IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC02-1317-4900
L.T. CASE NO. 4D00-60

ESIG PERLOW,

Petitioner,

vs.

SHARON H. BERG-PERLOW,

Respondent.
_____/

ANSWER BRIEF

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PREFACE

Petitioner will be referred to as Husband and Respondent will be referred to as Wife. The record on appeal will be referred to as (R-) followed by the appropriate volume and page number. The transcript of the trial will be referred to as (T-) followed by the appropriate page number (the trial transcript is contained in the supplemental record on appeal). The transcript of the hearing on temporary attorney's fees, conducted on December 9, 1999, is located in the Supplemental Appendix to Appellee's Amended Answer Brief in case 4DCA 00-60 (which was consolidated with 00-978). For ease of the court, a copy of this transcript is attached hereto as Appendix A. Reference to the transcript will be by (TR-) followed by the appropriate page citation.

STATEMENT OF THE CASE AND OF THE FACTS

The relevant history of this case was aptly set forth by the Fourth District Court of Appeal in Perlow v. Perlow, 816 So. 2d 210 (Fla. 4th DCA 2002), and is summarized as follows:

The parties were married in 1986, and had one child, Adam, who was born in 1991. Id. at 211; (R1 1-6). In 1998, Wife commenced divorce proceedings. Id.;(R1 1-6). During the divorce proceedings, which spanned two years, the child's behavior deteriorated markedly; he became verbally abusive and physically violent with Wife and at school. Id. Wife, during the proceedings, sought and received increasingly restrictive contact between the child and Husband (R9-1423-33).

Until approximately November or December of 1999, Husband was represented by counsel. Id. at 212;(T-52). On December 9, 1999, more than two months before the final hearing, the trial court conducted a hearing on Husband's Motion for Temporary Fees. Id. At the hearing, Husband's former counsel testified as to the amount of fees he estimated would be required to represent Husband. Id.; (TR-23). However, Husband's former counsel did not testify that he would represent Husband, and Husband did not present an attorney to testify that he or she would be willing to represent him, that attorney's hourly rate, and an estimate of the time required. Id.

Moreover, although Husband testified that he did not have funds to pay an attorney, his financial affidavit reflected that his income for 1996 was $177,000, and indicated that for 1997, his income was only slightly less. Id.; (R1 158-172). Husband testified that $123,00 of the $177,000 of the listed income was in dispute, and claimed that he had no income during 1997, 1998, and 1999. Id.; (TR-33). Husband asserted he had a heart condition and went through a bankruptcy. Id. Husband claimed to have filed an amended financial affidavit. Id.; (TR-29-30). However, the amended affidavit was not in the court file, and Wife's counsel had not received a copy of the alleged amended affidavit. Id.;(TR-29-30).

At the conclusion of the temporary relief hearing, the court found that Husband failed to show an obligation to pay attorney's fees, or show that the absence of an anticipatory award prevented him from obtaining counsel, and therefore he failed to show need. Id.; (R9 1525-1527). The trial court also explained that it did not have sufficient evidence to determine the amount of an award because there was no evidence as to the hourly rate charged by an attorney representing Husband. Id. The trial court therefore denied Husband's motion for fees, *without prejudice*. Id. at 213*;* (R9 1525-27).

Husband appealed the denial of his motion for fees to the Fourth District Court of Appeal (R9-1547).

On February 22, 2000, the first day of trial, Husband made a motion for continuance, which was denied. Id.; (T-74). He then absented himself from the proceedings. Id.; (T-103). After the lunch recess, Husband reappeared and moved the court for temporary attorney's fees. Id.; (T-117). The court indicated to Husband that if he came to court with an attorney, it would hear his motion. Id.; (T-119-120). The following day, Husband returned to court with an attorney. Id.; (T-334). The trial court informed the attorney of the status of the case: trial had begun and would not be recessed, and a cursory review of the financial affidavits revealed that it was likely that the court would reserve jurisdiction for fees, and Husband may be entitled to fees at the end of the case. Id.; (T-335). The court offered to recess the trial so that counsel had sufficient time to confer with her potential client. Id.; (T-337).

The attorney informed the court that if the only funding of the litigation was going to occur after the final judgment on a reservation of fees, after a finding of entitlement, even if the court were to make all findings in favor of Husband, she would not undertake the representation. Id.; (T-339). Neither Husband, nor the attorney presented sworn testimony, or sought to make a proffer as to the amount of the attorney's expected fee, hourly rate, or the amount of time the attorney estimated would be required for representation. Id. at 214.

Husband represented himself for the remainder of the trial. Id. Husband cross-examined witnesses, presented an expert witness, and made appropriate objections and motions during the trial.

At the conclusion of the trial, before closing arguments, Husband inquired whether he should prepare a proposed final judgment. Id.; (T-3406). The court indicated that it did not expect Husband to prepare a proposed final judgment, but if Husband wished to present one, by all means present it. Id.; (T-3407). Husband elected not to submit a proposed judgment. Id.; (T-3500).[1]

The final judgment signed by the judge was the proposed judgment submitted by Wife's counsel. Id.

The final judgment finds that Husband is a "pure psychopath." (R14 2491, paragraph 36). It further finds that the Husband has alienated the child, "in what is commonly referred to as the parental alienation syndrome" (R14 2492 at paragraph 37). The court founded that Drs. Gardner, Heller, and Agresti all opined that the court must sever all ties between the father and child in order for the child to be healthy; if

[1]Appellant, in his statement of facts, claims the court discouraged him from filing a proposed judgment (I.B. 10). This claim is belied by the record, as quoted by the Fourth District.

ties are not severed, the court finds the child will undoubtedly be incarcerated[2] or hospitalized (R14 2494 at paragraph 47). Based upon the court's findings, the court awarded Wife sole parental responsibility for the child, finding that it would cause great detriment to the child to do otherwise (R14 2500 at paragraph 3). It further ordered Husband to have no contact with the child until he reaches the age of 14, at which time Husband can petition the court to allow contact upon a showing of a substantial change in circumstance[3] (R14 2400-01 at paragraphs 4-5).

After the judgment was entered, Wife and the child relocated to Israel, where they reside today.

Husband took an appeal from the final judgment to the Fourth District Court of Appeal (R15-2524). Thereafter, Husband's appeal from the denial of temporary fees, and the appeal of the final judgment were consolidated.

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[2] In the Initial Brief, Husband contends that this was a gratuitous comment by counsel in the judgment, and the court never uttered anything to support such a finding. However, contrary to Husband's assertion, the court did note that it was the opinion of Dr. Agresti that there is a likelihood that the child will be a career criminal (T-297).

[3] Appellant, in his statement of the facts, discusses in some detail his version of the financial status of each party. The "facts" cited are contrary to the findings of the trial court in the final judgment, which findings were affirmed by the 4th DCA, and are not relevant to any issue before this Court. Thus, these "facts" will not be addressed in this brief.

The Fourth District in Perlow, supra., affirmed the decision of the trial court with regard to all issues raised in the briefs.

SUMMARY OF ARGUMENT

ISSUE I: The Fourth District did not hold that a party must first secure counsel before a court can hear a request for an award of fees. Rather, the court held that in order to prove an entitlement to fees, a party must either present evidence that they can not retain counsel in the absence of a fee award, or must present an attorney who testifies he/she has been retained, is charging $X per hour, and anticipates it will take XX hours to take the case through trial.

The reasoning of the Fourth District is consistent with well-established case law that in order to prove entitlement to final fees, the court must make specific findings as to the number of hours reasonably expended and the hourly rate. There would be no basis for holding that a different rule should apply to interim fees, especially since section 61.16(1) specifically provides for an award of "reasonable" temporary fees. There is no method to determine whether fees are reasonable absent evidence of an hourly rate, and an estimation of total hours necessary. Moreover, if a litigant presents evidence that they are totally without funds to hire an attorney, the court can award a nominal amount for a retainer, and then hold a subsequent hearing to determine a reasonable amount of temporary fees.

ISSUE II: The trial court did not improperly delegate its decision making authority by signing Wife's proposed final judgment. It is not per se reversible error to sign a proposed judgment in total; there must be other indicia that the judgment was not the decision of the court. In the instant case, there were no additional indicia that the judgment was not the judge's independent decision. The evidence revealed that the trial court had knowledge of the trial proceedings, participated extensively at trial, including questioning witnesses, and all the findings in the judgment were supported by competent and substantial evidence (which has been conceded in the initial brief).

ISSUE III: The trial court properly denied the request for a guardian ad litem. This is a proceeding under Chapter 61, there was no allegation of child abuse, and the request was not made until after trial commenced, at which point the guardian could not have made an investigation (no continuance was requested for this purpose). Further, any error is harmless, as the child's treating therapist performed all the functions of a guardian ad litem.

ARGUMENT

I. THE FOURTH DISTRICT PROPERLY HELD THAT THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING HUSBAND'S MOTION FOR TEMPORARY ATTORNEY'S FEES WITHOUT PREJUDICE WHERE HUSBAND DID NOT PRESENT THE APPROPRIATE EVIDENCE TO SUSTAIN SUCH AN AWARD.

Wife contends that the Fourth District held that a party must first secure counsel before a court can hear a request for an award of fees. This is a misstatement of the holding of the Fourth District. The Fourth District specifically disagreed with Wife's assertion that the fee request was denied based solely on the fact that appellant was not represented by counsel at the time of the hearing. Perlow, 816 So. 2d at 214. The Fourth District noted that the trial court also found that there was no showing that Husband was obligated to pay fees, **and** that Husband failed to prove that the absence of an anticipatory awarded prevented him from obtaining counsel. Id. Based upon the lack of evidence that the absence of an anticipatory award prevented Husband from obtaining counsel, the court held that the trial court did not abuse its discretion in requiring Husband to present an attorney to testify as to the attorney's willingness to represent Husband and as to the elements necessary to determine the amount of the temporary fees. Id.

Wife contends that the holding of the Fourth District conflicts with the Third District's holding in Baucom v. Baucom, 397 So. 2d 345 (Fla. 3d DCA 1981), and the Second District's holding in MacLeod v. Hoff, 654 So. 2d 1250 (Fla. 2d DCA 1995). In Baucom and MacLeod, the respective courts held that an attorney has no standing to apply for a fee award. These holdings, however, are not in conflict with the Fourth District. The Fourth District did not hold that an attorney must move for an award of fees. Rather, the Fourth District held that in order to prove a "need" for fees, a party must either present evidence that he/she can not retain counsel in the absence of a fee award, or must present an attorney who testifies he/she has been retained, is charging $X per hour, and anticipates that it will take approximately XX hours to take the case through trial.

This reasoning is consistent with the general goal of fee awards. According to Nichols v. Nichols, 519 So. 2d 620 (Fla. 1988), the purpose of an interim award of suit money is to ensure that both parties to a dissolution proceeding have similar access to counsel and can thus fight the action on a nearly equal footing. If a party needs fees to retain counsel, then they must present evidence that their finances are such that they can not afford to retain an attorney absent an award. The court can then award a nominal amount for a retainer, and hold another hearing and take testimony from the attorney retained regarding the amount of fees needed. See Section 61.16 Fla. Stat.

(2003) (the court may "from time to time…" order a party to pay a "reasonable" amount for attorney's fees).

In the instant case, the Fourth District found that the record did not indicate that Husband was so indigent that he could not afford to retain an attorney. Id. at 215. Thus, in order to prove his need for fees, Husband was required to present evidence that he had retained an attorney, that attorney's hourly rate, and the amount of time anticipated.

The Fourth District's holding in the instant case is consistent with its holding in Duncan v. Duncan, 642 So. 2d 1167 (Fla. 4th DCA 1994), in which the court held that a trial court has an obligation to determine that temporary attorney fees and costs awarded are reasonable. In order to determine whether an award is reasonable, the court must determine whether the hourly rate is reasonable and whether the amount of hours an attorney anticipates expending correlates to the issues in the case. Based upon the "reasonable" amount of an anticipated fee, the court then should determine whether the party requesting the fee has a financial need for such fees, and whether the other party has a corresponding ability to pay such fees. Absent a determination of the actual amount necessary to sustain the case on a temporary basis, interim fee awards would be arbitrary. Again, these determinations need not be made, initially, if a party presents evidence that it can not hire an attorney absent an award.

It is well-established that in order to prove entitlement to final fees, the court must make specific findings as to the number of hours reasonably expended and the hourly rate. See Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985); Saporito v. Saportio, 831 So. 2d 697 (Fla. 5th DCA 2002) (the trial court failed to make specific findings as to the number of hours reasonably expended and the hourly rate); Ard v. Ard, 765 So. 2d 106 (Fla. 1st DCA 2000)(reversal of fee award required where court made no factual findings with regard to total number of hours expended, hourly rate, or reasonableness of fee); Porzio v. Porzio, 812 So. 2d 485 (Fla. 5th DCA 2002) (trial court failed to make findings of fact regarding award of attorney's fees in judgment of dissolution as to number of hours spent and a reasonable hourly rate, and thus judgment failed to adequately support fee award). There can be no justification for finding that a different rule should apply for interim fees. This is especially true since section 61.16(1) Fla. Stat. (2002) specifically states:

> The court may from time to time, after considering the financial resources of both parties, order a party to pay a ***reasonable*** amount for attorney's fees, suit money, or costs, whether ***temporary*** or otherwise…

Again, there would be no way to determine whether the fee award is reasonable, in the absence of testimony regarding the hourly rate the attorney hired will be charging, and the amount of hours the attorney deems necessary.

Wife agrees with Husband, that section 61.16(1) expressly states that corroborating expert testimony is not required to support a fee award. However, this section does not state that a party requesting fees need not present sufficient evidence from which a trial court, based upon its own knowledge and experience, can determine if the requested fee is reasonable.

Finally, Husband's argument that no evidence was presented because Judge Harrison did not permit him to have a hearing on entitlement, is without merit. Judge Harrison permitted Husband to present the testimony of an attorney the following day. The fact that the attorney chose not to testify is not the fault of the court. Moreover, even if the court prohibited the testimony, which it did not, both Husband and the attorney who was present at the hearing should have known that they were required to proffer the evidence in order to preserve the issue for appeal. No proffer was presented.

Thus, the Fourth District's opinion, contrary to Husband's assertion, merely holds that the proper evidentiary requirements were not met in order to prove Husband's entitlement to temporary fees. These evidentiary requirements (proof from which a court can determine if the requested award is reasonable) are well-established by the legislature, this Court, and other district courts, and the Fourth District properly held that Husband did not meet these requirements.

Next, Husband contends that the trial court should have permitted the Husband to have a full evidentiary hearing on entitlement without having to wait until the completion of the 17 day trial or the hiring of an attorney. Husband further claims that the Fourth District's finding that the trial court properly denied his motion for continuance is in conflict with Peiman v. Pieman, 829 So. 2d 307 (Fla. 5th DCA 2002).

First, Husband fails to mention that the original denial of temporary fees was ***without prejudice***. The trial court specifically indicated to Husband that he could again seek temporary fees when he had the proper evidence. Husband chose not to take advantage of this option, knowing, as the Fourth District pointed out, that trial was set in two months. Further, Husband, who has attended law school and is not a novice to legal procedure, did not inform the court of his alleged dilemma until the morning of trial, at which time he requested a continuance. Husband did not request a hearing on entitlement to fees until trial had commenced; he asked for this relief after the lunch recess on the first day of trial (T-114).

The Fourth District properly affirmed the denial of the continuance and request for trial on entitlement, as Husband's delay in retaining counsel, or Husband's failure to come to court and testify that he needed temporary fees just to retain counsel, should not be a basis for him to delay the entire trial, which had been set for a time certain for at least 3 months, with the Husband's agreement.

Wife's contention that the Fourth District's decision affirming the denial of the continuance is in conflict with Peiman is unavailing. In Pieman, Husband's counsel withdrew one month prior to the hearing. Husband then diligently attempted to hire alternate counsel. Three days before trial, one of the attorneys he attempted to retain declined representation. Husband filed his motion to continue one day prior to trial. The court in Pieman held that it was an abuse of discretion to deny the continuance because: 1) the denial of the continuance created an injustice for Husband, who had never represented himself and could not represent himself competently; 2) it was unforeseeable that Husband would be unable to retain counsel and; 3) the continuance would not have resulted in any prejudice or inconvenience to Wife. Id. at 308. The court in Pieman, distinguished Lee v. Lee, 751 So. 2d 741 (Fla. 1st DCA 2000).

In Lee, the First District affirmed the trial court's denial of the motion for continuance because Lee did not state he intended to retain counsel, Lee had ably represented himself by filing numerous motions, scheduling hearings, and obtaining rulings on his motions, and Lee had ably represented himself at trial in that he thoroughly questioned witnesses during direct and cross-examination at the final hearing, and he even qualified an expert to testify. The court in Lee noted that these factors indicated that Lee was able to represent himself in a competent manner and

therefore did not suffer an injustice as a result of the court's denial of his motion for continuance.

Lee, rather than Pieman, is on point with the facts of the instant case. Husband has attended law school and passed the California bar (although he was later disbarred for ethical reasons) (T-10). Husband, from November 3, 1999, the date his counsel withdrew, until December 2, 1999, the date his motion for fees was denied without prejudice, actively participated in the proceedings: Husband filed no less than 20 pro se motions (see R7 1126-R8 1525), he filed a motion for reconsideration (R7 1197), he took depositions (SR 4201, 4206, 4211, 4230), and he attended 8:45 hearings. It was clear from Husband's participation, that he was well able to represent himself. Further, Husband was aware, at least as early as November 22, 1999, that the trial was set for a time certain on February 22, 2001 (R8 1242). It is unclear from the record at what point Husband realized that he was allegedly unable to hire counsel. Husband, rather than moving to continue as soon as he realized he was unable to retain counsel, waited until the first day of trial to seek a continuance. Husband's request for a continuance was not based solely on his inability to represent himself (he had been ably representing himself since November). Rather, his main complaint appeared to be that he was unable to hire experts, and pay for depositions (T-8, 14, 15). Granting a continuance to hold a hearing on entitlement to fees, as Husband suggests in his brief

was appropriate, would not have solved the problem of lack of funds for experts and depositions, and illustrates that the request may have been for the purpose of delay. Additional evidence that the requested continuance was for the purpose of delay is the fact that during trial, Husband indicated to the court that he had in fact ordered certain depositions: "The depositions of the Boca Police Department and Florida Highway Patrol which I have ordered and I should have them Monday morning" (T-2908). Moreover, Husband did in fact hire at least one expert, Dr. Fischer, and he admitted that he had already paid an accountant $7,000 (T-63).

Further, Husband ably represented himself at trial and did not suffer an injustice as a result of the court's denial of his motion for continuance; in fact he did a better job than many lawyers may have done. Husband thoroughly cross-examined witnesses, including experts (T-1149, 1595, 1728). Husband made objections to testimony (T-1282, 1350). Husband filed multiple motions (T-340, 1287), continuously preserved his objections for the record (T-225,994), and qualified his expert (T-2319).

Additionally, the cause of the request for continuance, that Husband did not have counsel, was not unforeseeable and was a result of dilatory practices by Husband. Husband knew for two months that he did not have counsel, and never once, during those two months, filed a motion for continuance on this basis. Further,

it is clear that Husband was sophisticated enough to know that his lack of counsel was grounds for reversal on appeal, and he purposely tried to perpetuate the issue. During the trial, Husband even informed the court that he did not intend to participate at trial because if he participated he would be "in a worse hole." Husband must have been aware that ably representing himself at trial could possibly eliminate an appellate issue regarding the denial of the continuance.

Finally, Wife would have suffered prejudice and inconvenience if a continuance had been granted. Wife was requesting that visitation be suspended as Husband had a sickness that was emotionally harming the child. Any delay in the proceeding would prejudice the child's health. Further, Wife had hired experts and met with them prior to trial, and Wife had flown her parents in from Israel to testify. Thus, any delay would have severely inconvenienced Wife and caused unnecessary suffering of the child.

Based upon the foregoing, the decision of the Fourth District is in compliance with decisional case law from other districts as well as this Court, and the decision should be AFFIRMED.

II. THE FOURTH DISTRICT PROPERLY FOUND THAT THE TRIAL COURT DID NOT IMPROPERLY DELEGATE ITS DECISION-MAKING AUTHORITY.

It was previously conceded that the Final Judgment signed by the court is the proposed judgment submitted by counsel for Wife. Husband concedes that there was ample evidence to support the findings of fact contained in the judgment (IB at 26). Husband, however, contends that the Fourth District's decision that the trial court did not improperly delegate its judicial functions by signing the proposed judgment submitted by counsel for Wife, is in conflict with other districts on this same point.

In its opinion, the Fourth District specifically addresses the case law from other districts, and explains how its decision is in conformity with these decisions. First, the Fourth District acknowledges the Fifth District's decision in Rykiel v. Rykiel, 795 So. 2d 90 (Fla. 5th DCA 2000), in which the court stated the trial court may not adopt the judgment of counsel verbatim, blindly, or without making in court findings. Perlow, 816 So. 2d at 217.

The Fourth District then cited to a footnote in Douglas v. Douglas, 795 So. 2d 99 (Fla. 5th DCA 2001), in which the Fifth District explained that they reversed in Rykiel, in part, because the trial court adopted verbatim a final judgment prepared by one party. Id. The court, in Douglas, explained that Rykiel was also reversed because there were numerous indicia of the judge's lack of participation and knowledge in the final judgment.

The Fourth District also cited to Thomas v. Thomas, 781 So. 2d 540 (Fla. 5th DCA 2001), in which the Fifth District rejected the argument that Rykiel stood for the rule that a proposed final judgment adopted verbatim by the trial court constitutes per se reversible error. Id. The court in Thomas again noted that in Rykiel there were numerous indicia of the trial judge's lack of participation and knowledge in the final judgment. The court in Thomas affirmed the trial court's adoption of one party's judgment, finding that the trial judge had current knowledge of the trial proceedings and simply requested the judgments in order to expedite finalization of the matter. The court, in Thomas, further found that the judgment was not improper, although it was drafted by one of the parties, because there was competent substantial evidence to support the findings of the trial court.

Relying upon Douglas and Thomas, the Fourth District concluded that, in order to reverse a verbatim adoption of a proposed judgment, there also must be some indication that:

> 1) the trial court did not have current knowledge of the trial proceedings;
>
> 2) the trial court did not participate in the trial; or
>
> 3) the findings contained in the judgment were not supported by competent and substantial evidence.

Perlow, 816 So. 2d at 217.

Husband contends that the Fourth District misread the Douglas and the Thomas cases. Husband contends that the Fourth District concluded that the decision in Rykiel, as well as the decisions from the Fifth District preceding Rykiel, are not viable (IB at 31). The Fourth District made no such finding. The Fourth District specifically acknowledged the viability of the Rykiel decision, when it distinguished the case based upon subsequent Fifth District decisions.

Moreover, the previous decisions from the Fifth District, cited in the brief as conflicting with the instant decision, are all distinguishable.

In Polizzi v. Polizzi, 600 So. 2d 490, 490 (Fla. 5th DCA 1992), the court criticized and suggested the abandonment of the practice of some judges of having counsel prepare a proposed judgment ***before trial***. The court explained that this practice could create an appearance to lawyers and litigants that they are not being heard fairly at trial. Id. In the instant case, the proposed judgments were requested ***after*** trial.

In Wattles v. Wattles, 631 So. 2d 349, 350 (Fla. 5th DCA 1994), the court held that the trial court erred in ordering "standard" visitation, where the record indicated that standard visitation was the court's fall back position in the event the parties could not agree on a visitation schedule; it was not a visitation schedule developed in compliance with the evidence. The court noted that the trial court did not ask the

parties' attorneys, as officers of the court, to prepare a judgment in accordance with specific directions by the trial court ***after the evidence was in and his decision made***. Id. Thus, the court remanded for the trial court to craft a visitation schedule more in conformity with the age of the child. In the instant case, the court asked for proposed judgments after the evidence was closed. Moreover, the judgment signed by the court was in conformity with the evidence presented at the trial, and was consistent with the comments and questions asked by the court during the trial.

In White v. White, 686 So. 2d 762 (Fla. 5th DCA 1997), the court reversed a final judgment which based its attorney fee award on a proposed final judgment submitted by Husband's attorney, because the proposed judgment based fees on wife's misconduct, and husband never requested fees on such basis in his complaint. In the instant case, all of the findings of fact and decisions of law were supported by the evidence and the pleadings. Thus, there were no indicia that the judgment rendered was not the independent judgment of the trial court.

In Corporate Management Advisors, Inc. v. Boghos, 756 So. 2d 246, 248 (Fla. 5th DCA 2000), the court declared a contract to be void and unenforceable, in a judgment drafted verbatim by counsel. The Fifth District found that the evidence at trial did not support such a decision, as there was no finding of fraud, unconscionability, or similar grounds. The court, therefore, reversed and remanded.

The court noted that its review of the conclusions reached by the trial court in the Final Judgment took into consideration the court's lack of participation in drafting the Final Judgment. Again, this case is distinguishable because in the instant case, there was evidence to support the decision of the trial court. Moreover, this case is consistent with Thomas and Douglas, in that the court notes that the appellate court should consider the fact that a judgment was signed verbatim, in conjunction with other indicia, such as lack of evidence.

In Peterson v. Brown, 787 So. 2d 979, 979 (Fla. 5th DCA 2001), the court acknowledged the problems inherent in having an adversarial attorney draft documents for the court's signature. In this case the court reversed the judgment because the judgment cited to a stipulation which was not supported by the record, and because the interpretation of a prior judgment was in clear conflict with its actual language. Id.

Again, this case is distinguishable because, as admitted by Husband, the evidence presented at trial supports the findings and conclusions set forth in the judgment signed by the court.

As in the Fifth District, the First District also adheres to the philosophy that signing of a verbatim judgment is not per se reversible error. In Cole Taylor Bank v. Shannon, 772 So. 2d 546 (Fla. 1st DCA 2000), the court held that a trial court's verbatim adoption of one party's proposed findings or final judgment requires reversal

only when: 1) the signed judgment or a finding is inconsistent with an earlier pronouncement of the trial judge; 2) the appearance of impropriety so permeated the proceedings below as to justify a suspicion of unfairness; or 3) the record establishes that the final judgment does not reflect the trial judge's independent decision on the issues of a case. Although the factors set forth by the First District are not identical to the factors set forth by the Fifth District, the general philosophy is the same: there must be some other indicia that the judgment signed is not the independent judgment of the trial court. In fact, in arriving at its factors, the First District relied upon cases from the Fifth and Fourth Districts.

Neither the Second District nor the Third District has directly discussed whether it is per se reversible error to sign verbatim a proposed judgment. However, both courts agree that it is the trial court's responsibility to make the decisions regarding the various issues, rather than merely choosing the better judgment. See Scalabroni v. Scalabroni, 807 So. 2d 793 (Fla. 2d DCA 2002); Cornett v. Cornett, 713 So. 2d 1083 (Fla. 2d DCA 1998); Walden v. Walden, 520 So. 2d 87, FN4 (Fla. 3d DCA 1988)(court did not overturn verbatim adoption of proposed final judgment, although it condemned the practice, indicating that such a practice creates a temptation to

overreach and exaggerate[4]). The Second and Third Districts' holdings are consistent with the decision of the Fourth District.

Following the dictates of the decisions out of the Fifth District, the Fourth District in the instant case, after acknowledging the judgment was signed verbatim, reviewed the record to determine if there were other indicia which would indicate the judgment was not the trial court's independent judgment. The Fourth District's review of the record revealed: 1) the trial court had current knowledge of the trial proceedings; 2) the trial court participated in the trial; and 3) the findings in the judgment were supported by competent and substantial evidence. These findings by the Fourth District were well supported by the record.

The record reveals that the trial court played a very active role during the trial. The trial court questioned witnesses (T-269, 300, 304, 524-529, 708, 1115, 1190. 1317, 1356-1357,1557, 1738, 1780, 1812, 2284, 2289-2291, 2467, 2499) and clarified testimony (T-298, 300, 506, 550, 559, 1107, 1149, 1257, 1481, 1484, 2026, 3207, 3219). Based upon the questions and comments made during the course of the trial, it is clear that the court had current knowledge of the proceedings and participated in

[4] Overreaching or exaggeration is addressed by the requirement that the findings be supported by competent and substantial evidence; if the findings are an exaggeration, they will not be supported by the evidence.

the proceedings, as these comments and questions are embodied in the Final Judgment.

For example, the court, during the testimony of Dr. Agresti, asks the doctor what Husband's "spin" or explanation was for the allegations of criminal behavior and fraud (T-269). The doctor explained that Husband testified that many of the events were "misunderstandings" and that he was still friends with the individuals (T-269-270). The doctor testified that the testimony from the actual individuals drastically varied: one of the women believed Husband was the devil incarnate (T-270). The doctor opined that you can not get a straight story from Husband, and that this type of behavior is indicative of an antisocial personality disorder.

The court incorporated this answer into paragraph 14, of his Final Judgment:

> During the trial, the Husband attempted to minimize much of this background information (the experts stated this rationalization would occur due to the Husband's personality disorder).

The court also questioned Dr. Ellinger, the child's treating therapist as to the likely path of the child:

> THE COURT: … one question that I wanted to ask you as the treating physician. Dr. Gardner had testified yesterday that based on the materials that he had looked at and in his conversations with you over the lunch hour, he was of the opinion that Adam [the child] was becoming a sociopath or whatever the words are that you want to use.

THE WITNESS: It is the same for all.

THE COURT: Do you sense that as his treating physician?

THE WITNESS: Yes.

THE COURT: And yet I hear everybody says these people are not treatable. Is he at a point now where he is not treatable?

THE WITNESS: No.

THE COURT: That's all I wanted to know.

THE WITNESS: It has not been what we call crystallized, encrusted, set in. The paint has not dried, so to speak.

When children are in these kinds of situations where there is abuse, if they have what we call a sympathetic witness, and it can be a biological parent, a grandparent, can be the guy selling apples on the corner, the janitor at the school, this relates cross culture, called resiliency research. A sympathetic witness where they can talk about these things and held in an empathetic way. Psychologically and physically it helps them maintain their sense of empathy or humanness. When they are not able to do that, they begin to slowly erode their own ability to care for themselves and others, and their ability to have empathy for others. They do not care. They can feign it, but they do not care really.

THE COURT: He is not there yet?

THE WITNESS: That is evidenced by the session that I had with the youngster and his parents after the school altercation where he ran out into the road and chucked chairs. It was really a bad situation.

> When he cam into the therapy office, my office, he went to his mom directly. He could have gone to either parent. So there is still that bond there.
>
> His words say mom is bad, but his behavior still is loving towards her.
>
> THE COURT: It's your interpretation of going over and putting his head on her lap or whatever he does, that is kind of nonverbal expression of some sort of empathy?
>
> THE WITNESS: Yes
>
> THE COURT: Or showing he still has feelings?
>
> THE WITNESS: Yes. That ember needs to be put to the bellow. If it's not, that ember could be squelched.

(T- 1355-1358).

In paragraph 44 of the judgment, consistent with the court's questions and corresponding answers, the court finds:

> 44. Both Dr. Ellinger and Dr. Gardner have deferred as to what should take place in order to assist this child from the path which this child will be led if the Court does not intervene to wit: a psychopath [sociopath and psychopath are synonymous terms].

The court commented, during the trial, that the child's behavior, one week prior to trial, was behavior he would expect from a 2-3 year old (the child was 9 years old)(T-2363).

Later in the case, during Husband's case in chief, the court stated:

> THE COURT: He [Adam] doesn't seem to be able to distinguish between being with your buddies on the playground, kids like to use dirty words, and saying whatever you fell like, and puffing around with your pals; and then when you are in an adult setting, some kind of religious dinner or something or the doctor's office, he doesn't seem to be able to differentiate from one situation to the next.
>
> And obviously it's like an emotional thing. He can't seem to grasp –it is like socially he's – he seems to be in trouble. Maybe intellectually he is great, but socially and emotionally he is in trouble.

(T-3224).

The judgment, at paragraph 34, reflects these finding. The court held:

> The Court notes that the child's behavior is so egregious that it appears the child is regressing in his behavior, so that he acts more like a three-year-old as opposed to his intellectual level of nine years old.

During the trial, Wife alleged that Husband was briefing the child, and telling him that he may not ever see his Dad again. In response to these allegations, the following colloquy occurred between Husband and the court, which indicates the judge's opinion of the evidence, to that point:

> MR. WEISSMAN: …The petitioner will tell you that Mr. Perlow has spoken to Adam and told him Adam will not see him anymore. … We have a tape-recording of his telling Sharon this, which we have a right to do, that he is going to tell Adam this. If he wants to hear the tape, we are more than pleased to play it for him.

MR. PERLOW: May I address that, Your Honor?

THE COURT: I think you better address it.

MR. PERLOW: The beginning of the weekend, this weekend, I had a discussion with Sharon and I told her it appeared the likely outcome was it appeared to be an order of the Court that was going to somehow or another bar me from seeing the child.

I suggested to her very strongly that rather than having him surprised by it, I suggested that we should talk to him together. I offered her all day Saturday, whatever time was available –

THE COURT: Aren't you under a court order not to discuss the case with him in any way, shape or form?

MR. PERLOW: We weren't discussing the case.

THE COURT: Of course you are discussing the case if you talk to him. You are discussing what might be the outcome of this case. …

MR. PERLOW: We are not supposed to involve the child in the case, that's correct.

THE COURT: How would you characterize telling the child that the judge is going to enter an order and as a result of that you are never going to be able to see your father again; how would you characterize that then?

MR. PERLOW: What I said –

THE COURT: That's what it sounded like to me.

MR. PERLOW: I suggested that we should talk to him; not that I told the child that, but I suggested we should talk to him together, because Your Honor stated very simply –

THE COURT: Talk to him about what?

MR. PERLOW: About that he may not see me for a while, not to get involved in it. Before we do this –this is very prejudicial. You told me Wednesday or Thursday you were going to issue an order, you said that to me on Friday. You said you had no intention of waiting and you were going to issue the order right away.

THE COURT: Correct. I said that I would get an order out on this case very quickly.

MR. PERLOW: This child was with me this weekend. I don't know if you take the child away from me, I don't know if you are going to give me a chance to say good-bye, you will do whatever it is you decide to do. But I felt that to have the child faced with the mother coming to him and saying guess what, you can't see you dad anymore, I felt that was not the right way for this to happen and I suggested to her that we should speak to him together if, in fact, this was going to happen.

THE COURT: And say what to him?

MR. PERLOW: What possible outcomes to this might be.

THE COURT: That's discussing the case.

MR. PERLOW: Okay. Of course it's the case, but we didn't speak to him.

THE COURT: From all the evidence, I don't know what your case is going to show, but all the evidence so

> ***far is that you just don't seem to get it. You are not supposed to be involving this child in this case and what goes on in court.***
>
> ***From all the evidence so far, it appears literally that he gets a briefing every time he sees you about everything that goes on in the case. And then he ---then essentially it kind of destroys him every time he is brought in and involved in it***.
>
> MR. PERLOW: Your Honor, you said—
>
> ***THE COURT: I can't believe you would even contemplate on your own to sit down and discuss that with him or the two of you, without – I mean, given the attachment that the has to you, the impact that it would have, I am not a psychologist or anything, but obviously he would have a heck of a time go [sic] trying to deal with it. You just don't drop that on him***.
>
> …

(T-2938-2942).

The court in paragraph 26 of the Final Judgment found:

> The Husband has no concept of his acts and how it has harmed this child and will continue to harm the child because of his own inability to understand his problems (the husband's) and his failure to seek help in resolving those problems, if at all possible.

Thus, the record on appeal, which contains questions and comments from the court, as well as evidence to support each of the trial court's findings (which has been

conceded by counsel), reveals that the judgment does in fact reflect the trial court's own reasoning.

Further, the fact that the judgment was signed within 2 hours is not, in this case, indicative of a lack of independent judgment. The court, during the proceedings, informed the parties that he would enter an order on Wednesday or Thursday (the final day of trial) dealing with custody (T-2756). It can be assumed that the court felt it exigent to have a judgment as soon as possible due to a concern for the child. Dr. Agresti specifically testified that the court should be concerned about Husband taking the child (T-297). Further, there was a vast amount of evidence of alienation and briefing of the child regarding the proceedings. It can be gleaned, from the comments of the court, that the court wished to spare the child the agony of hearing about the trial from his father (the court acknowledged that the child would "have a heck of a time" dealing with this—the knowledge that he may not see his father for some time), and then having to spend days worrying about the court's decision.

Based upon the foregoing, the decision of the Fourth District, affirming the judgment signed by the trial court, is consistent with the case law from other districts, and is supported by the record.

III. THE FOURTH DISTRICT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF HUSBAND'S REQUEST FOR A GUARDIAN AD LITEM, WHICH REQUEST WAS NOT MADE

UNTIL THE MIDDLE OF TRIAL, TWO YEARS AFTER THE INITIAL PLEADINGS HAD BEEN FILED.

The Fourth District held that the dissolution proceeding was not a proceeding pursuant to Chapter 39, Florida Statutes, to terminate Husband's parental rights. Thus, the court found that the failure to appoint a guardian ad litem was not error as a matter of law. Perlow, 816 So. 2d 210 (Fla. 4th DCA 2002). The Fourth District further concluded that the trial court did not abuse its discretion when it denied Husband's appointment of a guardian ad litem, because Husband did not move for the appointment until two years after the commencement of the proceedings and not until midway through the trial. Id. Additionally, the court found no error because Husband failed to furnish the trial court with sufficient reasons for the appointment of a guardian so late in the proceedings. Id. The court did, however, direct the trial court's attention to section 61.401, Florida Statutes (2001), should any subsequent proceedings occur pertaining to the custody and visitation rights of the parties with the minor child. Id.

Section 61.401 states, in pertinent part:

> In an action for dissolution of marriage, modification, parental responsibility, custody or visitation, if the court finds it is in the best interest of the child, the court may appoint a guardian ad litem to act as next friend of the child, investigator or evaluator, no as attorney or advocate. In such actions which involve an allegation of child abuse, abandonment, or neglect as defined in s. 39.01, *which allegation is verified and determined by the court to be*

> *well-founded*, the court shall appoint a guardian ad litem for the child. …[e.s.].

Section 39.01(2) defines child abuse as follows:

> (2) "Abuse" means any *willful act* or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. … [e.s.]

Husband claims, for the first time in this Court, that this case involves an allegation of child abuse, and therefore it was mandatory that the trial court appoint a guardian ad litem, no matter when the request was made. There was no finding in either the trial court or the appellate court that this case involved child abuse, as defined in Chapter 39, which requires a "willful" act. Further, there was no testimony that parental alienation syndrome is the result of a willful act on the part of one of the parents. In fact, the evidence was to the contrary. Dr. Agresti testified that Husband may love his son, but is incapable of raising a healthy child (T-295). Dr. Gardner testified that parental alienation syndrome (PAS) was a sickness: PAS, in some cases, is a shared psychotic disorder (T-1043). The court, as well as the experts, refer to PAS, not as a type of abuse, but as a diagnosis: The court inquired of Dr. Heller whether the fact that PAS is not in the DSM-IV, means it is not a bona fide *diagnosis* (T-1738). Dr. Heller testified that the sad thing about psychopathy is they [the psychopath] do not think they are doing anything wrong (T-1717). Dr. Heller

categorized the child as a victim of psychopathy: All it takes is 5-10 minutes of a booster shot [speaking with the psychopathic parent] and the child will stay a victim of psychopathy (T-1718). Even the court, in response to Husband's comment that he is amazed by the concept of parental alienation because he is not trying to get the child away from his mother, stated that Dr. Gardner opined the sometimes PAS is unintended (T-3207).

Moreover, there was no verified allegation of child abuse, which, according to the statute, is a prerequisite to the mandatory appointment of a guardian ad litem for the child. There was no allegation of child abuse because this was not Wife's claim. The basis of Wife's request for sole parental responsibility and restricted visitation was that Husband had a sickness which resulted in the child suffering from Parental Alienation Syndrome, and which placed the child in jeopardy of becoming a sociopath/psychopath based upon his emulation of his father, a crystallized sociopath/psychopath.

Further, at trial, Husband did not ask for the appointment of a guardian ad litem on the basis that there were allegations of child abuse. Rather, Husband requested a guardian ad litem because the child's rights are coming into question and jeopardy (T-1287). Thus, this argument, which was not propounded to the trial court or the Fourth District, is not preserved for review.

Based upon the foregoing, there is no basis for Husband's argument to this court that this case involved "child abuse," as that term is defined in Chapter 39; this case involved a sickness of Husband, which negatively impacted the child. Therefore, the Fourth District properly evaluated the trial court's denial of the appointment of a guardian ad litem under the abuse of discretion test.

Next, Husband challenges the Fourth District's finding that the motion for appointment of a guardian was properly denied because it was not timely. Husband argues that because parental alienation syndrome was not plead, and because Wife was not taking the position that all contact should be ended as of just a few months before trial, Husband's motion should not be considered tardy. First, the opinions of the experts were required to be designated prior to trial, and Husband was given the opportunity to depose these witnesses. Thus, it is disingenuous for Husband to claim that he had no knowledge that Wife was claiming that the minor child suffered from PAS, and contact with his father should be severed for a discrete period of time. In fact, in the testimony of Husband's expert witness, Diane Fischer, she admitted that she was questioned regarding PAS in her deposition (T-2401). Thus, Husband clearly had knowledge of Wife's claim of PAS well before the trial, and could have moved for the appointment of a guardian ad litem prior to the middle of the trial. The trial court, therefore, was well within its discretion in denying this request.

Further, at the time Husband requested a guardian, he did not simultaneously request a continuance for the guardian to conduct an investigation. Therefore, the appointment of the guardian at that stage of the proceeding would have been of no benefit to the court, and any error would be harmless.

Husband next claims that Husband can not waive the child's interest in having a guardian appointed because the Husband is tardy in his request. The child was not a party to this suit, and had no interest per se. Further, section 61.16 does not "entitle" a child to a guardian, and therefore there is no right or "interest" for the Husband to waive.

Husband argues that rule 1.210(b) Fla.R.Civ.P., and case law from other districts, specifically Mistretta v. Mistretta, 566 So. 2d 836 (Fla. 5th DCA 1990) and Gilbertson v. Boggs, 743 So. 2d 123 (Fla. 4th DCA 1999), requires the appointment of a guardian ad litem whenever the child's interest is adverse to the parent's interests. Again, Husband never made this argument in either the trial court or the Fourth District, and this argument is not preserved for review. The Fourth District properly acknowledged this lack of preservation when it held that Husband failed to furnish the trial court with sufficient reasons for the appointment of a guardian ad litem. Perlow, 816 So. 2d at 216.

Nevertheless, Husband's reliance upon rule 1.210(b), which deals with parties to an action, is misplaced. Rule 1.210(b) states in pertinent part:

> (b) Infants or Incompetent Persons. …An infant or an incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 12.210 Fla.R.Fam.P. specifically states that rule 1.210 shall not be read to require that a child is an indispensable party for a dissolution of marriage or child custody proceeding. Thus, because the child is not a party to the suit, the child is not required to have representation via a guardian, and rule 1.210 is not applicable in this situation.

Husband's reliance upon Mistretta, and Gilbertson, is likewise misplaced. In Mistretta, the court found that a guardian was not necessary because the child was not a party to the action. Mistretta, 566 So. 2d at 837. The court explained that because the court was of the opinion that the interests of the minor were fully protected throughout the action because the child's interest coincided fully with the wife's interest in obtaining payment of child support from the husband, no guardian was necessary. Id. In the instant case, the child is not a party to the action, the child's interests were fully protected by Dr. Ellinger, his therapist (see below), and the Wife's

interest in assuring that the child was safe and healthy coincided with the child's interest (even if this was not the case, Dr. Ellinger's role in the trial rendered Wife's interest irrelevant).

Gilbertson is a paternity case. The court in Gilbertson noted that the child was a party to the suit as the child had an independent right to have his interests determined by the court. This is not the case in a dissolution proceeding. Gilbertson then goes on to discuss who may appropriately represent a child as a "next friend" and holds that if a father's interest conflict with the child's interest, he is not an appropriate "next friend." There is no issue in the instant case regarding a parent's eligibility to sue on behalf of a child: a child is not a party to the dissolution proceeding.

Husband again attempts to argue that the dissolution proceeding was a termination of parental rights, and, citing Cothron v. Hadley, 769 So. 2d 1148 (Fla. 5th DCA 2000), argues that if a guardian is required to change a child's surname, it should be required to sever all ties with a parent. As pointed out by the Fourth District, Cothron was not reversed for failure to appoint a guardian ad litem, but rather for insufficient evidence; the Fifth District did not hold that an appointment of a guardian is necessary to change a child's surname. Moreover, in the instant case, the trial court did not terminate Husband's parental rights; it merely suspended his rights for a discrete period of time. Perlow, 816 So. 2d at 216. There was no proceeding

pursuant to Chapter 39. Whether or not Husband or the child feels the distinction is blurred, is of no consequence legally. Legally this is an action pursuant to Chapter 61, and Chapter 61, specifically 61.401 governs this action. Thus, Husband's claim of conflict with Harris v. Harris, 753 So. 2d 774 (Fla. 5th DCA 2000), is unavailing, as Harris was a not a dissolution proceeding. Harris is a paternity case. The basis of the Harris decision was the court's finding that a legitimate child has a right to maintain that status both factually and legally, and before any blood test can be ordered, a guardian must be appointed to represent the child. These facts are not on point with the facts or issues in the instant case.

Finally, any error in failing to appoint a guardian ad litem is harmless error, as the child had a therapist that acted in the capacity of the child's guardian ad litem. It is universally recognized that the function of a guardian ad litem in a custody dispute is to protect the best interests of the children. Perez v. Perez, 769 So. 2d 389 (Fla. 3d DCA 1999). Guardians serve an important role by acting as representatives of the children and promoting society's interest in protecting children from traumas commonly associated with divorce and custody disputes. Id.

Dr. Ellinger's testimony reveals that he performed all the functions of a guardian ad litem. Dr. Ellinger specifically testified that he was an advocate for Adam (T-1512). He stated that he tried to represent what the youngster wanted in the court of law, but

that despite his best efforts Husband continually attacked him (T-1334). Dr. Ellinger told the court that he did not make a recommendation at the temporary relief hearing regarding custody, he stated facts as observed, and he expressed the child's wishes for 50/50 time sharing (T-1345). Dr. Ellinger requested evaluations of the parents in the child's best interest, as would a guardian (T-1348). Finally, Dr. Ellinger made it clear to the court that he was acting only in Adam's best interest: Dr. Ellinger testified that everything goes back to the youngster, we are here for the best interest of Adam (T-1349).

Thus, based upon the foregoing, the Fourth District properly held that the trial court did not abuse its discretion in denying Husband's motion for appointment of a guardian ad litem and the decision should be AFFIRMED.

CONCLUSION

The decision of the Fourth District in the instant case is not in conflict with the decisions of any other districts, and is supported by well-established case law and record evidence. Thus, the decision of the Fourth District must be AFFIRMED in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this _____ day of _____, 2003 to Richard A. Kupfer, P.A., 5725 Corporate Way, Suite 106, West Palm Beach, Florida 33407.

_____
Denise C. Desmond

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the above brief has been prepared in accordance with rule 9.210 in New Times Roman 14 point font.

_____
Denise C. Desmond

1980/appeals/appeal.1/supreme/answer brf.amend on merits