of the time-sharing schedule ordered in the Final Judgment. She says she did so because Dn revealed to her that the father had physically abused him. Dn is anxious, depressed and suffering headaches and stomachaches. The mother's text messages in evidence, mother's Exhibit 2, show that Dn was showing these symptoms as early as 2/13/2010. There is no doubt his distress is real. The question is why. He is suffering these symptoms but not entirely because of something his father did. It is because of the long standing conflict between the parents.

The children last spent time with the father on Sunday 8/29/2010, a fact not known by Dr.

C.. This was a very good time for the children. That day they went out on a boat, went fishing, and grilled on a beach. A playmate and her parents accompanied them on this day. Dn was not upset with his father or otherwise during this weekend. There was no arguing or difficulties between the father and the children. The mother sent a text to Dn on his phone during this Sunday outing. The father saw to it that Dn called his mother. He spoke to his mother privately and returned to the activities with no concerns.

Nevertheless, after that weekend the mother refused to let the children make contact with the father except on an occasion in a park in Cape Coral, where she presumed the authority to limit his contact to supervised contact only, supervised by her, all without any court order authorizing this limitation on the children's contact with the father. Since the end of August 2010, the mother has been interfering, limiting and restricting the children's time with the father without any authority to do so. This is a willful violation of the time-sharing order.

On 10/26/2010 the mother filed her "Emergency Motion to Abate Time-Share Schedule," "Motion to Allow Testimony of Minor Child," and "Motion for Appointment of Guardian Ad Litem." She noticed the first and third for a hearing on 12/6/2010 and the second for a hearing 11/29/2010.

The finder of fact may accept or reject the evidence of any witness that the finder decides is not credible, including expert witnesses. The mother's expert witness, Dr. C., is not a credible witness on the issue in this case, that is, the long standing tension and course of dealing between the parents that has resulted in the current situation. This tension exists because the mother does not regard the father as an equal parent. She does not believe he is as qualified to take care of the children as she is. She regards her decisions about the children as superior to the father's and she tries to control the children when they are with the father.

Dr. C. is competent to diagnose Dn's mental condition, but she is not qualified or competent to give an opinion on the issue, in experience or training. She missed the issue altogether. She is a clinical psychologist. She has extensive experience with psychological testing and evaluations, principally of adults. She said that he is suffering with adjustment disorder and mixed anxiety, as a result of "going through a stressful time that at age 10 he cannot handle." However, this expert opinion is not helpful to the finder of fact or necessary to this finding because his condition is apparent to a lay person. The "stressful time" for Dn and Dk has been going on for a long time. It did not originate with some event of physical contact with his father.

Dr. C. does not have a counseling degree. She does not have experience counseling families or family members in contested cases involving parenting issues between separated parents. Her *c.v.* and her testimony do not reveal that she is aware of professional literature concerning parental alienation in contested cases between separated parents. She does not appear to be familiar with professional literature concerning false reports of physical and sexual abuse and manipulation of a child in order to obtain control of the child, to prevent the child from making contact with the other parent, or to advance another agenda. She seems to believe that all abused children seek to avoid their abusers, that none want to be with their abusers. She believes that Dn's reluctance to see his father is entirely his father's responsibility. She believes that Dn's

symptoms result entirely from an event of physical contact between Dn and his father. She has not reviewed the entire court file. She is not a competent witness on the issue, even if she is competent to evaluate Dn and diagnosis his condition.

Dr. C. made the diagnosis and began treatment of Dn with only the mother's consent. Again, the mother presumed that only her consent was necessary, that the father was not an equal participant. Dr. C. interviewed the mother. She has seen the mother on at least six occasions when Dn has been treated. She also spoke to the father for about an hour, but agreed to meet with him only after he made contact with her office and brought her staff a copy of the settlement agreement of 3/26/2008. Apparently, Dr. C. and her staff either accepted mother's statement that she has sole custody, if the mother told them that, or they did not see any need to consult the father before seeing and treating Dn. When asked if the father was participating in Dn's treatment, Dr. C. said the father "did not ask to be part of the treatment plan," which is a very odd thing to say, as if the father is an outsider in his son's life who must ask to be involved. It appears that Dr. C. has been coopted to the mother's view of the orders in this case and to her view of the father. He is considered of secondary importance, at best, in Dn's treatment, which is consistent with the mother's penchant for dismissing the father from the children's lives. Dr. C. said she looked at some medical records of Dn, but exactly which records and whose records is not known. In any event, she diagnosed and began treating Dn without obtaining the father's consent.

The parties agreed to shared parental responsibility, which was ordered in the Final Judgment. Their agreement, consistent with the concept of shared parental responsibility in Chapter 61, Florida Statutes, provides:

> "Other than day to day decisions, all decisions affecting the children's growth and development, including ... major medical treatment, ... psychotherapy, ... or like treatment ...shall be discussed and agreed to by both parties. The consent of either parent shall not be arbitrarily withheld."

In her testimony, Dr. C. was not aware of the agreement and order for shared parental responsibility and she does not know what that means. Even though these are separated parents and there is a court file with active proceedings, there is no evidence that she reviewed the entire court file, the course of the pleadings, the orders, the agreements, and the motions. She has no knowledge of the course of this litigation since it was filed in 2006 and what it might reveal about the parents and the children that is relevant to a diagnosis of Dn's mental health and physical symptoms. Her opinion that Dn does not want to see his father because his father physically abused him in the past is simplistic, not competent, and not credible. There is much more going on in this family.

Neither Dr. C. nor the mother had any explanation why Dk has not been following the time-sharing schedule. For the mother's assumption of the authority to suspend Dk's contact with the father she is in willful violation of the time-sharing order.

The mother has also violated the shared parental responsibility order, consistently and for a

long time. As discussed above, the parties agreed to shared parental responsibility in the 3/26/2008 agreement, yet the mother testified that she takes the children to doctors and other medical providers without consulting the father and that she arranges for treatment without the father's participation. Her attitude about the shared parental responsibility order, that it is insignificant and not binding on her and that she knows what is best for the children, better than the father, is the same attitude she has about the time-sharing schedule order, that is, that she controls both and those orders do not control her. She testified that in general she does not consult the father about the children's medical needs, which is a violation shared parental responsibility and a violation of the order she agreed to, and is indicative of the fundamental problem: *the mother dismisses the father as an equal partner in the raising of their children, a dismissal that the father resents*. After the end of August, without discussing it with the father and obtaining his agreement, the mother took Dn to a series of doctors, culminating in Dn's hospitalization late in October.

Among others, she took Dn to Ms. S., a master's level psychotherapist. The parties believe she called in an abuse report to D.C.F., and D.C.F. investigated. The result of that investigation was to have the father agree to a "safety plan" that said he would not use corporal punishment. Dn was not sheltered away from the father.

Dn missed about 15 days of school in September and October because of his illness, but the mother never discussed these absences or Dn's condition with the father. When the father learned from his lawyer that his son was in the hospital, he went to the hospital but the mother presumed the authority to bar him from the hospital room, coopting the nurses in her campaign to exclude him from the room.

In this case the parties agreed to, and the court ordered, shared parental responsibility. So, no medical provider is authorized to treat the children without the joint participation of both parents, just like the "Redneck Yacht Club" needs the consent of both parents before admitting a child. Ms. S. understood this, she sought both parents' consent before providing therapy to Dn, but she seems to be the only medical provider who did realize she needed both parents' consents or even thought about it, and it appears that the mother never told any of them that the shared parental responsibility order in this case required both parents to consent to any treatment because none of them, except Ms. S., asked for it.

2. Ruling

2.1 Father's motion for contempt is granted; shared parental responsibility order The mother is in willful violation of the time-sharing order, which is willful contempt for a court order. The father's motion is a civil motion for contempt so the object is to compel compliance. It is not a criminal contempt motion.

The father's motion does not raise the mother's violation of the shared parental responsibility order. He only raises the mother's violation of the time-sharing schedule. Therefore, the court does not find her in contempt for violation of that order, because she has no notice that this would be an issue at this hearing. Nevertheless, her violation of the shared parental responsibility order is important evidence in this case because it shows the fundamental problem

between the parents, that is, the mother's attitude that she alone controls the children and knows better how to take care of them. She does not view the father as an equal parent. This is the fundamental problem in this case. Long term individual and family counseling may help these parents resolve this problem, but the court has not have the authority to order counseling for the parents, the children or the family and the court does not do so now.

"Parental responsibility" means parenting decision-making. "Parental responsibility" has nothing to do with where the children will be living from time to time during the year. *See, e.g.*, F.S. §61.046(17) & (18) (2009):

"(17) "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.*

(18) "Sole parental responsibility" means a court-ordered relationship in which *one parent makes decisions regarding the minor child*." (*Emphasis supplied.*)

So, "parental responsibility" is concerned with how parenting decisions will be made after parents separate. The parental responsibility order is not concerned with where the children will be living from day to day during the calendar year.

The order detailing where the children will be living from day to day is now called the "time-sharing order." Formerly, the "time-sharing order" was the order that named a "custodial parent" or "primary residential parent", which meant "the parent with whom the child maintains his or her primary residence." F.S. §61.046(3)(2004). However, on October 1, 2008 the terms "custody", "visitation", "custodial parent", and "primary residential parent" were deleted from all Florida statutes dealing with separated parents. *Session Law* 2000-61 effective 10/1/2008. Before that change in the statutes, the terms "custody and visitation" were generally used to describe the time-sharing order, but those terms are now obsolete. "Primary parent," "custodial parent", "noncustodial parent" or "primary residential parent" are also now meaningless terms under Florida law.

F.S. §61.13(2)(b)(2009) now requires the court to order a "parenting plan" that includes a "time-sharing schedule" and a "designation of who will be responsible for" parenting decisions. Therefore, since 1982 and under the current statute the "time-sharing" order and the "parental responsibility" order must be two, separate orders.

In this case, there are two, separate orders in this case, one for shared parental responsibility and one for time-sharing. In this case the parties reached agreement on these two questions in their settlement agreement of 3/26/2008.

So, if shared parental responsibility is ordered, then ***each parent has an equal say*** in major decisions concerning the children, and if the parents have a disagreement on a major decision, it is not for the court to say who is right or who is wrong. They each have equal control over parenting decisions. In such a situation, nothing happens, so long as a risk to the children's lives, health, or

safety is not at stake, and it is not on these motions and this record. It is not for the court to decide the winner of the debate. The court in a Chapter 61 case has no power to overrule a jointly made parenting decision or to make a parenting decision when the parents ordered to share parenting are at an impasse.

The court in a Chapter 61 case cannot substitute its judgment for the a parenting decision of either parent because the children have two fit and competent parents. Chapter 61 does not give the judge the authority to become a "super parent" empowered to make parenting decisions for the children or overrule a parenting decision or decide a parenting decision when parents ordered to share parenting are at an impasse. Chapter 39 does give the judge this authority, but this is not a Chapter 39 case for dependency or termination of parental rights. In a Chapter 39 case the issue is whether one or both parents are incompetent and unfit. In such a case if there is no fit, competent parent, then the judge is a "super parent" empowered to make parenting decisions for the children. *See, e.g.*, §39.407(2)(a)2. 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), and in this case the parties agreed to shared parental responsibility.

2.2 Sanctions Pursuant to §61.13(4)(c), 2. and 4., the court orders (1) the mother shall pay the father's reasonable and necessary attorney's fees for his motion for contempt and the hearing. If the parties cannot agree, the court will determine the amount and how it will be paid at later hearings. (2) the mother shall perform 20 hours of community service at an agency or agency listed in the list of agencies published currently by the Lee County Probation Department within 60 days of 12/6/2010. Within that time she shall obtain written proof of the community service from the agency signed by a supervisor and provide that proof to her counsel who shall provide it to the father's counsel.

Hereafter, if the time-sharing schedule is not complied with the court reserves to order further sanctions as allowed by law for civil contempt of a time-sharing order. *See, e.g.*, §61.13(4)(c)1., 2., 3., 4., 5., 6., and 7.

2.3 The mother's motions are denied The court denies the mother's motions. Previously, on 11/29/2010 the court orally denied the mother's "Emergency Motion to Allow Testimony of Minor Child," filed 10/29/2010. At the hearing on 12/6/2010 the court orally announced this ruling and denied the mother's other two motions.

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

R. Thomas Corbin, Circuit Judge

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