IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-1577

SAMUEL SHAW,

Petitioner,

vs.

ELIZABETH SHAW,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

This brief is filed on behalf of the Petitioner, the Appellant below, SAMUEL SHAW, seeking reversal of the panel opinion of the Fourth District filed May 31, 2000.

Throughout this brief, Petitioner will be referred to as "The Father." The Respondent, the Appellee below, ELIZABETH SHAW, will be referred to as "The Mother."

References to documents included in the appellate record will be designated "R." followed by the appropriate reference in the record. References to the Transcript of Proceedings from the trial held on September 29 and 30, 1999, which is included at the end of the appellate record, will be designated "T." followed by the appropriate page in the transcript.

STATEMENT OF THE CASE AND FACTS

This case began in April of 1997 when the Mother filed a Petition for Dissolution of Marriage seeking, among other things, to relocate from Broward County, Florida to Louisiana with the parties' then two and a half year old daughter, Jenna, and to be her primary residential parent. (R. 1-8). The Mother's petition **did not** seek sole parental responsibility nor did it make any mention whatsoever of any psychological unstableness on the part of the Father or request that the Father be required to attend any type of parenting course in order to have contact with his daughter. (R. 1-8).

The Father filed an answer to the Mother's petition as well as a Counter-Petition for Support, Custody, and Child Support Unconnected with Dissolution of Marriage wherein he sought to be named Jenna's primary residential parent. (R. 80-82; 83-87). At the time that the Father filed his pleading in May of 1997, Jenna and the Mother had already moved to Louisiana pursuant to an *ex parte* order that had been entered by the trial court authorizing the Mother to immediately relocate with the child in order to begin her new job.[1] (R. 52-53).

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[1] After entry of this *ex parte* order, the Father appealed to the Fourth District which concluded that the trial court had erred in entering the *ex parte* order in light of the absence of a "true emergency" or "extraordinary facts." Specifically, the Fourth District noted that there was no allegation that the Father had threatened to harm Jenna. *See* ***Shaw v. Shaw***, 696 So. 2d 391 (Fla. 4th DCA 1997). Nonetheless, Jenna

Upon remand of the *ex parte* order by the Fourth District, the trial court held an evidentiary hearing on the Mother's motion to temporarily relocate. After hearing from the parties on this issue, the trial court authorized the temporary relocation to Louisiana and ruled that the Father could exercise visitation with Jenna four times per year in Louisiana and four times per year in Florida. (R. 170-173).

Thereafter, in October of 1997, the parties agreed to the entry of a child support order including both on-going and back support for Jenna. (R. 207-208). This obligation was met through the voluntary entry of an Income Deduction Order. (R. 209-214). Furthermore, in February of 1998, the parties came to an agreement in regard to equitable distribution. (T. 14-15). Throughout this dispute, there has really never been an issue regarding either equitable distribution or child support.

Where there has been considerable dispute between the parties is the issue of the Father's visitation with Jenna. In January of 1998, when he had not seen his then three year old daughter for nine months, the Father filed a Motion for Contempt and to Enforce Visitation on grounds that the Mother refused to comply with the trial court's temporary visitation order. (R. 216-217). During a hearing on this motion, the Father testified that he had repeatedly sought to exercise visitation with Jenna and had requested that the Mother allow her to fly to Florida, but that each time the Mother

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and the Mother remained at all times in Louisiana.

refused the visitation. (R. 237-238). Furthermore, the Father testified that he and the Mother had pre-arranged a visitation between Jenna and the Father in Florida during the period between July 19 and July 26, 1997, but that just prior to the time that the visitation was to occur, the Mother sent a letter to the Father stating that she was postponing the visitation based on a comment that the Father made and that until the Father agreed to abide by the orders of the court,[2] visitation would be supervised and conducted in Louisiana. (R. 243-244).

The Father testified that he did not want to exercise visitation in Louisiana because he feared for his life. (R. 242, 246). He explained that he was concerned that if he went to Louisiana to exercise visitation, the Mother would accuse him of attempting to kidnap Jenna and he would end up in jail in Louisiana. (R. 242). After hearing the Father's testimony, the lower court ruled that the Father had the right not to go to Louisiana and that the Mother did not have the authority to impose any greater conditions on the Father's visitation than those imposed by the court in its prior order. (R. 249, 258). The court ordered that Jenna should visit the Father in

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[2] The Mother alleged in this letter that the Father told her that he did not recognize the lower court's orders and that he refused to abide by them. The Father denied making these statements and testified that what he had said was that he did not believe he was receiving a fair hearing from the court and that he felt his rights had been violated, but that he was bound by the court's order and would live by it whether he agreed with it or not. (R. 239, 244).

Florida. (R. 258).

While the Father testified that the Mother consistently refused him visitation with Jenna, the Mother claimed that she encouraged the Father to see her, but that he refused. (T. 301; 145-148). Nonetheless, at the time of trial in September of 1999, it is undisputed that the Father had visitation with Jenna on four separate occasions: for one night in April of 1998 when the Mother was visiting a friend in Fort Lauderdale[3] (T. 143; 296-301); for one week in September of 1998 (R. 298; T. 144); for one week in October of 1998[4] (R. 223); and for twelve days in June of 1999. (R. 223).

Additionally, from the time that the Mother initially moved to Louisiana, the Father testified at trial that he maintains constant phone contact with Jenna and that at the time of trial, he was calling on a weekly schedule on Wednesday and Sunday nights.[5] (T. 315). The Father regularly sends the child birthday and holiday cards with gifts. (T. 160).

Notwithstanding her constant insinuations that the Father was derelict in his

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[3] The first time that the Father finally saw Jenna since the Mother left for Louisiana was a year later in April of 1998. (T. 296).

[4] During this visit, the child spent her fourth birthday and Halloween with the Father. (T. 223-224).

[5] The Mother, on the other hand, testified that the Father's phone contact has been sporadic and that the Father has gone for up to a month without calling the child. (T. 159-160). The Father denied this, claiming there has never been a month that he didn't consistently call the child. (T. 318).

care giving role,[6] the Mother unequivocally testified during trial that, in her opinion, Jenna could spend up to two weeks straight with the Father during visitation. (T. 190-191). Moreover, the Mother admitted that the Father had a good and loving relationship with his daughter and that the daughter loves the Father. (T. 190).

Prior to trial, the Father filed a motion for Psychological Evaluation wherein he requested that the trial court compel the parties and the child to undergo psychological evaluations and that an independent custody evaluation be performed since this was the primary issue in the case. (R. 311-312). The trial court denied this motion. (R. 319). Nonetheless, during trial, the psychological stability of the parents became a central issue. The Mother alleged that the Father was psychologically unstable because he had lied to her about his past. (T. 208). Specifically, the Mother alleged that during their marriage, the Father had told her that he was in the Army and that he would take one Saturday off a month to go to Homestead Air Force Base. (T. 126-127). Additionally, the Mother testified that the Father told her that during Desert Storm, he had to go to Korea. (T. 128). Thereafter, the Mother came to learn that, in fact, the Father had never been in the Army. (T.130).

The Father denied both that he was ever in the Army and that he had ever told

[6] While the Mother alleged that after each of the visits with the Father, the child returned filthy and with head lice, the Father denied that this was true. (T. 144; 301; 323-324).

the Mother that he had been in the Army. (T. 268). The Father alleged that the only time that the subject of the Army had ever come up during their marriage was when they were buying their house and the Mother had asked if they could get a VA loan and the Father told her they were not eligible. (T. 269). The Father claimed that it was not until after the divorce proceedings began that this issue with him supposedly impersonating someone in the Army came up. (T. 269).

Moreover, the Mother's psychological condition was put into question by virtue of evidence that she had been hospitalized for depression and substance abuse prior to their marriage and that throughout their marriage, she continued to have bouts of depression. (T. 269-270). The Father testified that the Mother's depression resulted from abuse by her father and that throughout their marriage whenever she would speak to her father, she would become upset. (T. 270-271). The Father explained that after Jenna's birth, he felt that she was going through postpartum depression and that he had requested that she seek counseling, but the Mother had refused saying that it would bring up things that she did not want to talk about. (T. 271-272). The Mother admitted that she had been in a drug rehabilitation program for cocaine abuse, but denied that she had ever been depressed or that she had suffered from postpartum depression. (T. 202-204). The Mother admitted that she had "probably" told the Father that her father had been abusive to her. (T. 205).

During his testimony, the Father raised an issue in regard to the care that Jenna was receiving in Louisiana. The Father testified that when she came to visit him in Florida in September of 1998, she arrived with a "four centimeter slash" on her arm. (T. 321). When he asked the Mother what had happened, the Mother simply said that she had fallen and would not provide any other information. (T.321).

Thereafter, the Father testified that when Jenna came to see him in June of 1999, the Mother told him that she had developed a problem where she "talks to dead people" and that she thinks she has a dead brother named "Emily." (T. 322). Additionally, during the same visit, the Mother showed the Father a mass of mosquito bites on Jenna's arm and told him that she had already gone to the doctor and that she had been told to put Neosporin on it. (T. 322). The Father took the child to a doctor in Florida who diagnosed her as having a staph infection and put her on antibiotics to prevent it from going into her bloodstream. (T. 322-323).

Moreover, during the trial, there was an issue raised in regard to Jenna having told the Father, in June of 1999 while they were on a flight back to Louisiana, that she had been hit by the Mother, the maternal grandfather, and a maternal uncle. (T. 326-336). Specifically, the Father testified that the child told him that the uncle "hit her with wood." (T. 329-330). The Father explained that he had reported the incident to his attorney and to the child's physician in Florida. (T. 333-336).

After the court interrogated the Father about the incident, he ruled that he was not going consider the testimony because it was uncorroborated. (T. 336; 342). In response to a suggestion by the court that he had improperly sought to bring the issue before it, the Father's trial counsel explained that the Father had not raised the issue to suggest that the Mother was abusing the child, but rather to make sure that no one other than the parents be permitted to discipline the child by inflicting corporal punishment upon her. (T. 339).

After both parties presented their case, the lower court made a detailed oral ruling. (T. 399-438). The lower court ruled that the Mother would be Jenna's primary residential parent and approved the relocation to Louisiana. (T. 406-419).

In regard to parental responsibility, the lower court ruled that the Mother would have "temporary sole parental responsibility" for Jenna and ordered the Father to take a 36-week parenting course offered by the Broward County Mental Health Association. (T. 419, 422). The court stated that it would have another hearing after the Father attended the course and that the Father would have to go the "extra mile" to convince the court that he had earned the designation of shared parental responsibility. (T. 422). Morever, the court ruled that the Mother could provide the court with feedback because he was "totally convinced she would not use it as an extortion or as leverage against dad." (T. 422). Until that time, the court told the

Father that he was being relegated to the status of a renter rather than an owner of his child. (T. 423).

In regard to visitation, the trial court ordered that the Mother would "be the court" on this issue and would determine when and where there should be visitation, if at all, and whether it be supervised or unsupervised. (T. 420-421).

Lastly, the court ruled that the Father would be responsible for "every last penny" of the Mother's attorney's fees pursuant to the ***Rosen***[7] case based on a finding that "this litigation should have never gone this far, not at all." (T. 426).

Thereafter, a detailed written order was entered which, for the most part, conformed with the court's oral rulings. (R. 380-392). It is from this order that the Father appealed to the Fourth District.

On appeal, the Father challenged several different aspects of the court's ruling. The Father argued that the lower court had abused its discretion in allowing the Mother to have unilateral control and authority to determine if and under what circumstances he could see Jenna. Moreover, the Father challenged the trial court's award of "temporary sole parental responsibility" to the Mother arguing that there was no evidentiary support for the lower court's finding that shared parental responsibility would be detrimental to the child and that the lower court's requirement that the

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[7] ***Rosen v. Rosen***, 696 So. 2d 697 (Fla. 1997).

Father complete a nine month parenting class as a pre-requisite to reconsideration of this ruling was an abuse of discretion. Thirdly, the Father argued that in light of the conflicting testimony presented and the allegations of mistreatment of the child and mental instability on the part of the parents, the lower court had abused its discretion in refusing to appoint a neutral third party, such as a psychologist or guardian ad litem, to evaluate the situation prior to ruling on custody and visitation. Lastly, the Father challenged the lower court's decision to make him responsible for the entirety of the Mother's attorney's fees pursuant to ***Rosen*** since the record does not support a finding that the Father was overly litigious, or in any way vexatious, during the course of the litigation.

While acknowledging that there was case law both out of the Fourth District and the other district courts of appeal which expressly disapproved of the actions taken by the trial court in this case, the Fourth District nonetheless affirmed the trial court's order in all respects. In support of its ruling, the Fourth District simply stated that even though it may generally be error, based on the facts presented in this case, the trial court did not abuse its discretion in allowing the Mother to have unilateral control over the Father's visitation. Furthermore, the Fourth District affirmed the trial court's decision to award temporary sole parental responsibility to the Mother until the Father completed the nine month parenting class, at which point the trial court

would conduct a status conference to hear from the parties. In regard to this issue, the Fourth District expressed disagreement with the First District, which had held in ***Williams v. Williams***, 690 So. 2d 601 (Fla. 1st DCA 1996) that it constitutes reversible error to order a parent to attend a parenting class where such relief 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. The Father has sought review in this Court of the Fourth District's opinion.

SUMMARY OF THE ARGUMENT

While the Fourth District concluded that the trial court's ruling in this case was justified by the discretionary credibility determinations made during trial, the Father respectfully submits that this determination was wrong and that even in light of the broad discretion afforded to trial judges to make credibility assessments, the ruling of the lower court cannot be sustained on this ground. As recognized in the opinion of the Fourth District, the panel's affirmance of the trial court order creates both inter-district and intra-district conflict on several different issues and thus simply cannot be rationalized as a narrow, fact based, opinion.

The Father urges the Court in reviewing this case to recognize not only that the trial court's ruling has broad, statewide implications regarding several different aspects of child custody litigation and the right and ability of a parent to seek certain relief in courts of this State, but also that it directly implicates constitutional concerns about the due process rights of a parent and a child to pursue a meaningful relationship.

ARGUMENT

Point I

IT IS A VIOLATION OF DUE PROCESS TO IMPOSE A PARENTING CLASS ON A PARENT IN THE ABSENCE OF EITHER A REQUEST FOR SUCH RELIEF OR SOME OTHER NOTICE THAT SUCH A PROVISION IS BEING CONTEMPLATED SO AS TO ALLOW THE PARENT AN OPPORTUNITY TO BE HEARD ON THE ISSUE.

In this case, the Fourth District expressly approved of the lower court's decision to require the Father to attend a nine month parenting class sponsored by the Broward County Mental Health Association as a precondition of its reconsideration of custody and visitation despite the fact that neither of the parties had ever requested such relief in their pleadings nor did the trial court ever provide the parties with any notice whatsoever that it was contemplating this relief. In the panel opinion, the Fourth District stated outright that it did not agree with the decision of the First District in ***Williams v. Williams***, 690 So. 2d 601 (Fla. 1st DCA 1996) wherein the court reversed a portion of an order requiring a parent to attend a parenting class where this requirement exceeded the scope of relief sought in the pleadings and was made without allowing the party against whom the relief was ordered to oppose the contemplated relief in any meaningful way.

While the Mother has argued throughout these proceedings that this case can

be distinguished from ***Williams***, *supra*, and ***Silvers v. Silvers***, 504 So. 2d 30 (Fla. 2d DCA 1987) because neither of these cases were decided in the context of a full trial on custody and visitation disputes and neither discussed any statutory basis for a parenting class, these distinctions are without merit.

Both ***Williams*** and ***Silvers*** correctly recognize that it is a violation of due process for a trial judge to require a parent to attend a parenting class when the party has never been placed on notice that such relief is being contemplated by the court and thus is denied the opportunity to be heard on the issue before a ruling is made. *See also* ***Little v. Little***, 718 So. 2d 341 (Fla. 4th DCA 1998); ***Brady v. Jones***, 491 So. 2d 1272 (Fla. 2d DCA 1986).

Recently, in ***Windancer v. Stein***, 765 So. 2d 747 (Fla. 1st DCA 2000), the First District reiterated this notion that it is a violation of the fundamental right to due process for a court to adjudicate issues that are not presented by the pleadings, not noticed by the parties, and are not litigated during a hearing. This concept is exceedingly relevant to this case since the trial court below not only required the Father to attend a 36-week parenting class which had never been suggested by either the parties or the court prior to its ruling, but in fact, pre-conditioned any and all access that the Father had to his child on the completion of this nine month course.

Moreover, the violation of due process is especially significant since the trial court not only failed to ever indicate that it was contemplating a denial of custody and visitation[8] based on the Father's alleged mental health deficiencies and/or lack of parenting skills, none of which had ever been pled or raised by the Mother in her pleadings, but to the contrary, by virtue of its repeated denial of the Father's request that the parties undergo psychological evaluations and that a guardian ad litem be appointed, led him to believe the exact opposite. In so doing, the trial court essentially made it impossible for the Father to address the court's concerns in any real fashion or to oppose the trial court's contemplated relief in any meaningful way. For this reason, the trial court's ruling, which denied the Father shared parental responsibility and visitation with Jenna until at least such time as he completed a nine month parenting course, was a violation of due process as recognized in ***Williams*** and ***Silvers***. While it is true that pursuant to F.S. § 61.21, the Florida Legislature has authorized, and in fact mandated, that all judicial circuits in the State approve of a four hour parenting class known as the Parent Education and Family Stabilization Course to be attended by all divorcing parents at the early stages of divorce litigation, it is

[8] This is especially true in regard to visitation since neither party ever requested or raised the issue before the court of the Father being denied his right to visit with Jenna. In fact, the contrary is true since the Mother requested that the trial court enter a specific, detailed visitation order so as to help them carry out visitation more smoothly. (T. 28, 30).

apparent that the nine-month course sponsored by the Broward County Mental Health Association, which the Father was required to attend in this case, is entirely different from the class contemplated by the Legislature in F.S. § 61.21. Consequently, contrary to the argument of the Mother in the Fourth District, the existence of this statutory section cannot warrant the drastic step taken by the trial court in this case.

Nor, for that matter, can F.S. § 61.13(4)(c), which is the statutory section relied upon by the Fourth District in its opinion to justify the ruling of the lower court regarding the parenting course. This statutory section authorizes a trial court to order a custodial parent, who has interfered with or refused to honor a non-custodial parent's visitation, to attend a parenting class authorized by the judicial circuit. There is absolutely nothing in this portion of F.S. § 61.13 that can be interpreted to authorize a trial court to condition a non-custodial parent's right to custody and visitation upon attendance of the type of course mandated by the trial court in this case.

Point II

BECAUSE IT IS THE RESPONSIBILITY OF A TRIAL COURT IN A DIVORCE CASE, AS THE FINDER OF FACT AND THE APPLIER OF LAW, TO ESTABLISH A VISITATION SCHEDULE IN COMPLIANCE WITH THE EVIDENCE AND FLORIDA LAW, IT IS AN ABUSE OF DISCRETION TO ALLOW ONE PARENT UNILATERAL CONTROL AND AUTHORITY TO DETERMINE IF AND UNDER WHAT CIRCUMSTANCES THE OTHER PARENT CAN EXERCISE VISITATION.

Both this Court and the United States Supreme Court have recognized that in regard to a non-custodial parent's right to visitation, there is a constitutionally protected, inherent right, founded in due process, to maintain a meaningful parental relationship with a child and that, consequently, visitation with a child should never be denied as long as the visiting parent conducts himself, while in the presence of the child, in a manner which will not adversely affect the child's morals or welfare. ***Quilloin v. Walcott***, 434 U.S. 246 (1978); ***Stanley v. Illinois***, 405 U.S. 645 (1972); ***Schutz v. Schutz***, 581 So. 2d 1290 (Fla. 1991); ***Yandell v. Yandell***, 39 So. 2d 554 (Fla. 1949).

In furtherance of this natural right of a non-custodial parent to enjoy the companionship of his offspring, it has been recognized in appellate courts of this State that it is the duty and the obligation of the trial court to consider the relationships

between parents and children and to address visitation rights after considering applicable Florida law and the evidence presented. *See* ***McAlister v. Shaver***, 633 So. 2d 494 (Fla. 5th DCA 1994); ***Wattles v. Wattles***, 631 So. 2d 349 (Fla. 5th DCA 1994). On numerous occasions, it has been pointed out that trial courts cannot abdicate this judicial decision-making role to third parties such as guardians or mediators by giving them absolute authority to determine issues of visitation. *See* ***Martin v. Martin***, 734 So. 2d 1133 (Fla. 4th DCA 1999); ***Wattles v. Wattles***, 631 So. 2d 349 (Fla. 5th DCA 1994); ***Roski v. Roski***, 730 So. 2d 413 (Fla 2d DCA 1999); ***Scaringe v. Herrick***, 711 So. 2d 204 (Fla. 2d DCA 1998).

Consistent with this notion, in ***McAlister v. Shaver***, 633 So. 2d 494 (Fla. 5th DCA 1994), the Fifth District acknowledged that a trial court's responsibility to a child to address the issue of visitation cannot be abdicated to either a parent or an expert. Until the present case, the Fourth District appeared to be in agreement with this rule of law as evidenced by the case of ***Letourneau v. Letourneau***, 564 So. 2d 270 (Fla. 4th DCA 1990). In that case, the Fourth District addressed the exact same issue presented in this case and concluded that the trial court had erred in placing a provision in a final judgment that gave complete control over the father's visitation to the mother and remanded the proceeding back to the trial court to establish a schedule of reasonable visitation which was created by the exercise of the court's

discretion, rather than the mother's. Regardless of the underlying facts in the case, which the ***Letourneau*** court did not feel were necessary to recite, the rule of law established therein is clear and unambiguous.

Nonetheless, the Fourth District completely disregarded its holding in ***Letourneau***, not to mention the well-established precedent cited above, and concluded that the trial court in this case did not err in giving the Mother unilateral control and unfettered discretion to decide if and when the Father could exercise visitation with Jenna. This decision is the only case that the Father's undersigned counsel has located where a trial court has been permitted to completely abdicate its judicial decision-making role vis-a-vis visitation to a third party.

While the Mother attempted to argue in the Fourth District that the trial court's ruling was simply an order allowing the parties to agree on their own visitation schedule, the clear import of the trial court's ruling is unmistakable. The trial court stated as follows:

> Therefore, the request for structured visitation is denied, because I want you [the Mother] to orchestrate it. You will be the Court on this. You will decide when and where there should be visitation at this time, because I have every confidence that you can do a better job than me.
>
> I don't want any structured visitation schedule. I'm going to leave it up to you as to when its best for your daughter to have visitation with her dad. And even under

> what circumstances, whether they should be supervised or unsupervised, I'll leave it up to you. If you decide there should not be a visitation at this time, you've got the Court's permission. . .(T. 420-421).

The inherent problem in allowing one parent to completely control the other parent's right to visitation, especially in a case such as the present where there have been allegations of frustration of and interference with visitation, is obvious. Even to the extent that the lower court completely rejected the Father's testimony during trial, it still had an obligation to rule on the issue of visitation rather than simply leaving it up to the unfettered discretion of the Mother.

In affirming the trial court's decision to do just this, the Fourth District has set a dangerous precedent. To the extent that two parents actually go to trial on issues of child custody and visitation, it is apparent that they are unable to settle these issues between themselves. That is the very reason why the parties submit such a significant issue to the court for its determination. For a trial court to simply throw the issue back into the hands of the parties, and in particular into the unilateral control of one party, is illogical and simply cannot be endorsed as an appropriate method of resolution by a trial court.

Furthermore, the trial court's ruling that the Mother would be authorized to require that the Father have supervised visitation with Jenna was completely

misplaced. Even in light of a trial court's broad discretion to limit visitation as may be necessary to protect the welfare of a child, it is still true that the discretion to impose restrictions on visitation must be supported by some evidence in the record showing that such restrictions are necessary. ***Adamson v. Chavis***, 672 So. 2d 624 (Fla. 1st DCA 1996); ***Kent v. Burdick***, 591 So. 2d 994 (Fla. 1st DCA 1991); ***Goodman v. Goodman***, 571 So. 2d 23 (Fla. 2d DCA 1990). In the present case, there simply is no justification for supervised visitation since the evidence presented does not even remotely suggest that the Father is an unfit parent who must be subjected to supervised visitation in order to protect the welfare of his child. As the Fourth District recognized in the initial, non-final appeal from the *ex parte* order on relocation, there is no allegation that the Father has ever threatened to harm Jenna. *See* ***Shaw v. Shaw***, 696 So. 2d 391 (Fla. 4th DCA 1997).

Furthermore, every witness that testified as to the relationship between Jenna and the Father, including the Mother herself and her sister, unequivocally testified that she and the Father have a loving relationship and that the child often speaks of the Father and the time that they spend together. (T. 55, 190-191; 256-257). The Mother testified that she believed Jenna could travel to Florida and stay with her Father for a period of two weeks at time. (T. 190). Prior to trial, Jenna had spent a week with the Father in September and October of 1998 and then twelve days in June of 1999. All

of these previous visits were unsupervised.

For the Fourth District to authorize supervised visitation in light of this undisputed evidence was improper. The effect of this ruling was to deny the Father his constitutionally protected right to enjoy the custody, fellowship, and companionship of his daughter by permitting the Mother to place limitless restrictions upon his right to visitation. There is absolutely no justification in the record in this case to approve of a visitation scenario which requires the Father to travel to Louisiana to exercise visitation with his daughter under the microscope of his ex-wife.

Point III

IN LIGHT OF THE ARTICULATED PUBLIC POLICY OF THE STATE OF FLORIDA TO ENSURE THAT PARENTS ARE PERMITTED TO SHARE IN THE RIGHTS, RESPONSIBILITIES, AND JOYS OF CHILDREARING, WHERE, AS HERE, IT IS UNDISPUTED THAT IT IS IN THE CHILD'S BEST INTEREST THAT THE FATHER PLAY AN ACTIVE ROLE IN HIS CHILD'S LIFE, IT IS AN ABUSE OF DISCRETION FOR A TRIAL COURT TO ORDER SOLE PARENTAL RESPONSIBILITY.

Florida Statute § 61.13(2)(b)1 expressly states that "It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of child rearing." Consequently, F.S. § 61.13(2)(b)2 compels a trial court to order that parental responsibility for a minor child be shared by both parents unless there is evidence to show that shared parental responsibility will be detrimental to the child.

In this case, the Mother did not request that she be awarded sole parental responsibility[9] until just before trial when her pre-trial stipulation was filed, at which point she alleged for the first time that the inability of the parties to communicate necessitated that sole parental responsibility be awarded to her. (R.366; T. 244-245).

[9] To the contrary, the dissolution of marriage petition specifically requested that the parties have shared parental responsibility for Jenna. (T. 244).

While the trial court justified its ruling of sole parental responsibility on its statement that it has "great concerns in this area," the court failed to ever articulate specifically what the concerns were. (T. 419; R.386). Nonetheless, the Fourth District affirmed the decision of the trial court to strip the Father of his right to have any say in Jenna's upbringing.

Unlike those cases where trial courts have been authorized to award sole parental responsibility based on a finding of a failure to be able to discuss all issues relating to the children, this case is not an "inability to communicate" case where the parents are completely unable to agree on any and every issue in regard to their child. *See* ***Roski v. Roski***, 730 So. 2d 413 (Fla. 2d DCA 1999)(sole parental responsibility justified by record evidence that parents were unable to agree on any subject thereby creating an invitation for weekly journeys to family court); ***Regan v. Regan***, 660 So. 2d 1166 (Fla. 3d DCA 1995)(sole parental responsibility justified by parties' inability to agree on even the most routine questions of child care which was affirmatively harmful to the child); ***Hunter v. Hunter***, 540 So. 2d 235 (Fla. 3d DCA 1989)(sole parental responsibility justified by parents' animosity to each other, their inability to communicate, and their use of the children to hurt each other).

Aside from the allegations of problems with visitation, the Mother did not provide one example of the parties' inability to communicate which had adversely

affected Jenna. Insofar as it was the Mother's burden,[10] as the party opposing shared parental responsibility, to establish that this arrangement would, in fact, be detrimental to the child, her lack of evidence to substantiate this claim should have resulted in reversal of the custody determination in the Fourth District. *See* ***Kent v. Burdick***, 591 So. 2d 994 (Fla. 1st DCA 1991).

The Father argued in the Fourth District that where the evidence presented established only that the parties were unable to agree on issues regarding visitation, the proper course of conduct for the trial court to have taken would have been to enter a detailed visitation schedule rather than stripping the Father of his parental rights. This is especially true in the present case where the Mother did not seek sole parental responsibility until just before trial in a pre-trial stipulation and, in fact, during trial, requested that the trial court assist them with their visitation problems by entering a visitation schedule which specifically laid out a schedule for when the non-custodial parent could exercise visitation with Jenna. (T. 28, 30). In failing to promote the Father's fundamental right to be a part of his daughter's life, which all of the parties

[10] The trial court misconstrued the proper burden in regard to the issue of shared parental responsibility as evidenced by its statement during the oral ruling that before the Father would be entitled to shared parental responsibility, he would have to prove to the court that he had "earned that designation." (T. 422). In fact, it was the Mother that had to the burden to show that the presumption of shared parental responsibility should be set aside.

admitted during trial was in Jenna's best interest, and to facilitate this goal by assisting the parties with their difficulties in setting up visitation, and instead, simply taking away all of the Father's rights in regard to Jenna, the trial court erred as did the Fourth District in upholding such a ruling. Even in light of the trial court's broad discretion to make credibility determinations, the record in this case simply cannot, under any interpretation of the evidence presented, support a finding that it is in Jenna's best interest that she have no access to her Father for a period of, at the very least, nine months. In effect, by affirming the trial court's decision to award the Mother temporary sole parental responsibility, this is exactly what has been authorized by the Fourth District in this case.

Point IV

IN A CASE WHERE THE ONLY ISSUES PENDING FOR THE MAJORITY OF THE LITIGATION ARE CHILD CUSTODY AND VISITATION, IT IS AN ABUSE OF DISCRETION TO REQUIRE ONE PARENT TO PAY ALL OF THE OTHER PARENT'S ATTORNEY'S FEES UNDER *ROSEN* WHERE THE RECORD CANNOT SUPPORT A FINDING OF OVERLY LITIGIOUS CONDUCT.

Despite the fact that the record is undisputed that the Father earns only slightly more than the Mother,[11] the trial court nonetheless ruled that the Father would be responsible for paying "every last penny" of the Mother's attorney's fees pursuant to ***Rosen v. Rosen***, 696 So. 2d 697 (Fla. 1997), based on a finding that "this litigation never should have gone this far, not at all."[12] (T. 426).

In ***Rosen***, this Court considered the issue of attorney's fees in the context of a dissolution of marriage proceeding and concluded that while the financial resources of the parties are the primary factor to be considered by the trial court, other relevant

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[11] According to the trial court's finding in the Final Judgment, the Father earns a net monthly income of approximately $2,550 and the Mother earns a net monthly income of approximately $1,888. **These figures are before child support is considered.** Clearly, in considering need and ability to pay, this is not the type of case where the Father should be responsible for the Mother's attorney's fees.

[12] While the written order, which was drafted by the Mother's attorney, made an additional finding regarding the Father not cooperating or complying with discovery, it must be noted that the lower court never raised this issue in its oral ruling nor was there any evidence presented during trial to support this finding. (R. 392).

circumstances to be considered include the scope and history of the litigation, the length of the litigation, the merits of the respective positions, whether the litigation is brought or maintained primarily to harass, and the existence and course of prior or pending litigation. ***Rosen*** at 700. Applying this proposition, the ***Rosen*** court concluded that, irrespective of the other party's ability to pay, a trial court has the discretion to deny a request for attorney's fees where the party bringing suit has brought a frivolous or spurious action that was primarily geared at harassing the adverse party.

Contrary to the Fourth District's decision in this case, courts have not construed ***Rosen*** broadly, but rather have required that for there to be an award of attorney's fees against a party that does not have the ability to pay, the facts must be fairly egregious. In ***Robbie v. Robbie***, 726 So. 2d 817 (Fla. 4th DCA 1999), the Fourth District summarized the conduct that would permit a ***Rosen*** award as follows: "if the court finds that the actions are frivolous, spurious, or undertaken primarily to harass the adverse party." ***Robbie*** at 822.

In the proceedings in the Fourth District, the Mother sought to equate the factual scenario presented herein with that presented in the Third District in ***Diaz v. Diaz***, 727 So. 2d 954 (Fla. 3d DCA 1998). In ***Diaz***, the issues before the court were strictly financial and the initial offer of settlement by the wife was, by any standard,

better than the best case scenario in litigation. In this case, the situation is simply not the same.

To the contrary, the parties in this case agreed to a child support obligation and an income deduction order was voluntarily put into place as of October of 1997. (R. 207-208; 209-214). Additionally, a mediation agreement was executed in February of 1998, a year and a half prior to the trial, in regard to equitable distribution. (T. 14-15). Had the Father herein refused to agree to an amount of child support which was mandated by the child support guidelines or refused to consent to equitable distribution of the parties' marital property, and the parties spent in excess of two years litigating these issues, then an award of fees under ***Rosen*** might be justified.

However, for the trial court to blame the Father alone for the fact that the custody litigation in this case remained pending for two years was not proper nor is it justified by the record. In fact, a review of the record reveals that the Father requested a fairly small amount of affirmative relief throughout the entire proceeding. Moreover, it should be pointed out that a primary reason that the case took so long to get to final hearing was because the trial judges kept rotating in an out of the division and, in fact, between the period of January 1998 and September 1998, there was no meaningful record activity in the lower court proceeding. (R. 223-298).

Furthermore, it must be recognized that a considerable portion of the fees that

the Father was ordered to pay were brought about by the fact that the Mother initially removed Jenna to Louisiana without providing the Father with notice and an opportunity to be heard thereon, requiring him to file an interlocutory appeal in order to enforce his due process rights. To hold the Father responsible for this portion of the Mother's fees, in particular, was inappropriate and, in effect, required the Father to pay for the Mother's decision to remove Jenna from Florida in a manner which the Fourth District expressly recognized violated his rights.

Though the Fourth District and the trial court failed to recognize it, the facts presented in the present case are substantively different than those presented in the cases where fees have been authorized under ***Rosen***. In the first place, the issues in this case concern access to children and therefore are, by their very nature, less straightforward than strictly financial issues. As a matter of policy, to subject a party who loses a custody case to attorney's fees for "prolonging the litigation" is a dangerous precedent to set and is extremely unfair to a parent who wants nothing more than to be a primary part of his child's life. While the Father is not suggesting there will never be a custody case where ***Rosen*** fees are justified, he is suggesting that, absent egregious conduct which requires unnecessary fees to be incurred by the other party, it is improper to punish a parent simply for seeking and following through with his desire to remain a primary part of his child's life.

CONCLUSION

Based on the foregoing arguments and authorities, the opinion of the Fourth District should be reversed in its entirety and this proceeding should be remanded to the trial court with directions that the court's rulings in regard to shared parental responsibility, visitation, and attorney's fees be reversed. The trial court should be ordered to award the Father shared parental responsibility and to implement a reasonable visitation schedule for the Father, which does not require supervised visitation. Finally, the award of attorney's fees to the Mother should be reversed and each party should be required to pay their own attorney's fees, both at the trial court level and the district court level.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits was furnished by mail this 7th day of November, 2000 on ABBE COHN, ESQUIRE, Riverwalk Plaza, Suite 2000, 333 North New River Drive East, Fort Lauderdale, Florida 33301 and NANCY W. GREGOIRE, ESQUIRE, Bunnell, Woulfe, Kirschbaum, Keller, Cohen & McIntyre, P.A., 888 E. Las Olas Boulevard, 4th Floor, Fort Lauderdale, Florida 33301.

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