IN THE SUPREME COURT OF FLORIDA

CASE NO. 00-1577

SAMUEL SHAW,

Petitioner,

vs.

ELIZABETH SHAW,

Respondent.
/

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY TO THE STATEMENT OF THE CASE AND FACTS

The Mother's brief distorts the facts, taking so-called statements of the Father completely out of context, and doing everything possible to prejudice this Court against the Father in an obvious attempt to shift this Court's attention from the legitimate issues raised herein. Because the Father is incapable of responding in the allotted page limit to each of the inaccuracies and misrepresentations contained within the Mother's brief, he will simply urge the Court to review the record independently rather than taking at face value the factual assertions made by the Mother throughout her answer brief.

The Court must recognize that the trial judge below unequivocally and repeatedly found that the Father dearly loves Jenna, that she is not in any type of abusive or dangerous environment when she is with him, and that the Father is a morally fit parent.[1] (T. 408, 411, 415, 417). Furthermore, the trial court expressly found that both the Mother and the Father had the capacity to provide Jenna with a stable environment and could provide her with food, clothing, and shelter. (T. 415). Likewise, the Mother testified during trial that she believes the Father is a good and loving father and that the child loves the Father dearly and that, in her opinion, Jenna, who was four years old at the time of trial, could have spent up to two weeks in Florida with the Father at his home. (T. 190-

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[1] While the Mother argues throughout her brief that the trial court concluded the Father was morally unfit, this is simply untrue. (T. 416). What the court concluded, at most, was that the issue regarding the Father's representation that he had been in the military, which the Father denies is true, was "bizarre" and did not make sense. (T. 416).

191). Moreover, the record is undisputed that at the time of trial, the Mother did in fact feel comfortable enough with the Father's parenting skills to allow Jenna to spend extended stays in Florida on three separate occasions. (R. 298; T. 223).

Nonetheless, despite the above mentioned findings by the trial court and the uncontradicted testimony by the Mother, she still spends the bulk of her brief attempting to portray the Father as an unfit parent who has no interest in pursuing a relationship with his child and who can and should legitimately be denied access to his daughter until such time as he completes a nine month parenting course. Even in light of the findings that were made by the trial court in its Final Judgment, many of which are not supported by the record, the trial court never found, nor could it have found based on the evidence presented at trial, that Jenna was in danger or was adversely affected by spending time with the Father. Consequently, the trial court's ruling vis-a-vis visitation, which clearly authorized the Mother to either impose supervised visitation or to deny the Father visitation completely, was, as a matter of law, erroneous.

The Mother's attempts throughout her brief to downplay the effects of the trial court's rulings and to justify them by arguing that they were only temporary must be rejected. Clearly, a trial court has no more authority to impose an erroneous temporary order than it does to impose an erroneous permanent order. Moreover, in light of the trial court's admonitions at the close of trial that it will likely make the arrangement permanent

and that it will base its decision as to shared parental responsibility primarily on what the Mother has to say, the Father holds little hope that, if and when the court reconsiders the issues, it will do anything but make the order permanent. (T. 422).

SUMMARY OF THE ARGUMENT

The essence of the due process violation in this case is the pre-requisite that the Father attend the parenting course before he will be permitted to seek shared parental responsibility and to have court-ordered visitation with Jenna. The Mother's brief mischaracterizes the due process violation.

The Mother's brief also mischaracterizes the trial court's ruling on visitation. The trial court clearly, unequivocally and in plain terms authorized the Mother in her discretion to either deny the Father visitation altogether or to require supervised visitation based upon whatever terms she wanted. This was erroneous and not based on the evidence and other findings in the case.

Since there is absolutely no evidence to support a finding that the Father did anything that could justify the trial court denying shared parental responsibility, it is evident that the ruling was nothing more than a punitive measure and must be reversed.

It is clear that the Father has no ability to pay the Mother's attorney's fees and that it was error to require such payment on the basis of ***Rosen***.

REPLY ARGUMENT

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.

The Mother responds to the Father's argument in Point I of his brief by essentially stating that the Father has no reason to take issue with the court's ruling and that, in fact, the trial court provided him with "more due process" than he was entitled. According to the Mother on page 16 of her brief, this is because the court's ruling was only temporary and thus the Father only gained by being ordered to the parenting class.[2] The Mother's argument misses the point and is flawed insofar as it fails to recognize that the Father should not have to wait one day, let alone nine months, to re-seek something that he should not have been denied in the first place.

Furthermore, the Mother is wrong on page 15 of her brief to characterize the Father's claim of the due process violation as simply in regard to the parenting class and not as to custody or visitation.[3] The Mother is simply trying to diminish the extent

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[2] In response to the Mother's claim that he has not lost anything, the Father would point out that the time that he has missed with Jenna is a tangible loss which he will never get back. The fact that the Mother does not recognize this fact is troubling.

[3] Similarly, the Mother is wrong on page 17 of her brief to state that the Father never challenged the length or scope of the parenting class–just the authority of the

to which the Father was denied due process in this case. In fact, all of the issues regarding custody, visitation, and the parenting class are inextricably intertwined.[4] The essence of the due process violation in this case is the pre-requisite that the Father attend the parenting course before he will be permitted to seek shared parental responsibility and to have court-ordered visitation with Jenna.

Beginning in the last paragraph on page 16 and citing to a number of cases, none of which stand for the proposition urged, the Mother argues that where a trial court considers issues of custody and visitation, it has the inherent authority to take whatever actions are necessary for the best interests of the child. The Mother argues that the parties always had constructive notice that a parenting class of this nature was within the court's "arsenal" to protect the best interest of the child. This argument is incorrect for several important reasons.

Initially, the Father urges this Court to recognize the inconsistency in the trial court's ruling which is brought about by its willingness to allow the Mother to have

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court to order any class at all. The Father has always taken issue with the length and scope of the course. Clearly, had the Father been ordered to a four hour course like the one contemplated in F.S. § 61.21, the issue presently before this Court would be different. The Mother's attempt to diminish the nature of the Father's claim should be rejected.

[4] After all, had the trial court awarded the Father shared parental responsibility and allowed him reasonable visitation in light of the Mother's relocation, but still ordered him to attend the parenting class, then the Father's objection to attending the parenting class would be much less forceful.

unilateral control over custody and visitation issues. While the Mother argues in her brief, and the Father does not necessarily disagree, that a trial court can and should be permitted to take whatever actions it deems necessary to protect a child who is in danger regardless of what is in the pleadings, the trial court in this case did not find that Jenna was in danger by having contact with the Father nor did it rule that the Father could not have contact with Jenna. The trial court simply authorized the Mother to do whatever she wanted with respect to visitation. Thus, the Mother's attempts to argue throughout her brief that the trial court found that there was a basis to restrict the Father's access to Jenna is misplaced. The trial court never made such a finding nor was the effect of its giving the Mother unilateral control over the issue of visitation geared to address such a concern.

The Mother argues that another reason why the Father was not denied due process when the trial court ordered him to attend the parenting class was because there was no "additional preparation" that he could have done aside from general trial preparation to address the issue. The Father adamantly disagrees. The "so-called" additional preparation that the Father could have done was in the form of an investigation by a neutral third party, whether it was a psychologist or a guardian ad litem or perhaps both, to inquire into the allegations that were raised regarding the so-called mental instabilities of the parties and the environment that Jenna was exposed

to in each household. In light of the allegations that were raised in this case, which were never at any time investigated by a neutral third party, the trial court was not capable of making the very significant findings that it did based simply on the "he said she said" testimony of the parties. In order for due process to have been afforded, the Father should have been given an opportunity to establish that the claims by the Mother regarding the Father's ability to care for Jenna were not true.[5] While the Mother has argued throughout these proceedings that the trial court was authorized to deny the Father's request for psychological evaluations[6] and appointment of a guardian ad litem because the request was untimely, this Court is urged to recognize that in child custody proceedings, regardless of when if a request is made, a trial court has an obligation to both the child and the parent for whom it is contemplating restricting his or her parental rights to ensure that its ruling is accurate and truly in the best interests of the child.

The Mother's attempt to compare this case with ***Osherow v. Osherow***, 757 So.

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[5] This Court must recognize that all of the neutral witnesses that testified during trial, including Jenna's pre-school teacher and a neighbor, testified that the child was well cared for when she was in the Father's custody. (T. 42-50; 51-62).

[6] On page 20 of her brief, the Mother states that the Father's psychologist testified that no formal evaluation was available for a child under six years old. This statement is a blatant mischaracterization of the testimony since within the same breath that this statement was made, the psychologist went on to finish her thought by saying that an evaluation of the child is nonetheless important to understand and observe the bonds that had been formed between the child and the parents and that a valid custody and visitation opinion could not be rendered without an evaluation of the parents and the child. (T. 309-310).

2d 519 (Fla. 4th DCA 2000) is completely misplaced. In ***Osherow***, the mother was addicted to prescription drugs and had entered into an agreement with the father that she would either undergo periodic drug testing or surrender parental responsibility and custody of the child to the father. After hearing testimony regarding the effect of the mother's drug use on the child, including evidence from a therapist that the child had spoken of using drugs as an adult, the court awarded the father sole parental responsibility, finding that the mother's behavior would eventually be detrimental to the child.[7] The issue in ***Osherow*** is completely different from the one presented herein.

While the Father does not deny that the underlying facts in several of the cases cited in his initial brief are not identical to the facts of this case, the holdings of such cases are nevertheless applicable. Clearly, each of the cases cited in the Father's brief recognize the well settled proposition that due process requires that a court not litigate an issue that has not been raised and thus a parent has not been placed on notice that the issue is being contemplated. *See also* ***Busch v. Busch***, 762 So. 2d 1010 (Fla. 2d DCA 2000)(acknowledging that in any judicial proceeding, but especially in a custody battle, basic elements of notice and opportunity to be heard must be afforded).

The Father respectfully submits that the Mother's argument that in a custody

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[7] Even in light of the mother's drug use in ***Osherow***, and its findings in regard thereto, it should be noted that the trial court ordered, and the Fourth District affirmed the finding, that the Mother would be entitled to unsupervised visitation.

case the trial court has discretion to do whatever it wants, irrespective of issues of notice, is not consistent with well settled and longstanding Florida law. The actions of the trial court in this case in restricting the Father's access to Jenna until such time as he completes a nine month parenting class, when such issue was never raised and the Father was never put on notice that the court was contemplating such relief, violated the Father's right to due process and has effectively denied him the opportunity to be a part of his daughter's life.

> II. BECAUSE IT IS THE RESPONSIBILITY OF A TRIAL COURT IN A DIVORCE CASE, AS THE FINDER OF FACT AND 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.

On pages 22 and 23 of her answer brief, the Mother mischaracterizes the trial court's ruling. The court clearly, unequivocally and in plain terms authorized the Mother in her discretion to either deny the Father visitation altogether or to require supervised visitation based upon whatever terms she wanted. (T. 420-421). Regardless of the Mother's attempts to side-step this issue, it is the decision to deny the parties' request for a detailed visitation schedule and instead to give the Mother complete and unilateral control over visitation that is being challenged herein.

The Father disagrees with the Mother's statement on page 23 of her brief that no Florida case suggests that this portion of the order under review is impermissible. As argued in the Father's initial brief, every court that has considered the issue has consistently recognized that a trial court cannot abdicate its duty to address the issue of visitation to any third party and that it is the responsibility of the trial court--not a parent or other third party--to consider the relationships between the parties and child and to exercise discretion based on applicable Florida law and the evidence presented during trial. *See, e.g.,* ***Martin v. Martin***, 734 So. 2d 1133 (Fla. 4th DCA 1999).

The Mother's attempts to distinguish the facts in the cases cited in the initial brief from this case are unsound in light of the unmistakable substance of the trial court's ruling in this case. According to the court's oral and written ruling, if the Mother decides that the Father cannot have any visitation at all or only on certain terms that are determined entirely by her, that is okay with the trial judge.[8] (T. 421).

The Father respectfully submits that such a ruling is erroneous both as a matter of law and as a matter of public policy. Regardless of the facts of the case, it is counter-intuitive to allow a trial court to settle a visitation dispute that has been submitted for its resolution by giving one of the parties unilateral control over the issue.

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[8] Because of the clear import of the trial court's order, the Mother's argument on page 25 of the answer brief that the Father is seeking an advisory opinion is erroneous.

For this reason, the Mother's claim on page 25 of her brief that the order under review can be justified based on "the trial court's obvious reliance on the Mother's good faith and good sense to decide if supervision should become necessary" misses the point.

Moreover, while the Mother argues throughout her brief that this is simply not a case where she has interfered with the Father's visitation, this claim is not supported by the record. Aside from the fact that the Father has always maintained that the Mother has denied him visitation with Jenna, back in January of 1998, the original trial judge cautioned the Mother that she had no right to place any conditions upon the Father's visitation with Jenna and that he was entitled to have unsupervised visitation in Florida and that she should not have denied the Father access to Jenna during Father's Day in 1998. (T. 249, 259). Despite the Mother's claim to the contrary, as the hearing transcript from January 14, 1998 makes clear, and as with many divorce cases that actually end up going to trial, there has always been a need in this case for a detailed, court-ordered visitation schedule to be in place. (T. 227-266). While the Fourth District sought to distinguish this case from ***Letourneau v. Letourneau***, 564 So. 2d 270 (Fla. 4th DCA 1990) on the specific facts of this case, the Father respectfully submits that the trial judge's decision to not implement a detailed visitation schedule in this case, perhaps even more so than in another case, was improper and cannot be upheld.

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 CHILD REARING, 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.

In light of the undisputedly drastic rulings in this case, it is somewhat perplexing that the Mother would characterize the trial court's custody and visitation determinations as amounting to "a gift." (Answer Brief, 26). The Mother argues that the Father was actually given more than he was legally entitled to under the law and that the trial court was being generous by giving him a second chance after completion of the parenting course. Since there is absolutely no evidence to support a finding that the Father did anything that could justify the trial court taking the actions that it did regarding custody and visitation, the Father adamantly takes issue with this claim.

Rather than repeat the same arguments made in the initial brief on the merits, the Father will rely on the arguments therein and reiterate his plea that this Court independently review the record. Upon doing so, it will become readily apparent that, contrary to the arguments made in the Mother's brief, the trial court's ruling was neither based on sound legal principle nor on the best interests of Jenna Shaw. To the contrary, it was based solely on the trial court's choice of which parent it believed, for

whatever reason, to be the better person and its choice to penalize the Father as a result of this assessment by allowing the Mother to be the one to implement the punishment. The fact that a trial court likes one parent better than another does not and should not translate into a finding that shared parental responsibility is detrimental nor that visitation can be denied or restricted.

As articulated in detail in the Father's initial brief, this Court, the Florida Legislature, and the United States Supreme Court have always given credence to the notion that, in a divorce scenario, both parents and children have the right to expect that a court's goal will be to ensure, whenever possible, that children have frequent and continuing contact with both parents and that both parents can participate in their child's upbringing. In every way, the trial court's ruling in this case abandons and ignores these sacred and fundamental concepts.

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.

The Mother's attempt to use the "Tipsy Coachman" argument to justify the attorney's fee award is flawed. The overwhelming majority of the factual recitations are completely taken out of context. Furthermore, because the trial court rejected the

Mother's suggestion during trial that the Father had been untruthful about his income, the attempt to prejudice this Court by suggesting that he has lied about his income is entirely improper. (T. 400). Likewise, the Mother's claim that the Father did not pay child support for a specified period is untrue since, in addition to paying $552.00 per month in on-going support, he pays back child support in the amount of $100.00 per month, which sum represents child support for the period before the agreed order was implemented. (R. 207-208; 209-214). The Mother simply cannot show that the Father has an ability to pay her attorney's fees; neither party in this case earns an income that would permit an award under F.S. § 61.16. The trial court acknowledged this fact when making its ruling. (T. 426).

To the extent that the Mother is taking the position that the Father can and should be assessed with attorneys fees under ***Rosen*** based on his refusal to simply agree to her relocating to a different state with their child and to agree that he will have virtually no contact with her, the Father respectfully disagrees that fees are appropriate in this situation. A parent has a right to be part of his child's life after a divorce and to the extent that the Mother would not allow this to occur, he also had the right to ask the Court to decide the issue. Subjecting him to an attorney's fee award simply for pursuing this was unjustified. The trial court, who was one of several successor judges in the case, was not familiar with the history of the proceeding and had no basis to

conclude that the litigation should not have gone on for two and a half years. A main reason the litigation took so long to conclude was not because of anything the Father did, but rather because there was no presiding judge in the division for a long period of time. A fair review of the record clearly establishes that, as with the majority of the findings in this case, the lower court's decision to make the Father totally responsible for the Mother's attorney's fees was an unjustified, punitive measure, which, as a matter of law, cannot be upheld.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font requirements of Rule 9.210, Fla. R. App. P.

Diane H. Tutt
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was served by mail this 5th day of January, 2001 on ABBE COHN, ESQ., Riverwalk Plaza, Suite 2000, 333 No. New River Dr. E., Ft. Lauderdale, FL 33301 and NANCY W. GREGOIRE, ESQ., 888 E. Las Olas Blvd., 4th Floor, Ft. Lauderdale, FL 33301.

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