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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC00-1577

SAMUEL SHAW,

Petitioner,

v.

ELIZABETH SHAW,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

ANSWER BRIEF ON THE MERITS OF RESPONDENT ELIZABETH SHAW

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TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to the Court's July 13, 1998 Administrative Order, Respondent Elizabeth Shaw certifies that the type size and style of this brief is 14 point Times New Roman.

TABLE OF CITATIONS

Cases **Page**

Statutes **Page**

Other Authorities **Page**

PREFACE

Petitioner Samuel Shaw's request for the Court's discretionary review on express and direct conflict is of an opinion of the District Court of Appeal of the State of Florida, Fourth District, affirming a trial court's decision that shared parental responsibility would be detrimental to the parties' minor child until the father completed a 36-week parenting course ("Opinion") and holding that section 61.13, Florida Statutes (1995), authorized the court to order the course in the best interests of the minor child.

Petitioner Samuel Shaw will be referred to as the "Father."

Respondent Elizabeth Shaw will be referred to as the "Mother."

The record will be cited as "R__-__."

The trial transcript will be cited as "T__."

Petitioner's Initial Brief on the Merits will be cited as "IB__."

STATEMENT OF THE CASE AND OF THE FACTS

A. Pretrial Proceedings

The Shaws married in 1991, and their only child, Jenna, was born in 1994 (R1-1). In April of 1997, after several frequently stormy years, the Mother filed for divorce, asking in her Petition for Dissolution of Marriage ("Petition") to be appointed Jenna's primary custodial and residential parent, with shared parental responsibility and reasonable visitation for the Father (R1-2). She cautioned, however, that the Father's employment was sporadic, he had a gambling problem, he had lied about his military background, and he had a pattern of instability (R1-3-5).[1]

At the time she filed her Petition, the Mother also sought ex parte relief giving her temporary primary residential custody of Jenna and permitting her to immediately relocate with Jenna to Louisiana, where her family lives (R1-1-8, 31-36; T72, 169, 172, 209). Her reason for leaving Florida, besides the ruined marriage and the absence of any family here, was that she was unable to find a job here in her field, radiation therapy, but had found one in Louisiana (T79-82, 172, 187-88). After the trial court granted the requested relief (R1-52-53; T211), the Father allowed the Mother to leave, but with only her clothes and Jenna's, and refused to allow her to take even her car, so she and the child were forced to take public transportation (T210). The move to Louisiana allowed the Mother to get a good job, be near her family, and establish a comfortable lifestyle for Jenna and herself (T72-73, 76, 91; WEx1).

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[1] The Mother disagrees with the Father (IB2) that she did not allege his instability (R1-5). He has improperly slanted the facts in his favor throughout his Initial Brief, particularly on visitation (IB3-6), even though she prevailed at the trial and appellate levels. *See Johnson v. State*, 696 So. 2d 326, 330 (Fla. 1997); *Smith Barney, Inc. v. Potter*, 725 So. 2d 1223, 1225 (Fla. 4th DCA), *rev. denied*, 749 So. 2d 503 (Fla. 1999); *Thompson v. State*, 588 So. 2d 687, 689 (Fla. 1st DCA 1981).

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The Father appealed the relocation order to the fourth district and filed a Counter-Petition for Support, Custody and Child Support Unconnected with Dissolution of Marriage (R1-80-82) in which he sought primary residential custody and shared parental responsibility (R1-80). The fourth district reversed the ex parte relocation order because the Father had not been noticed of the hearing, *see Shaw v. Shaw*, 696 So. 2d 391, 392 (Fla. 4th DCA 1997), but after the reversal, the trial court held an eight-hour evidentiary hearing on the issue and again allowed the relocation as in the best interests of the child and not calculated to defeat the Father's visitation (R1-143-50, 151, 170-73; T26). The trial court also gave the Father four yearly unsupervised visits with Jenna in Louisiana, at the Mother's expense, for two to ten days at a time, and four in Florida, for one week at a time (R1-170-73). Several times after her move, the Mother invited the Father to Louisiana to see Jenna's school and the home she made for Jenna and herself, but he refused to come, claiming without any explanation that he was "afraid" and "fearful for his life" (T79).

In May 1999, after the case had been pending for two years, the court scheduled trial for July 1999 (R2-309-10; IB7). Two weeks later, for the first time, the Father filed his Motion for Psychological and Custody Evaluation, asking for psychological evaluations and a guardian ad litem to decide Jenna's primary residence and visitation, and scheduled the motion for hearing on uniform motion calendar (R2-315; IB6).[2] The court denied the motion as untimely, because a psychological evaluation would be useless given Jenna's age, and because a Florida

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[2] The Initial Brief omits critical facts regarding the decision (IB6). For instance, the "repeated" denials (IB16) of the Father's alleged requests were limited to one in May 1999, on the eve of trial, and one during trial. Even though trial was continued from July to September 1999, the Father never again raised the issue pretrial.

guardian ad litem would be equally useless given her residence in Louisiana (R2-319).[3] Although trial was later continued until September 1999 (R2-321, 348), the Father never again sought either evaluations or a guardian ad litem.

Before trial, the Mother filed her Amended Unilateral Pretrial Catalog, changing her request for shared parental responsibility to sole parental responsibility because of the Father's increasing unwillingness to share responsibility for Jenna or cooperate in visitation and increasingly bizarre behavior (R2-364-69; T232-42). Although she continued unsuccessfully to try to schedule visitations (T162), she came to believe that sole parental responsibility, at least for a time, was in Jenna's best interests. By the time she changed her request, she had documented over 50 fruitless attempts to arrange visitations between Jenna and her father (T150-58, 222). Because she had such trouble scheduling visits with the Father directly, she even tried to do so through the trial court (T144), but by 1999, the Father had become completely uncooperative, and no visitations took place (T140, 148, 158; WEx5).

B. Trial

1. Custody and Visitation

During trial, which took place in September 1999, the Mother testified that her lifestyle and Jenna's improved after relocating to Louisiana. There was less stress; she was more confident; and Jenna was happily surrounded by friends and family (T91-92, 98-99, 196). The Mother testified to her desire for frequent and meaningful contact between the Father and Jenna and for the Father's input in Jenna's life (T162), but explained that she believed shared parental responsibility would harm

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[3] A psychologist hired by the Father supported the trial court's decision, testifying that there were no formal tests appropriate for a child under six (T309-10), and that she discussed her opinions with the Father in January of 1998, a full year and a half before he finally sought evaluations from the court (T310, 313).

Jenna until the Father's willingness to cooperate and communicate improved (T242). She said she would comply with any reasonable visitation schedule and do whatever was necessary to foster the relationship, including paying for Jenna's airfare. She recounted her frequent attempts to schedule visitations and the Father's vehement refusal to go to Louisiana, to cooperate on arranging a Florida visit until April 1998, and to schedule more than three visits between the parties' separation and trial (T143-51, 215, 223; WEx5).[4]

The Mother described the marriage as often stormy, with the Father unemployed at times, which she attributed to his lack of credibility and discipline (R1-1-3). More of a problem to her, however, was his apparent inability to separate fact and fiction. For instance, he told both her and his employer that he was in the military reserve and could not work on Saturdays (R1-1-4). Even before the marriage, he claimed to go to Homestead one Saturday a month and returned wearing Army fatigues (T127). During Desert Storm, he disappeared for a longer period and claimed he was sent to Korea to replace other troops there (T128). When the Mother asked about his Army equipment, such as dogtags, he said they had been destroyed (T129). Finally, when the couple applied for a home mortgage and the Mother asked

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[4] The Mother said the few visits went well, although on return Jenna was not as clean and neat as the Mother would have liked and had head lice each time (T140-44). The parties' descriptions of these visits and attempted visits were very different (T141-42, 296-97). Even though the trial court believed the Mother's description (R3-382), and the Father lost his appeal of that factfinding, his Initial Brief improperly returns to his version of the facts (IB3-5). The Father's description of his telephone contact with Jenna (IB5) is improperly skewed in his favor for the same reasons. At trial, he described the conversations as "blah, blah, blah" (T159, 315), and during one call, while speaking to the Mother, he threatened that if she was alive she should start worrying about herself (T159-61, 345). The court rejected his claim that there was no threat and the comment was taken out of context (T345, 366, 409).

why they could not qualify for a Veterans Administration loan, he admitted his lies (T130-31).[5] At trial, he denied ever saying he was in the Army (T2-268-72).

Partly because of the lies, and partly because of other strains on the marriage, the couple began sleeping in separate rooms (T126, 131). Around the same time, the Father lost his job and his personal hygiene started to slip — he would go days without brushing his teeth or taking a bath and would wear the same soiled clothes (T131-33, 206). At times he made no sense — ranting, raving, and throwing things around the house (T132).[6] Once, the Mother was forced to call the police and file a restraining order (T132). When she talked about leaving, he said he would mentally torture her, and earlier in the relationship he threatened to kill her if she ever left him (T132). So she stayed.

Because the Mother was working and the Father was not during this time, he would sometimes pick Jenna up from daycare (T133). When the Mother arrived home, the Father and Jenna would be outside, with Jenna unfed and unbathed and the house dirty (T133). He also appeared to have a gambling problem, because the

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[5] Another two examples occurred during trial. The Father first told the court that Jenna never asked for the Mother during her September 1998 Florida visit with him (T320, 325-26), then admitted he had to keep Jenna occupied or she would say "I could be with mommy" (T348). And, after first denying ever saying he would not go to Louisiana to visit Jenna without a United States marshal, he finally admitted the statement when confronted with his deposition testimony (T351-52).

[6] The Mother disagrees that her psychological stability was ever at issue (IB6). The Father tried, but unsuccessfully, to make her psychological condition an issue by accusing her of depression, substance abuse, and child abuse (IB7-8). After he admitted that neither Jenna's pediatrician nor his own lawyer saw anything to report to the Department of Children and Families, the court rejected the testimony (T331-42), sustained the Mother's objection to its admissibility, and struck it from the record as uncorroborated (T337, 342). Despite these findings of fact, sustained on appeal, the Father makes the same allegations again here.

Mother overheard conversations with his bookies (T136). The Mother also objected to his smoking inside the house, because Jenna suffered from bronchitis (T96, 133).

In mid-1996, the Mother received her degree and national certification in radiation therapy (T79-80, 172). From then until early 1997, she unsuccessfully sought a position in South Florida (T79-80, 172-74, 181-87). Toward spring 1997, with the Father still out of work (T198, 201), Jenna in daycare, and the Mother working full time but still unable to find a position in her field, the Father stopped sleeping at home (R1-32; T135), and the Mother instituted these proceedings.

2. Attorneys Fees

During trial, the Father recounted his legal representation and fees. He paid his first attorney $4,000 (T370). For the appeal of *Shaw*, 696 So. 2d at 391, he paid his appellate attorney $7,000 (T370). He paid his second attorney $3,000 (T370). He gave his trial attorney a $1,000 retainer (T370). He paid the psychologist $1,000 (T370). His most recent financial affidavit showed a monthly net salary of $2,552 (R2-352; R3-386), or 57% of the combined net monthly income, compared with the Mother's monthly net salary of $1,888 (R2-342; R3-387). The Mother, who paid for Jenna's flights to Florida to visit the Father and offered to do so in the future (T232), was forced to borrow the majority of the 50% attorneys fees she paid before trial (T230). In contrast, the Father was able to pay his fees while claiming that he could not afford to pay for Jenna's flights for his Florida visitations (T346). The Mother said that she believed the Father made arranging for visitations unnecessarily difficult (T158, 228-29, 231) and that the custody case should not have taken two-and-a-half years and cost her almost $17,000 (R168).

C. The Final Judgment[7]

In the December 17, 1999 Final Judgment, the trial court found that the Father had "only minimally exercised his court ordered visitation" with Jenna and made little effort to visit with her, that he frustrated the first planned visit with her, that he voluntarily chose not to visit her in Louisiana, that he unreasonably refused to discuss any issues regarding Jenna with the Mother or through the parties' attorneys, that his behavior was generally "bizarre," and that his court testimony was "disappointing and not credible" (R3-382-83, 390). The court found that he was "misguided," had made "bad judgment calls concerning the child,"and that his moral fitness and mental health were questionable, particularly given his lies about military service (R3-385). The court also discounted the Father's psychologist's testimony as only a "general recitation of the parent and child relationship" (R3-384).

In contrast, the court found the Mother's testimony credible on her attempts to arrange visits and telephone contact between Jenna and the Father, that she was mentally and physically healthy, and that the Father's accusations of drug abuse were "ancient history" (R3-383-85).

After analyzing the factors in section 61.13(3) (R3-384-85), the court found that the Mother was more likely to allow frequent and continuing contact between the child and her father, was more morally fit and mentally healthy, had established permanency for Jenna and herself, and should therefore be the primary residential parent (R3-384-85). Focusing again on the Father's lack of credibility, bizarre behavior, and refusal to cooperate with the Mother's visitation attempts, the court

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[7] In addition to the parts of the Final Judgment discussed here, the court ordered permanent relocation for the Mother and Jenna (R3-389-90), awarded child support (R3-386-89), and equitably distributed the parties' assets (R3-390). The Father did not appeal those portions of the Final Judgment (R3-386-89).

then noted it had "great concerns" about allowing shared parental responsibility and found it would be "detrimental to the minor child and not in her best interests at this time" (R3-386). Rather than order sole parental responsibility, however, the court gave the Mother only temporary sole parental responsibility, ordered the Father to attend a 36-week parenting course, and directed the parties to schedule a status conference at the completion of the course to "revisit the issue of shared parental responsibility" (R3-386). The court explained that it saw the course as the Father's opportunity to earn shared parental responsibility (T422) and alleviate its concerns about his parenting ability (T419).

On the attorneys fee issue, the court found the Mother was entitled to recover her attorneys fees under *Rosen v. Rosen*, 696 So. 2d 697 (Fla. 1997), because the Father unnecessarily prolonged the litigation and caused additional expenses by failing to cooperate (R3-392).

D. <u>The Appeal</u>

The Father appealed the Final Judgment to the fourth district, arguing that the trial court abused its discretion in : (a) finding that the Mother was in the best position to determine the Father's visitation until he completed the parenting course; (b) awarding the Mother temporary sole parental responsibility of Jenna until he finished his parenting course and ordering the parenting course; (c) refusing his request for psychological evaluations and guardian ad litem reports; and (d) awarding the Mother her attorneys fees.

The Mother defended the temporary visitation order as within the trial court's discretion given a record showing her attempts to foster a meaningful relationship between Jenna and the Father, the Father's continual refusal without logical explanation to cooperate in visitation (T407), and his overall bizarre and unstable behavior.

She defended the temporary sole parental responsibility order on the basis of the court's discretion to award the relief, her Amended Unilateral Pretrial Catalog seeking the relief (R2-364-69), the Father's failure to object at trial (T232-45), and his acknowledgment that the court had the authority to order sole parental responsibility.

On the parenting course issue, the Mother argued that the order was within the trial court's discretion because a similar course was required by Florida statutes and because visitation, custody, parental responsibility and Jenna's best interests were at issue so the Father was on notice of the court's right to establish guidelines respecting those issues. She explained that the cases on which the Father relied required only notice of some kind and not a pleading seeking such relief, did not discuss any statutory foundation for a parenting course, and did not order the course in the context of a final hearing on custody, visitation, or parental responsibility.

As far as the attorneys fee award, the Mother argued that it should be affirmed for several reasons: (a) the record showed that the Father overlitigated the case; (b) his income was 57% of the family income; (c) he spent $16,000 on his own fees before trial; (d) the court relieved him of child support arrearages; (e) he underreported by $20,000 his income from April 1997 to September 1999; (f) he failed to contribute to Jenna's health care insurance or child care expenses during the same period despite his obligation to do so; (g) he refused to provide child support between April and September 1997; (h) he had $1,800 monthly expendable income after child support; (i) he received a $10,000 tax credit for the marital home after the divorce; (j) he received overtime pay for years, then denied receiving it during the litigation with no evidence other than his testimony that it had ceased, which the court found incredible; and (k) he refused to allow the Mother to take her car when she left Florida, and by the time the court ruled that she could have the car, it was worthless.

E. The Opinion

On May 31, 2000, the fourth district issued its Opinion. *Shaw v. Shaw*, 25 Fla. L. Weekly D1321 (Fla. 4th DCA May 31, 2000), affirming the Final Judgment in all respects. The court noted there was ample evidence in the record to sustain the trial court's factual findings that shared parental responsibility would be "detrimental to the minor child and not in her best interest at this time," that the Mother should have temporary sole parental responsibility until the Father completed the course, and its order that the parties return to revisit the issue at that time.

On the parenting course order, the court held that section 61.13(4)(c) authorizes such a course for a custodial parent and, although the Father was not the custodial parent at the time, explained that it saw no reason why a trial court could not require the course as a condition of reconsideration of custody. The court stated its disagreement with *Williams v. Williams,* 690 So. 2d 601, 603 (Fla. 1st DCA 1996), only to the extent that *Williams* requires a pleading, as opposed to other notice, to advise a parent that a trial court can order attendance at a parenting course as a condition of custody, parental responsibility, or visitation.

Last, on the issue of visitation, the court held it was proper "under the specific facts in this case" to give the Mother control of visitation until the Father completed the parenting course, because she had "gone above and beyond the call of duty" in fostering the Father's relationship with the child, but ordered the trial court to control visitation once the Father completed the course. The court repeated the trial court's findings that the Father exercised his right to visitation only four times in two-and one-half years, rejecting or sabotaging every other attempt by the Mother to schedule visitations. The Court also specifically noted the trial court's conclusion that the Mother was credible and the Father was not.

SUMMARY OF ARGUMENT

The fourth district correctly held that the trial court did not abuse its discretion and the Father was not deprived of due process on the parenting course issue. The court has statutory and inherent authority to order the Father to take a parenting course as a condition of parental responsibility, custody, or visitation if it is in the best interests of a minor child. Neither *Williams* nor any other case holds that a pleading must seeking a parenting course to satisfy due process requirements, only that some notice is necessary to satisfy due process requirements. Here, the Father received all the process due him with respect to the parenting course order because the Mother's Petition raised parental responsibility, custody, and visitation, because all three issues were properly noticed for final hearing, because he stood only to gain, and not to lose, as a result of the court's willingness to return to the parental responsibility and visitation issues after his completion of the course, and because there was no preparation he could have done specifically on the parenting course issue in addition to general trial preparation on the issues of parental responsibility, custody, and visitation.

The Mother disagrees with the Father that the fourth district recognized "both inter-district and intra-district conflict on several issues" (IB13). The only issue on which the court even mentioned another court's opinion was the parenting class, and even there expressed its disagreement only to the extent the opinion required a pleading to support an order requiring a parenting classes. Nevertheless, the Mother recognizes that once this Court's jurisdiction is triggered, it may decide all issues raised below, so will address the remaining issues.

The district court correctly held the trial court did not abuse its discretion in finding the Mother was in the best position to arrange a visitation schedule for Jenna and the Father until he completed the parenting course. The trial court did not

abandon its responsibility, or refuse the Father visitation, or give him an insufficient visitation schedule, as in the cases on which the Father relied. To the contrary, the court found the Mother fostered a generous visitation schedule but the Father was recalcitrant, uncooperative with visitation arrangements, opposed to visiting Jenna in Louisiana for no good reason, and unwilling to take advantage of even the court-ordered visitation. Under those circumstances, the district court did not err in holding that the trial court's short-term solution, just until the Father completed the parenting course, was the most workable and not an abuse of its discretion.

The district court was also correct in holding that the trial court did not abuse its discretion in ordering temporary sole parental responsibility. The record supports the trial court's findings that the Father's behavior was bizarre, that he did not cooperate with the Mother's efforts to forge a bond between him and his child, and that under the circumstances shared parental responsibility until the Father completed a parenting course would be detrimental to Jenna.

Finally, the district court properly affirmed the award of attorneys fees to the Mother. The Father has 57% of the parties' combined net income, and that fact alone is sufficient to warrant an award of fees to the Mother. In addition, however, there was evidence that the Father overlitigated the case, threatened the Mother, repeatedly blockaded her attempts to move to Louisiana with Jenna, told her he would not comply with court orders, attempted to delay trial by seeking appointment of a psychologist and guardian ad litem at the last minute, and lied to get his way. As the district court tacitly concluded, the *Rosen* guidelines entirely support the award.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE THE FATHER'S DUE PROCESS RIGHTS IN ORDERING HIM TO ATTEND A PARENTING CLASS WHERE FLORIDA STATUTES AUTHORIZE PARENTING CLASSES, CUSTODY, VISITATION, AND PARENTAL RESPONSIBILITY WERE AT ISSUE, AND THE TRIAL COURT FOUND THE FATHER'S PARTICIPATION IN THE PARENTING CLASS SERVED THE MINOR CHILD'S BEST INTERESTS.

The Mother disagrees that there was any abuse of discretion or due process violation in the trial court's order that the Father attend parenting classes as a condition of visitation and shared parental responsibility (IB14). A trial court abuses its discretion only if no reasonable person could take the view adopted by the court. *See Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). In this case, the record before the trial court showed:

- the Father's refusal to stop smoking around Jenna or recognize any relationship between his smoking and her bronchitis until ordered by the court to stop smoking in her presence (T104, 134, 364);
- his failure to ever contact Jenna's daycare center or pediatrician in Louisiana, despite the Mother's suggestions that he keep up with Jenna's progress through those sources (T351);
- his failure to ever send Jenna photographs or audiotapes despite the Mother's invitations and his ability to do so (T316, 357-58);
- his lies about military service, college degrees, and marital status, as well as his refusal to admit to his own comments about visiting in Louisiana only accompanied by United States marshals (T128-31, 351-55, 362-63);
- his periodic lack of good hygiene for himself, his home, and Jenna (T131, 142, 206);
- his temper tantrums (T132, 135);
- his periodic unemployment (T133);
- his threats against the Mother as well as his threats to violate court orders (T147, 160-61, 366-67); and

- his refusal to even respond to the Mother's numerous letters asking him to schedule visitations with Jenna (T150-156, 158; WE5).

Faced with that record, the trial court expressed its "great concerns" about allowing shared parental responsibility given the Father's bizarre behavior, failure to take advantage of visitation offers, misguided efforts to poison the waters regarding the Mother's parenting, threats against the Mother, and generally "clouded" judgment (T408, 416, 417, 419, 422). The court rejected the Father's testimony as "less than credible," noted its disappointment in the Father and his testimony, accepted the Mother's testimony unconditionally (T405-11), and based on those findings of fact concluded that it would be detrimental to Jenna to award the Father shared parental responsibility or scheduled visitation until he completed a parenting course (R3-386). Given the plethora of facts supporting the trial court's decision, reasonable persons could certainly differ over the propriety of the challenged ruling.

There was also no violation of the Father's procedural due process rights to warrant reversal. This Court has held that the purpose of procedural due process is to "serve[ ] as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991). But the "extent of procedural due process protections varies with the character of the interest and nature of the proceeding involved." *In Interest of D.B.*, 385 So. 2d 83, 89 (Fla. 1980). Where a parent has no need to prepare for a particular proceeding or issue, and all that is required is an appearance, the requirements of procedural due process are met if the parent simply appears. *See Gilbert v. Homar*, 520 U.S. 924 (1997); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961)); *see also Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970) ("The extent to which procedural

due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'").

Here the Father claims violation of his procedural due process rights only as to the parenting course, not visitation, custody, or sole parental responsibility (R1-2-3). He has never objected to the trial court's authority to rule on those issues (R2-364-69; T232-42). The sole question, therefore, is whether he was entitled to separate notice of the trial court's intention to require a parenting course as a condition for shared parental responsibility and visitation. The answer is no. To require a petition to list each type of relief available to the trial court is unreasonable. It should be sufficient, as the fourth district tacitly held here, to frame generally the issues before the trial court and then recognize the court's broad discretion under chapter 61, Florida Statutes, to craft specific relief based on the facts of the case. Based on the record in this case, the trial court would have been well within its discretion in awarding the Mother permanent sole parental responsibility of Jenna without giving the Father any chance to rehabilitate himself. *See Osherow v. Osherow*, 2000 WL 294513, *3 (Fla. 4th DCA 2000) (explaining that § 61.13(2)(b)2 authorizes a court to order sole parental responsibility and place restrictions on visitation if it determines that shared parental responsibility would be detrimental); *Roski v. Roski*, 730 So. 2d 413, 414 (Fla. 2d DCA 1999) (finding no abuse of discretion in awarding sole parental responsibility); *Adams v. Adams*, 677 So. 2d 6, 9 (Fla. 5th DCA 1996) (same).

However, rather than permanently eliminate the Father's right to shared parental responsibility, the court gave the Mother only temporary sole parental responsibility while allowing the Father the opportunity to take a parenting course and then seek shared parental responsibility. Similarly, after determining that shared parental responsibility would be detrimental to Jenna, the court could have restricted

the Father's visitation without allowing him any opportunity to readdress the issue. *See Osherow*, 2000 WL at *3. Instead, the court gave the Mother only temporary management of visitation and gave the Father, through the parenting course, an opportunity to improve his skills and attitude.

One can hardly conclude that the court's willingness to give the Father a second chance, even though it was not required to do so, is a violation of his due process rights. To the contrary, as the above cases recognize, there was no due process violation not only because he had notice of the trial court's authority to order the course as a condition of his parental rights, but also because he stood only to gain, and not to lose, as a result of the court's willingness to revisit its parental responsibility and visitation orders. As the above cases also recognize, there was no due process violation, because the Father was not deprived of any opportunity to prepare to address the parenting class ruling, because there was no preparation he could have done in addition to general trial preparation. Under the specific facts of this case, the fourth district correctly held that the Father received all the process he was due on the parenting course issue.

The fourth district also correctly pointed to Florida statutes as providing additional notice of the trial court's authority to order a parenting course. Where issues regarding child custody and visitation are before a trial court, Florida law requires that the court take whatever action is necessary for the best interests of the child. *See Bracken v. Bracken*, 704 So. 2d 746, 748 (Fla. 4th DCA 1998) (recognizing the trial court's discretion to consider the total circumstances and best interests of the child in deciding issues of custody and visitation); *Pulitzer v. Pulitzer*, 449 So. 2d 370, 371 (Fla. 4th DCA 1984); § 61.052(2)(b), Fla. Stat. (1995) (directing that a trial court may take any action it deems appropriate for the best interests of a minor child). Within the arsenal given trial courts to protect children is the power to

require parenting courses of divorcing and custodial parents. *See* §§ 61.13(4)(c), 61.21(3), (5), Fla. Stat. (1995). Knowledge of those statutes is imputed to the Father as a matter of law. *See Myers v. State*, 696 So. 2d 893, 899 (Fla. 4th DCA 1997), *quashed on other grounds*, 713 So. 2d 1013 (Fla. 1998). Given that imputed notice, and particularly considering the specific circumstances of this case, the trial court was surely within its broad discretion to protect Jenna's best interests by ordering the Father to take a parenting course without some additional notice.

The Father's argument that neither statute provided him proper notice because section 61.13 authorizes only a class for a custodial parent and section 61.21 authorizes only a shorter class (IB16-17) is without merit. He has never attacked the length or scope of the parenting course, only the trial court's authority to order any course at all because it was not requested in the Mother's Petition. But there is no question that both custody and visitation were at issue in this case and, as the fourth district explained, section 61.13, combined with a trial court's inherent discretion, is broad enough to authorize a parenting course under those circumstances.

Furthermore, the Mother does not believe there is any direct conflict between the cases on which the Father relied to seek this Court's jurisdiction and this case (IB14-15), nor did the fourth district recognize such a conflict. Neither *Williams*, 690 So. 2d at 603, nor *Silvers v. Silvers*, 504 So. 2d 30, 31 (Fla. 2d DCA 1987), the other case on which the Father relies, involved either pleadings or final hearings encompassing issues of custody, parental responsibility, or visitation, as does this case. Therefore, in noting its disagreement with *Williams* "to the extent it requires a pleading" before a trial court can order attendance at a parenting course, the fourth district in *Shaw*, 25 Fla. L. Weekly at D1321, was merely explaining that to construe *Williams* as requiring pleading notice would be incorrect because due process requirements could be satisfied by notice given in some form other than a pleading.

A review of the facts of *Williams*, 690 So. 2d at 602, shows why it does not conflict with Shaw. The sole issue before the court was the former wife's motion for enforcement of the financial terms of the parties' property settlement agreement. Nevertheless, the trial court ordered the former husband to attend parenting classes and to obtain alcohol abuse counseling. *Id.* at 603. In reversing, the first district held that it was "improper to enter an order which exceeds the scope of relief sought by the pleadings, absent notice which affords the opposing party an opportunity to be heard with respect to the proposed relief." *Id.* (emphasis supplied). The reason, explained the court, was that the "former husband was not afforded notice that such a provision was contemplated." *Id.*

The facts of *Williams* clearly showed a due process violation because in the absence of custody, parental responsibility, or visitation issues, there was no possible way the former husband could have foreseen entry of an order on alcohol abuse and parenting courses. That is not the case here, however, where custody, parental responsibility, and visitation were properly noticed for final hearing, where a parenting course is squarely within the scope of the requested relief, and where the trial court was statutorily authorized to require the course. The *Williams* court held only that a pleading or other notice is required, and the Father here had the notice described by the court in *Williams*. However, to the extent the Court finds conflict, it should hold that a pleading requesting a parenting course is not necessary if other notice, such as was given here, fulfills due process requirements.

Similarly, in *Silvers*, 504 So. 2d at 31, the only issue before the trial court, also raised in a post-dissolution motion, was financial. Custody, visitation, and parental responsibility were not before the court. Yet in its order, the court required both parents and their current spouses to participate in joint counseling and to complete two junior college courses in parenting, communications, building self-esteem in the

family, adjusting to divorce, or step-parenting. *Id.* In reversing, the second district noted, as did *Williams*, that the trial court erred in imposing those conditions without "motion or other notice." *Silvers*, 504 So. 2d at 31(emphasis supplied). Again the court did not restrict due process to a motion requesting the relief but recognized that other types of notice were sufficient. And again, nothing suggests that any alternative notice, such as the general scope of the pleadings or parenting course statutes, was discussed or even appropriate under the facts. Unlike *Silvers*, in this case there was notice, because it involved a final hearing on issues of custody, child support, and parental responsibility at which the court had statutory authority to order parenting classes. Here, there was no due process violation.

The other three cases on which the Father relies are equally distinguishable. In *Little v. Little*, 718 So. 2d 341, 342 (Fla. 4th DCA 1998), which cannot create conflict in any event because it is a decision of the fourth district, the court modified a final judgment at a post-judgment hearing designed only to arrange a single visitation. In *Brady v. Jones*, 491 So. 2d 1272, 1273 (Fla. 2d DCA 1986), the court also modified a final judgment at a post-judgment hearing directed only at visitation. In both cases, the appellate courts held that the trial court could not modify the final judgments in the absence of appropriate pleadings and presentations. In *Winddancer v. Stein*, 765 So. 2d 747, 748 (Fla. 1st DCA 2000), the court held that the trial court could not order the custodial parent and child into counseling where the "narrow subject matter of the motion" did not seek that relief and it was not noticed for hearing. All three cases contrast the narrow scope of the issue noticed for hearing with the order outside the narrow scope that became the subject of the appeal. This case, unlike those three cases, does not involve modification of a final judgment or other relief unconnected to any properly noticed issue. It involves only the trial court's decision, at a final hearing on custody, visitation, and parental responsibility,

that the Father's shared parental responsibility and visitation should be condition on his successful completion of a parenting course.

The Father's argument that the trial court's concerns regarding his parenting skills were inconsistent with its "repeated" denial of his request for psychological examinations (IB16) and therefore further deprived him of notice, is not borne out by the record. The primary reason his requests were denied was because they were untimely. His only requests were in May 1999, after the case had been pending for two years and after it had been set for trial (R1-1; R2-309-12), and in September 1999 at trial (T8). Despite his opportunity, he never renewed his request for evaluations between May and September 1999, when the trial was held (T1-438). Second, the argument fails to recognize that the Mother's Petition and Amended Unilateral Pretrial Stipulation notified the Father that his parenting skills and right to custody, visitation, and shared parental responsibility were at issue with or without psychological evaluations of the Mother and Jenna and a guardian ad litem for Jenna. Furthermore, the Father's own psychologist testified that no formal evaluation was available for a child under six (T310), that it was generally best for a child to have access to both parents as frequently as possible (T305), and that she had first given the Father her opinions in January of 1998 (T313). The first statement is consistent with no further need for formal evaluation; the second statement is consistent with the Final Judgment; and the third statement shows the Father could have timely pursued the evaluations issue but did not.

This case pits the best interests of a child against a father's determination to have his own way no matter what is best for the child. Well over nine months has passed since entry of the Final Judgment, and there is no indication that this issue has become moot through the Father's compliance. Contrary to his apparent position here, he has the absolute power to take the parenting course, treat the parental

responsibility and visitation orders as temporary, as the trial court clearly held, and upon completion of the course seek entry of permanent orders on shared parental responsibility and liberal visitation. While due process requirements must be respected, they are not static, but change with the interest and nature of the proceeding involved. Here, the Father's arguments that the decisions of the trial and appellate courts violated his due process rights are incorrect not only because they fail to take into account the nature of the proceedings but also because they ignore the best interests of his child. The arguments should be rejected.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE TRIAL COURT WAS WITHIN ITS DISCRETION IN ALLOWING THE MOTHER TO TEMPORARILY ARRANGE VISITATION BETWEEN THE FATHER AND JENNA WHILE THE FATHER COMPLETED THE PARENTING COURSE.

This is not a case like those cited by the Father, in which the trial court made no provision for visitation, or ordered inadequate visitation, or ordered supervised visitation without record support, or left the visitation schedule to an expert, or refused any visitation, or in which the custodial parent made every effort to defeat visitation (IB18-19). *See, e.g., Yandell v. Yandell*, 39 So. 2d 554, 555 (Fla. 1949); *Martin v. Martin*, 734 So. 2d 1133, 1136 (Fla. 4th DCA 1999); *Roski*, 730 So. 2d at 414; *McAlister v. Shaver*, 633 So. 2d 494, 497 (Fla. 5th DCA 1995); *Wattles v. Wattles*, 631 So. 2d 349, 350 (Fla. 5th DCA 1994). To the contrary, the court found that Jenna's visitation with her father was best left to the Mother's discretion for a short time, rather than governed by a structured schedule, because of the Mother's desire that Jenna and her father have a meaningful relationship and consistent efforts to foster that relationship (T407). The court's order was entered on a record showing the Father blockaded the Mother's attempts to have him see his child on the earlier court-ordered schedule, refused without logical explanation to go to Louisiana to take advantage of the visits he was to have with Jenna there, and stood on unreasonable demands and stipulations to make the court-ordered visitations in Florida impossible. A trial court's determination on issues such as visitation are within its broadest discretion. *See Martin*, 734 So. 2d at 1135; *Wattles*, 631 So. 2d at 350.

The cases on which the Father relies simply recognize, as does the Mother, that a parent has a protected right of visitation. *See, e.g., McAlister*, 633 So. 2d at 496. In this case, however, there is no attempt to prevent the Father from having visitation with Jenna. Quite the opposite. The trial court found, as a matter of fact, that the

Mother fostered the parental relationship (T407), but that the Father refused to take advantage of her many offers that he visit his daughter. In contrast to the cases cited by the Father, such as *Martin*, 734 So. 2d at 1136, where the court gave a mediator authority to establish the visitation schedule, and *Roski*, 730 So. 2d at 414, where the court ordered supervised visitation without evidentiary support, here the court found that the Mother fostered a liberal visitation schedule and simply gave her temporary authority to implement a schedule until the Father completed his parenting course.

No Florida case suggests such an order is impermissible. In *Wattles*, 631 So. 2d at 350, the court recognized that a visitation schedule agreed by the parties was appropriate, but here the Father never proposed any schedule. Had he done so, there is no evidence that the court would not have adopted the schedule or that the Mother would not have agreed to it. To the contrary, the record evidence, including the Mother's over 50 unsuccessful attempts to arrange visitation for Jenna with the Father (T150-58, 222), suggests that the Father did not take advantage either of the visitation offered to him by the Mother or of the visitation previously ordered by the court.

This case is also unlike *McAlister*, 633 So. 2d at 495, where the order was totally silent on the noncustodial parent's right to visitation. While the court explained that a trial court must "address" visitation rights when ordering sole parental responsibility, it also recognized that a court could order no visitation, if it found such an order appropriate and supported by the record. *Id.* at 496; *see also* § 61.13(2)(b)2.b, Fla. Stat. (1995). Here, unlike the situation in *McAlister*, the court did not order no visitation, as it could have done. Nor did it abdicate its responsibility to establish visitation guidelines, as prohibited by *McAlister*. Instead, it established specific visitation guidelines by recognizing that the circumstances were "extreme" and that the Mother was in the best position to determine whether and under what

circumstances visitation would adversely affect Jenna until the Father completed his parenting course.

Last, the Father's reliance on *Letourneau v. Letourneau*, 564 So. 2d 270, 270 (Fla. 1990), is misplaced. While the court there reversed a trial court's order allowing the husband visitation only upon approval of the wife, there is no recitation of the facts of *Letourneau* that led to the decision, and the decision cannot create conflict jurisdiction in this Court because it came from the fourth district, as did this case. *See* § 3(b)(3), art. V, Fla. Const. (1968) (limiting the Court's conflict jurisdiction to "any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law"). Furthermore, as explained in *Lane v. Lane*, 599 So. 2d 218, 219 (Fla. 4th DCA 1992), the trial court here observed the demeanor and personalities of the parties and witnesses and interpreted nuances invisible from a cold record. Based on those observations and interpretations, it found that the Mother was committed to fostering liberal and frequent visitation between the Father and Jenna, and would not restrict the Father's contact with his child. It is restrictions on visitation, rather than global and unlimited promotion of visitation, that are rejected by Florida courts. *See, e.g., Schutz v. Schutz*, 581 So. 2d 1290, 1292 (Fla. 1991); *Adamson v. Chavis*, 672 So. 2d 624, 626 (Fla. 1st DCA 1996); *Kent v. Burdick*, 591 So. 2d 994, 995-97 (Fla. 1st DCA 1991).

The Father's argument that he was prejudiced by the trial court's failure to rule on the issue of visitation (IB21) makes little sense in light of a record showing that he refused to comply with the court's earlier visitation orders. If this were a case where the Mother, as custodial parent, refused to cooperate in visitation or to foster a strong relationship between the Father and Jenna, while the Father vigorously sought visitation, there would be some reason for an order enforcing cooperation.

Here, however, the trial court found that the Mother eagerly sought visitation for Jenna and did everything in her power to arrange it, including paying for Jenna to come to Florida whenever the Father agreed to have her (IB22), while the Father went out of his way to prevent visitation. The Final Judgment does not set a "dangerous precedent" (IB21); it allows the party in the best position to do what is in the child's best interests.

Last, the Father argues that allowing the Mother to decide whether visitation should be supervised or unsupervised is error (IB21-22). Because there is no evidence that the Mother ever required any supervision for the Father's visitations with Jenna, this argument appears to ask the Court for an advisory opinion on a nonissue. The situation in this case is also distinguishable from the facts of each of the cases on which the Father relies. In *Adamson v. Chavis*, 672 So. 2d at 626, and *Kent*, 591 So. 2d at 995, the court held that the trial courts abused their discretion in severely limiting the fathers' visitations at the mothers' requests in the absence of any record support for such limitations. In *Goodman v. Goodman*, 571 So. 2d 23, 23 (Fla. 2d DCA 1990), the court held that the trial court abused its discretion in limiting the father's visitation with his children to the mother's state of residence. The Father's reliance on *Shaw*, 696 So. 2d at 391 (IB22), an opinion directed only at an *ex parte* pretrial order, ignores the evidence at trial of the Father's increasingly erratic behavior and the trial court's obvious reliance on the Mother's good faith and good sense to decide if supervision should become necessary. The Mother also rejects the Father's argument that he will be forced to visit Jenna in Louisiana under the Mother's microscope (IB23) as totally without any record foundation and inconsistent with her attempts to have Jenna visit him in Florida.

III. THE DISTRICT COURT CORRECTLY HELD THE TRIAL COURT WAS WITHIN ITS DISCRETION IN ORDERING TEMPORARY SOLE PARENTAL RESPONSIBILITY WHILE THE FATHER COMPLETED THE PARENTING COURSE.

The Father admits that the Mother's request for sole parental responsibility was properly noticed and tried (IB24-26) but argues that the fourth district erred in upholding the trial court's decision to award the Mother sole parental responsibility because the trial court articulated no basis for its decision. First, the argument, which characterizes the order as stripping him of "his right to have any say in Jenna's upbringing" (IB25), entirely ignores the fact that the order was for temporary sole parental responsibility until he completed his parenting course. Second, the argument entirely ignores a record, to which the Final Judgment repeatedly refers, supporting the trial court's "great concerns" about allowing shared parental responsibility given the Father's bizarre behavior, failure to take advantage of visitation offers, misguided efforts to poison the waters regarding the Mother's parenting, threats against the Mother, generally "clouded" judgment, and lack of credibility (T405-11, 416, 417, 419, 422).

The Father's alternative argument that the trial court improperly placed the burden on him to show his entitlement to shared parental responsibility (IB26 n.10) takes the court's remark out of context. By that point in the trial, the record showed that shared parental responsibility would be detrimental to Jenna. Based on that recognition, the court directed that the Mother would have temporary sole parental responsibility until the Father completed his parenting course, and that the Father would then have to return to the court and show that he had earned shared parental responsibility (T422). By that time, the Mother had carried her burden of proof and the Father was being given a second chance to which he was not legally entitled. It was a gift.

Section 61.13(2)(b)2.b gives a trial court authority to order "sole parental responsibility, with or without visitation rights, to the other parent when it is in the best interests of" the minor child. The fourth district correctly recognized that the standard of review for such orders is abuse of discretion, *see Martin*, 734 So. 2d at 1135, *Regan v. Regan*, 660 So. 2d 1166, 1167 (Fla. 3d DCA 1995), *McCann v. Daniels*, 650 So. 2d 205, 206 (Fla. 4th DCA 1995), and here there was no abuse.

IV. THE DISTRICT COURT CORRECTLY HELD THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE MOTHER ATTORNEYS FEES WHERE THE FATHER OVERLITIGATED HIS CLAIM FOR PRIMARY RESIDENTIAL CUSTODY WITHOUT A VALID BASIS, OVERLITIGATED HIS CLAIM FOR VISITATION WITHOUT EVEN TAKING ADVANTAGE OF HIS EXISTING VISITATION RIGHTS, AND WHERE THE FATHER HAS GREATER ABILITY TO PAY THAN THE MOTHER.

The district court's affirmance of the trial court's decision that the Father should be responsible for the Mother's fees (R3-392; T426-27) is correct for several reasons. The first set of reasons is unrelated to overlitigation but nevertheless supports the trial court's decision. *See Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999) (explaining this Court's "tipsy coachman" rule). First, the court relieved the Father of child support arrearages (T399). Second, he under-reported by nearly $20,000 his income from April 1997 through September 1999 (T29, 360). Third, he failed to contribute to Jenna's health care insurance or child care expenses during the same period (T90, 92). Fourth, he refused to provide child support between April and September 1997 (T138). Fifth, he acknowledged that he has $1,800 monthly available after child support (T267). Sixth, he admitted receiving a $10,000 tax credit for the marital home after the divorce (T361). Seventh, his overtime was a significant issue during the litigation, and while he denied receiving overtime after years of having done so, he admitted he lied about his marital status and college degrees in job resumes (T362-63). Eighth, he refused to allow the Mother to take her car when she left Florida (T210), and by the time the court ruled that she could have the car, it was worthless. Ninth, he afforded at least $16,000 by trial for his own case (T370). Tenth, the record shows that his income is 57% of the net family income (R3-386).

As this Court noted in *Rosen*, 696 So. 2d at 698, need and ability to pay are the primary factors to be considered in chapter 61 proceedings, but section 61.16, Florida Statutes (1995), allows a trial court broad discretion to determine whether to make an award of attorneys fees in family cases, and one party need not be completely unable to pay before the trial court requires the other spouse to pay. *Id.* at 699. Rather, chapter 61 "constitutes a broad grant of discretion" for a trial court to make decisions regarding attorneys fees and other issues. *Id.* at 700. Here, the fourth district correctly affirmed the trial court's award as within its discretion.

The second consideration that supports the attorneys fee award here is precisely what the trial court found — that the Father overlitigated and overextended this case to the Mother's financial detriment (R3-392; T426). Contrary to the Father's argument (IB28 n.12), the court found that the litigation would never have gone so far except for the Father's actions (T426). The Mother also testified that the case should not have taken two-and-a-half years (T168). This Court confirmed a trial court's authority to make that type of finding irrespective of the other party's ability to pay. *Id.* at 700-01.

The Father's reliance on cases such as *Robbie v. Robbie*, 726 So. 2d 817 (Fla. 4th DCA 1999) (IB29-31), is misplaced. There, citing *Rosen*, 696 So. 2d at 701, the court found that a trial court "has discretion to deny either party his or her attorneys' fees if the court finds that the party's actions are frivolous, spurious or undertaken primarily to harass the adverse party." *Robbie* at 822. The court in this case made just such a finding, and it is supported by the record. Had the Father allowed the Mother to relocate, as the trial court ultimately decided she could do, those fees would not have been incurred. He has not been punished for wanting to "remain a primary part of his child's life" (IB31). He has been assessed attorneys fees for

engaging the Mother in lengthy and unnecessary litigation on the parties' respective roles in the child's life.

Contrary to the Father's argument (IB30-31), this was absolutely a case where the Father was unyielding and unreasonable on the visitation and custody issues, as the trial court found. The reason he saw his daughter on only four occasions, as he complained, was because of his own recalcitrant positions with respect to visitation, as the trial court also found (T407) and as the record reflects (T148). The award is supported by the record. *See McCann*, 650 So. 2d at 206.

CONCLUSION

For the foregoing reasons, Respondent Elizabeth Shaw respectfully requests that the Court approve the decision of the fourth district in all respects.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U.S. Mail to Diane H. Tutt, Esq., Dianne H. Tutt, P.A., 8211 West Broward Boulevard, Suite 420, Plantation, Florida 33324-2741, this 27th day of November, 2000.

Respectfully submitted,

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