IN THE SUPREME COURT OF FLORIDA

ESIG PERLOW,
Petitioner,

CASE NO. SC02-1317

v.

SHARON J. BERG-PERLOW,
Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

The parties will be referred to herein as the "Husband" (Petitioner) and the "Wife" (Respondent). The following symbols will be used to refer to the various parts of the record:

(R.)	Record on Appeal
(S.R.)	Supplemental Record
(T.)	Transcript of Final Hearing
(H.A.)	Appendix to Husband's Initial District Court Brief (Case No. 4D00-60)
(W.A.)	Appendix to Wife's Initial District Court Brief (Case No. 4D00-60)
(H. Ex.)	Husband's Trial Exhibit
(W. Ex.)	Wife's Trial Exhibit

ISSUES PRESENTED

I. **WHETHER THE FOURTH DCA HAS CREATED CONFLICT BY AFFIRMING THE TRIAL COURT'S ORDER DECLINING TO HOLD A HEARING ON ENTITLEMENT TO TEMPORARY ATTORNEY'S FEES UNTIL AFTER TRIAL WAS CONCLUDED?**

II. **WHETHER THE FOURTH DCA HAS CREATED CONFLICT WITH OTHER DISTRICTS BY FINDING THAT THE TRIAL COURT DID NOT IMPROPERLY DELEGATE ITS DECISION-MAKING FUNCTION TO COUNSEL?**

III. **WHETHER THE FOURTH DCA CREATED CONFLICT AND ERRED BY FINDING THAT THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO APPOINT A GUARDIAN AD LITEM FOR ADAM?**

STATEMENT OF THE CASE AND FACTS

The parties were married in 1986 and their only child, Adam, was born in 1991. (See Perlow v. Berg-Perlow, 816 So2d 210 (Fla. 4th DCA 2002). At the time of the final hearing Adam was eight years old. (T.1/76). The Husband was 54 years of age and the Wife was 40 years of age. Both the Husband and the Wife have college degrees. (R.2/270).

The Wife filed a Petition for Dissolution of Marriage in which she initially sought shared parental responsibility of Adam with liberal visitation for the Husband. (R.1/1, 23, 55A). The Husband sought joint rotating custody. (R.4/571). Neither the Wife's original petition nor any subsequent amended petition (See R.6/938A) pleaded for a permanent termination of all contact between the Husband and his only child, nor did it mention "parental alienation" which was injected at trial as the main theme of the Wife's case.

Four months before the final hearing was scheduled the Husband's attorney, Ken Renick, Esquire, advised the court that the Husband had run out of money and asked the court to determine his motion for temporary fees so that he could continue to represent the Husband. (R.14/2319-2324). The court refused and Renick withdrew. (R.7/1126-27; 14/2334).

FACTS PERTINENT TO ATTORNEY'S FEE ISSUE

According to the financial findings attached to the Final Judgment of Dissolution of Marriage (R.14/2506, ex. A) the Wife had a net worth of about $3.5 million while the Husband's net worth was $271,556. Nearly all of the Husband's $271,556 consisted of the Wife's jewelry valued at $250,000 (Id.), which the Husband denied having taken notwithstanding the Wife's accusations. If the disputed jewelry is eliminated, the Husband has total assets of about $20,000 according to the trial court's own findings, while the Wife, who has admittedly spent over $700,000 on this litigation (See T.20/2538-40; H.A. 100-02) has over $3.5 million in assets.[1]

Ken Renick, Esquire, the attorney who withdrew because he was owed $40,000 by the Husband, explained to the trial court that the Husband had no more money to pay to an attorney or to a forensic accountant or psychiatrist or other similar experts to counter the arsenal of experts that had been amassed by the Wife. (H.A. 14, 22). This occurred on October 1, 1999. (R. 14/2319-24). Renick testified he needed at least $210,00 to $225,000 in fees and costs to complete the case. (H.A. 23-27). The

[1] The Husband has not worked since 1998 due to a heart condition. (T.1/58-59). The Wife's intangible tax return filed in 1998 listed nearly $5 million in securities alone.(H. Ex. 2; H.A. 20). Her affidavit filed five days before trial admitted to a net worth of nearly the same amount. (R.5/1730).

Husband's business was terminated in 1997 due to his heart condition and his mother has loaned him $200,000 to defray litigation expenses, but she could not loan him any more and he could not afford to hire counsel. (H.A. 37-38). The Husband asked the court not to pay temporary fees directly to him but to have it set aside for an attorney to represent him. (H.A. 39; W.A. 2, p.28).

After the trial court (Judge Colton) declined to award temporary fees as requested by attorney Renick, who then withdrew from the case (R. 7/1126-27; 14/2334), the Husband filed his own motion for temporary fees (R. 8/1397-98) and asked the court to set a hearing. (R. 8/1266). That hearing was held on December 9, 1999 about 2½ months before the final hearing was scheduled, and at that time Judge Colton denied the Husband's motion without prejudice to the Husband coming back again after he hires a new attorney to ask for temporary fees. (R.9/1525; H.A. 70). Judge Colton ruled that since the Husband had no obligation to pay attorney's fees as he was now acting pro se, he failed to demonstrate any "need" for attorney fees. (H.A. 68-70). Unfortunately, the Husband could not retain an attorney to represent him until the court determined he was entitled to an award of temporary attorney fees.

After that hearing the Husband spoke with several attorneys specializing in marital and family law including Ron Sales, Esquire, Tom Sasser, Esquire and Jim Tutle, Esquire. (T. 1/55-59, 63). Mr. Tutle was the least expensive but he still wanted

at least $150,000 in fees plus $50,000 to $75,000 in costs to represent the Husband in this case. (T. 1/63).

No attorney wanted to appear without being assured they would be awarded fees (H.A. 73-75, 81). This was explained to Judge Harrison (retired judge assigned to preside at the final hearing) on the morning that the final hearing was scheduled to begin on February 22, 2000. The Wife's attorney told Judge Harrison that Judge Colton had already denied temporary fees to the Husband because he was representing himself. (T. 1/10-11). The Husband again asked for temporary attorney fees and a continuance so he could obtain a new attorney. Judge Harrison denied both requests (T. 1/51-74; 2/117-20; H.A. 82-84) on grounds that the Husband still did not have an attorney in the courtroom who was willing to represent him.

There is no question about the Wife's far greater ability to pay, but the Wife argued that until the Husband actually hired a lawyer he was not entitled to a temporary fee award. (H.A. 40-44). Judge Harrison stated:

> [The Court]: The only way I know of basically doing attorney's fees is you have to get someone to come in here, an attorney to come in and say they have agreed to take the case on this basis - - and we have a hearing. There is no procedure whereby I order them to give you money to run out and hire an attorney. (T. 2/118).

Judge Harrison agreed that if the Husband brought an attorney the following

day, the court would hold a fee hearing. (T.2/119-20). The Husband showed up the next day with Peggy Rowe-Linn, Esquire a family law attorney. (T.3/334). Judge Harrison stated that it appeared "somewhat likely" the Husband would be entitled to fees and costs when the case was over. (T.3/229, 335). The court changed its mind, however, about holding a hearing at that time. If Ms. Rowe-Linn wanted to "come on board" fee entitlement would be determined at the end of the case. (T.3/335). Ms. Rowe-Linn told the court there is no way that she, or most any other attorney, could enter the case under those circumstances. (T.3/337). She stated to the court:

> ...nor do I know of any other practitioner in Palm Beach County who would come on board under these circumstances...This is a case of not less than 15 days trial duration... A case with six (minimally) experts in psychology and psychiatry. (T.3/337).
>
> * * *
>
> ... in excess of 3 or $400,000 has been expended thus far on the Wife's side of the case;[2] that there are in excess of 700 docket entries... that the case is being litigated by Mr. Weissman whose reputation in the community is legendary in terms of his ability to effectively litigate for his clients.
>
> I don't know anybody who Mr. Perlow could hire under those circumstances if the money were not in the bank and there was not a continuance granted for a reasonable period

[2] The Wife admitted by the end of trial to having actually spent over $800,000 on this litigation to prohibit the Husband from having any contact with his only child. (See Appendix to Husband's District Court Reply Brief, 1-3).

> of time to acquaint oneself with at least the documentary evidence... (Id. at 338).

The Husband then asked if he could speak to the court and the court responded:

> [The Court]: Well, no. I am not going to go any further with it at this point. Mr. Perlow,...you are representing yourself...(Id.at 339).
>
> * * *
>
> [The Husband]: I take it your ruling is that you are going to deny me an award of temporary fees?
> [The Court]: At this time.
> [The Husband]: Versus what time, at the end of trial?
> [The Court]: I said I would hold a hearing at the end of the trial on the issue of entitlement. And as I indicated, that preliminarily, just looking at the affidavits, preliminarily it would appear that you would get entitlement. But I can't do it at this time. [e.s.] (Id. at 339-40)

Judge Harrison offered to recess the case only for the remainder of that day and then start again the next day and not hold a hearing on temporary fees until after trial. (T.3/337). Attorney Rowe-Linn then left the courtroom and the Husband struggled to represent himself against the Wife's attorneys during 17 days of trial. Out of that 17 days, the Husband's case was put on for 1¼ days. Out of a transcript of over 3,500 pages, the Husband's evidence comprises less than 400 pages.

After entry of a 25-page final judgment, which is discussed further in the next section of this brief, the Husband filed an appeal and moved the trial court for a

finding of entitlement to temporary attorney's fees so he could retain an appellate attorney. A hearing was held at which an appellate attorney, Edna Caruso, Esquire, appeared and indicated a willingness to handle the appeal for the Husband if there is a finding of his entitlement to temporary appellate fees. At that time, although the trial court had before it the same financial information it had when trial began, this time the court (Judge Colton) granted the Husband's motion and determined he was entitled to temporary attorney's fees to prosecute this appeal based on his need and the Wife's ability to pay. (W.A. 7; S.R. 19/5796). That same need and ability to pay also existed a few weeks earlier before trial began when the Husband needed an attorney to stand up to the Wife's litigation team. Judge Colton noted when he granted temporary appellate attorney's fees that the Husband has been found in another unrelated proceeding to be without funds to pay for an attorney. (W.A. 149-153).

FACTS PERTINENT TO THE CUSTODY ISSUE AND THE SCATHING FINAL JUDGMENT

During most of this litigation the Husband and Wife rotated custody of Adam. (See R.3/453). On December 8, 1999, 2½ months before trial, Judge Colton made a finding that shared parental responsibility was still in Adam's best interest, but the court made the Wife primary residential parent with the Husband having standard visitation. (R.9/1423-26). Judge Colton noted that Adam's therapist, Dr. Ellinger, felt it would be harmful to completely separate Adam from his father due to a strong bond

between them. (R.9/1424-25).

When the case came to trial a few months later, the Wife had still not filed any pleading specifically notifying the Husband that she sought to have the court completely terminate all contact between the Husband and Adam. Two months earlier at the temporary custody hearing, the Wife did not take the position that no visitation should be awarded to the Husband. (R.11/1889). The Wife, however, argued below that when she amended her Petition to seek "restricted visitation" that should have put the Husband on notice that it could result in a complete termination of contact. (See Wife's District Court Brief at pp. 1, 26-27, 46). The Wife's position hardened considerably after the Husband was no longer being represented by an attorney.

At the 17 day trial, the Wife introduced testimony from an array of experts who never actually examined or tested the Husband, but who concluded from other sources that the Husband had a sociopathic personality disorder. They also opined that it would be in Adam's best interests to cease all contact with his father because the father was acting to alienate Adam from his mother.

One of the Wife's experts, Dr. Agresti, based his opinion on the Husband's conviction in Minnesota of a crime in 1967 (over 35 years ago) when he was 19 years old (S.R. 1/2664) and in 1986 (17 years ago) for grand theft. (A. 101; S.R. 12/4728;

T. 3/272-76). Dr. Agresti was not aware that the 1986 conviction had been set aside by the court and charges were dismissed. (A. 110, 113; H.Ex. 10).

Several of the Wife's experts admitted that the source of Adam's anger and aggression toward his mother could also be Adam's perception that his mother is trying to end Adam's contact with his father. (A. 154; S.R. 12/1198, 1272-73). That is exactly what Adam told his therapist (R.12/2109; 14/2345-46, 2404) and his teachers at school (S.R. 26/688-93; T. 19/2373, 2414-19, 2428). Adam expressed to Dr. Fischer, a child psychiatrist, a fear of being taken to Israel to live. (T. 19/2419-20). The trial court denied the Husband's motion for the court to interview Adam en camera. (T.26/3400-06).

There was evidence on both sides of the issue. Adam's treating therapist, Dr. Ellinger, saw Adam 14 times, the Husband six times and the Wife seven times. (R. 14/2343-44). He testified that Adam strongly desires to spend time equally with both parents. (W. Ex. 47, vol. 1 pp. 48, 81; R. 12/2098, 2110). Adam was fearful that the court would restrict his right to see his father and Dr. Ellinger did not believe it was in Adam's best interest to stop contact. (R. 12/2109; 14/2345-46, 2404). Dr. Ellinger felt that <u>both</u> parents needed counseling to manage their hostility in front of Adam. (R. 14/2376-77). The Wife had disparaged the Husband and discussed custody issues with Adam which caused Adam to act out in anger in Dr. Ellinger's opinion. (R.

14/2103). That testimony was given at the temporary custody hearing 2½ months before trial, and at trial Dr. Ellinger's testimony was essentially the same. (See T. 11/1307, 1316, 1319, 1326, 1336, 1345; 12/1427-31, 1466, 1500-03). Other experts agreed that Adam should have contact with both parents. (E.g. Dr. Fischer, T. 24/3103, 3137-38; 19/2445). Dr. Fischer, a child psychiatrist, did not believe a proper psychological diagnosis could be made for someone who has not been directly examined or tested (T. 19/2389), nor on the basis of a criminal incident that happened 20 or 30 years in the past. (T. 19/2397-98; 24/3118).

At the conclusion of the 17 day trial and on the morning the court heard closing arguments, the Wife's attorney submitted a 25-page proposed Final Judgment to Judge Harrison. (T. 26/3410). Judge Harrison made no oral rulings from the bench, nor any findings, nor stated anything to guide counsel for the Wife in drafting proposed findings of fact.

When, at the close of the evidence, the Husband asked the court if he could also submit a proposed Final Judgment the court discouraged him from doing so. The court told the Husband he was not expected to submit a proposed final judgment and that if the Judge needs any help there is a legal staff available to help him, but the Husband could submit one if he has one. (T. 26/3406-07). The next morning the Husband again asked the court if he could have the remainder of the day to prepare

his own proposed final judgment and the Judge again discouraged him and said it was not necessary. (See T. 27/3500). However, at the same time after closing arguments ended at 1:00 p.m. (R. 46/3409), Judge Harrison announced from the bench that the final judgment would be signed and ready to be picked up within two hours (by 3:00 p.m.) in Judge Colton's office. (T. 27/3500).

THE FINAL JUDGMENT

Within those two hours, Judge Harrison signed and filed the 25-page proposed Final Judgment drafted by the Wife's attorney verbatim without making a single alteration to it (other than the date just above the judge's signature). (R. 14/2481-2511). The Final Judgment dissolving the marriage is so scathing and overreaching that it is shocking. It immediately and permanently ends all contact between the Husband and Adam based upon the Wife's "parental alienation syndrome" theory. In order to justify taking such action, the entire final judgment repeatedly vilifies the Husband while it canonizes the Wife. It is replete with invectives against the Husband that were never uttered by the court at any time prior to having been drafted by the Wife's counsel.

First, the Final Judgment traces the "Husband's involvement in various criminal activities" which the court said was consistent with a sociopathic personality (R.14/2483). The Final Judgment mentions the Husband's conviction in 1986 for

grand theft, but never mentions the conviction was set aside and charges were thereafter dismissed. (R.14/2483). The Final Judgement mentions the Husband's disbarment in California after he was initially convicted of grand theft (R.14/2483) without mentioning he never sought reinstatement after his conviction was set aside because he did not actively practice law. (W.Ex. 69-70). While condemning the Husband's "meanness" and "atrocious conduct" (R.14/2485) and referring to him as a "pure psychopath" (R.14/2491, 2494), the Final Judgment extols the Wife as being "exemplary", "good, loyal and constant", "supportive" and "loving". (R.14/2484).

The Final Judgment states that the bond between Adam and his father is unhealthy because Adam has now postured himself as the advocate for his father. (R. 14/2485, 2489, 2493). It states that Adam misbehaves horribly towards his mother due to the Husband's influence (R. 14/2489), and if Adam is not immediately removed from all contact with his father he will likely turn out to be a sociopath just like his father (R. 14/2490) and will then have to be incarcerated or hospitalized himself. (R.14/2494, 2501). Nothing like that was ever uttered by the Judge to support the Wife's attorney gratuitously putting it into the Final Judgment.

The Final Judgment then continues and awards sole parental responsibility for Adam to the Wife and it prohibits the Husband from contacting Adam by telephone or e-mail, it prohibits sending videos, it prohibits visitation at any location and it even

prohibits indirect contact through third parties[3], along with a prohibition against the Husband obtaining any of Adam's school records or medical records. (R. 14/2500-01). The Husband has been ordered to pay for Adam's support including his private school tuition and his medical bills until he turns 18, (R. 14/2502, 2497 -98), but the Husband is prohibited from knowing anything about Adam's school records or medical condition or any other subject.

The icing on the cake comes at the end of the Final Judgment where the court specifically directs the mother to disparage the father. (See R. 14/2501-02, ¶ 9). The court "finds" that its own previous order (entered by Judge Colton) prohibiting the Wife from disparaging the Husband has now become a detriment to Adam, and the Final Judgment affirmatively directs the mother to advise Adam about his father's "deceitfulness, his lack of remorse, his arrests,[4] his poor behavior control and impulsivity, his lack of empathy, and his total anti-social personality disorder." (R. 14/2502). The Final Judgment also "requests all law enforcement officers in every state and county" to enforce the "no contact" provisions of the order because "the court believes the Husband will somehow attempt to violate the court's orders." (R.

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[3] For example, a grandmother telling Adam "Your father says hello and that he loves you" is expressly prohibited by the Final Judgment.

[4] If that was worded "convictions" instead of "arrests" it would come to a total of one 30 year old conviction.

14/2503). The judgment also authorizes the Wife to record all of Adam's conversations to make sure he is not contacting his father. (R.14/2504). The judge never uttered anything like that at trial before the Wife's attorney gratuitously put it into the Final Judgment which expressly threatens the Husband with incarceration if the order is violated. (R.14/2503).

The Final Judgement also, quite tellingly, criticizes the Husband for lying about attending a parenting course with the Children First Program and orders him, on pain of contempt, to attend it and furnish proof of doing so. (R.14/2485, 2504). Just hours before the Final Judgment, the Husband brought to court with him and gave to Judge Harrison his certificate of completion of that parenting course. (See T.27/3414). It was discussed in open court that very morning (T. 27/3414), but the proposed Final Judgment was drafted by counsel just before that happened. If Judge Harrison had read the 25-page order that he immediately signed and filed, that paragraph at the very least would have been stricken. Judge Harrison either did not carefully read the Final Judgment he signed, or he did not remember being handed the certificate of completion and talking about it just a few hours earlier the same day.

The Final Judgment also decided every property claim and financial issue 100% in favor of the Wife and accepted her "scheme of equitable distribution". (R. 14/2499). The court also rejected the Husband's request for a geographical restriction

and expressly finds that it would be beneficial for Adam to be relocated to another country. (R. 14/2501). After the Final Judgment was entered in March of 2000, the Wife relocated with Adam to Israel and the Husband has had no contact with him since that time. (See Wife's 4DCA amended Answer Brief at pp. 25-26). At the time this brief is being written, Israel is experiencing escalating violence to civilians and certainly poses a greater risk to Adam's safety than his former residence in Florida.

The Final Judgment does ostensibly hold out one carrot for the Husband, but it is completely illusory. The Final Judgment prohibits contact until Adam becomes emancipated (10 years after the trial date) but it also states that when Adam turns 14 (six years after the trial) the Husband can then file a motion for modification based on a showing of a substantial change of circumstances in order to try to re-establish contact with Adam. (R. 14/2501). That not only prohibits the Husband from trying any sooner to achieve a modification, but it makes it dependent on a showing that the court has already said cannot happen. The same Final Judgment expressly finds that "this father is crystallized in his position and will never change." (R. 14/2486). "Psychopathology is a psychiatric disturbance that is not curable. It is enduring." (R. 14/2492). So, unless the Husband can prove to the court that it was wrong to say that (and the court has already said it will not retry these issues de novo - R. 14/2501), the Husband is never going to have contact with Adam until he is no longer a

child...assuming by then Adam still has a desire to see his father after years of court-sanctioned brain washing. Interestingly, despite all the disparaging statements made about the Husband in the Final Judgment, one thing it does not state is that he is an unfit parent.

THE DISTRICT COURT'S OPINION

The district court rejected the Husband's attorney fee argument on grounds that neither the Husband nor the attorney (Peggy Rowe-Linn, Esq.) had testified under oath or made a sworn proffer of an estimated amount that would be required to undertake representation. Perlow, supra at 214. The Fourth DCA concluded:

> The trial court did not abuse its discretion in requiring [the Husband] to present an attorney to testify as to the attorney's willingness to represent him and as to the elements necessary to determine the amount of the temporary fees. We also conclude that the trial court did not abuse its discretion when it did not conduct separate hearings to first determine entitlement and then determine the amount of temporary fees. Perlow, supra at 214-215.

The Fourth DCA also stated that the Husband failed to show an "obligation to pay attorney's fees" (since he had not yet retained an attorney) or that he could not retain an attorney without being awarded temporary fees. Perlow, supra at 214-215. The Fourth DCA also concluded that the trial court did not abuse its discretion by denying a continuance of even a few days at the beginning of trial so that an attorney

could represent the Husband. Perlow, supra at 215. The Fourth DCA held that the Husband did not furnish a reasonable explanation for his failure to secure counsel or his need for fees, Perlow, supra at 215, even though there was no evidence contrary to Ms. Rowe-Linn's statement to the court that no attorney would step into the case at this point without at least a finding of entitlement to temporary fees.

The Fourth DCA rejected the Husband's argument that a guardian ad litem should have been appointed for Adam, on the grounds that the Husband did not move for appointment of a guardian until midway through the trial and because the trial court did not terminate the Husband's parental rights but merely "suspended" his visitation rights. Perlow, supra at 215-216. However, the Fourth DCA directed the trial court's attention to Section 61.401, Florida Statutes for any later proceedings in this case involving custody or visitation. Perlow, supra at 216.

Lastly, on the issue of immediately signing the proposed Final Judgment submitted by the Wife's attorney, the Fourth DCA concluded this was not an improper delegation of the trial court's decision - making function even though the Wife's 25-page proposed Final Judgment was adopted verbatim less than two hours after closing argument without the trial court having made any prior oral findings or given any directions to counsel for preparing the Final Judgment. Perlow, supra at 216-217. The Fourth DCA noted that an apparently contrary opinion by the Fifth

DCA, the Rykiel case, has since been so eroded by two later Fifth DCA cases that it no longer conflicts with an affirmance of the Final Judgment in the present case. In so holding, the Fourth DCA employed a "sufficieny of the evidence" test which is not the test employed by other districts in analyzing whether a trial judge has improperly delegated the fact-finding function of the court to an attorney.

SUMMARY OF ARGUMENT

I. A party's entitlement to temporary attorney's fees is not dependent on having a lawyer presently representing him. Other district courts have so noted, the statute itself (§61.16) so states, and the Fourth DCA's contrary view places a burden on litigants that emasculates the purpose of the statute.

II. Although the Fourth DCA found there was no improper delegation of the trial court's decision-making function, even though the Wife's vitriolic 25-page proposed Final Judgment was adopted verbatim in less than two hours after the case was submitted to the court without the trial judge having made any prior statements to guide counsel in drafting a final judgment, other district courts have found such actions to be an abdication of judicial responsibility. The various district courts have addressed this subject numerous times over the last decade and there is a dichotomy of appellate viewpoints on it. It is obviously a political hot potato. The Fourth DCA below has employed a "sufficiency of the evidence" test that has been eschewed by

other district courts. This is a very important issue going to the basic integrity of the litigation system, and there is a substantial need for uniformity throughout the state.

III. Both statute and case law from other districts require (not just permit) the trial court to appoint a guardian ad litem to protect Adam's interests in a case like this. The fact that the Husband, who was unrepresented, did not ask for such an appointment until mid-way into the trial does not relieve the trial court from doing what it would be required to do sua sponte even if neither party requested it. Because a parent's interest is considered adverse to the child whenever the parent seeks to terminate the child's contact with the other parent, and because the Husband in this case was accused by the Wife of conduct falling within the statutory definition of "abuse" under Section 39.01(2), Florida Statutes, Adam was absolutely entitled to the appointment of a guardian ad litem to protect his interests pursuant to Section 61.401. The refusal to make that appointment in this case was fundamental error.

ARGUMENT

II. WHETHER THE FOURTH DCA HAS CREATED CONFLICT BY AFFIRMING THE TRIAL COURT'S ORDER DECLINING TO HOLD A HEARING ON ENTITLEMENT TO TEMPORARY ATTORNEY'S FEES UNTIL AFTER TRIAL WAS CONCLUDED?

A party's entitlement to temporary attorney's fees is determined by need and ability to pay, not whether he has a lawyer presently representing him. The first order entered by Judge Colton a few months before trial denied the Husband's timely motion for temporary fees "without prejudice to the Husband to seek temporary fees after retaining counsel." (R.9/1525). The same reasoning was used by Judge Harrison two months later on the first day of trial after the Husband renewed his motion for temporary attorney's fees along with a reasonable continuance so he could secure counsel. (T.1/51-74, 117-20). The next day when the Husband brought along an attorney (Ms. Rowe-Linn), the court still declined to hold a hearing on entitlement until after trial. Nobody was sworn to testify. There was just some brief conversation with the court and the court agreed to recess the trial for the rest of that day, but refused to conduct a fee entitlement hearing until after trial and would say only that it "appears somewhat likely" that the Husband will eventually be entitled to attorneys fees.

(T.3/334-340).

The purpose of an award of temporary (interim) attorney's fees under Section 61.16, Florida Statutes, is to enable the financially disadvantaged spouse to have similar access to counsel. Here, the Wife is a multi-millionaire[5] who has spent over $800,000 on experts and attorneys in an effort to terminate the Husband's contact with his only child. If we eliminate the claim that the Husband took the Wife's $250,000 jewelry (which is disputed and unproven), he essentially has no assets other than his nine year old Chevrolet and personal belongings. (See T. 1/72). The purpose of the statute in this scenario is to enable the Husband to defend himself on a level playing field against the Wife's efforts. The purpose is to enable him to secure counsel, not just to pay for counsel that has already been hired. See Canakaris v. Canakaris, 382 So2d 1197 at 1204 (Fla. 1980).

The Fourth DCA below concluded that the trial court did not abuse its discretion in declining to determine the issue of entitlement until after trial. In so holding, the Fourth DCA is in conflict with cases from other districts which find that a party does not need to first hire counsel before entitlement can be determined. See e.g. Baucom v. Baucom, 397 So2d 345 (Fla. 3dDCA 1981); MacLeod v. Hoff, 654

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[5] Whether her assets are marital or non-marital is irrelevant to the attorney fee issue. Kendall v. Kendall, 677 So2d 48 (Fla. 4th DCA 1996)

So2d 1250 (Fla. 2d DCA 1995). In Baucom, the court held that the party lacking adequate resources to obtain counsel must apply for such an award and the attorneys themselves have no standing to apply for it. The MacLeod case is in accord and also discusses how fees can be set aside and made payable to an attorney. The statute itself, Section 61.16(1) expressly states that a motion for temporary attorneys fees and suit money "shall not require corroborating expert testimony in order to support an award."

The trial court below should have permitted the Husband to have a full-blown evidentiary hearing on entitlement without having to wait until completion of the 17 day trial or the hiring of an attorney. That procedure defeats the purpose of the statute and that error was devastating to the Husband in this case. The amount of fees can be determined post-trial with money earmarked and made payable directly to counsel or pursuant to further court order. See Baucom, supra and MacLeod, supra; §61.16, Fla. Stat.

To the extent the Fourth DCA's opinion below finds no abuse of discretion in denying the Husband's motion for continuance, it directly conflicts with the Fifth DCA in Peiman v. Peiman, 829 So2d 307 (Fla. 5th DCA 2002). In Peiman the Fifth DCA held the trial court to have abused its discretion by denying a continuance when a former husband's attorney withdrew a month before the final hearing, the husband

contacted three other attorneys, one of whom would only take the case if a continuance could be obtained, and the husband requested a continuance the day before the final hearing was scheduled to begin so that he could be represented by counsel. Those are virtually the same facts that occurred in the present case and here, as in Peiman, the trial court's denial of a continuance created an injustice even apart from the refusal to hold a hearing on entitlement to temporary fees. The Husband's reason for the continuance was legitimate, not for delay and the Wife would not have suffered any substantial prejudice from a continuance. There is no rational way to reconcile the Peiman case with the holding of the Fourth DCA in the present case.

Without representation and the ability of the Husband to hire forensic experts of his own, the findings contained in the Final Judgment are the result of litigation that was fought on an unlevel playing field. If the Husband had been found entitled to interim attorney's fees and suit money when he first moved for such an award (2½ months before trial), he would not have needed to ask for a continuance later on and he could have retained his previous attorney, who would have at least been assured of getting paid some reasonable amount. Entitlement versus the amount of attorney's fees are routinely determined separately and there is no reason they could not have been in this case.

An after-the-fact award of entitlement to an interim fee does little to accomplish

the purpose of the statute. These proceedings got on the wrong track when Judge Colton incorrectly ruled before trial that the Husband needed to retain counsel before he could obtain an entitlement award. They continued down the wrong track when Judge Harrison ruled the same way once he was advised how Judge Colton had ruled. That deprived the Husband of representation during trial and ultimately led to the vitriolic 25-page Final Judgment.

The Fourth DCA below mentioned in its opinion that Judge Harrison did not err because no one was testifying under oath, the total amount of the fees requested was not mentioned, and the Husband did not ask for a hearing on entitlement to fees but only for a continuance. (See Perlow, supra at 215). The Husband, in fact, specifically clarified to Judge Harrison that he was moving for entitlement to fees and not just for a continuance. (See T. 2/117-121). The reason no one was placed under oath is because Judge Harrison refused to hold an entitlement hearing. The colloquy at T. 3/334-339 was not a hearing but just a brief conversation that the court initiated when Ms. Rowe-Linn appeared. It ended in about three minutes when Judge Harrison said "I'm not going to go any further with it at this point" and that it would not be considered until the end of trial. (T. 3/339). That is why no one was sworn and further evidence was not presented.

The evidence presented by the Husband at the temporary fee hearing before

Judge Colton months before trial was the same evidence presented at the temporary appellate fee hearing held after trial in which Judge Colton awarded temporary fees. That evidence showed the that the Husband has suffered from a debilitating heart condition and had not worked in three years, he lost his previous business in bankruptcy and he had been living off of loans from his mother.

The prejudice to the Husband in this case was the entry of a 25-page judgment, the product of the Husband trying to represent himself against an aggressive and highly competent family law attorney armed with a cadre of experts and bankrolled to the hilt. The Husband had only one expert whose credentials were assailed at trial, and no legal counsel. The Husband was no match for such an onslaught and got buried in a lopsided trial that resulted in his losing all contact with his only child. That is reversible error under any conceivable standard of review.

II. WHETHER THE FOURTH DCA HAS CREATED CONFLICT WITH OTHER DISTRICTS BY FINDING THAT THE TRIAL COURT DID NOT IMPROPERLY DELEGATE ITS DECISION-MAKING FUNCTION TO COUNSEL?

About half of the Wife's brief filed with the Fourth DCA was devoted to summarizing the Wife's evidence of the Husband's improper character in order to

support the findings made in the 25-page Final Judgment.[6] We do not deny there is evidence in the record to support the Wife's "parental alienation" theory. There is also ample evidence that would support contrary findings, as mentioned in the statement of facts, supra. However, the important point here is that we are not challenging the sufficiency of the evidence to support the findings of fact. The point is that those findings of fact must be made by a judge and not by opposing counsel. Any discussion by the Wife in her brief about her evidence of the Husband's bad character is completely irrelevant to the issues in this appeal.

Although the Fourth DCA below found there was no improper delegation of the trial court's judicial functions, case law from other district courts indicates that most other districts would disagree with the Fourth DCA on this point, and with good reason.

First, it should be made clear that we are not suggesting the practice of submitting proposed orders is inappropriate, nor are we suggesting that a court may never sign a proposed order without making substantial changes to it. The practice of receiving proposed orders has become a practical necessity for the trial courts in this state although it is not followed by the appellate courts. But, as this case

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[6] The Wife's Fourth DCA brief (at p. 10) described the Husband as "controlling, rude, arrogant, abusive, belligerent, odious, demeaning, obnoxious, loud, miserable, insulting, and a liar."

demonstrates, there must be realistic limits placed on this practice in order to safeguard the perception that cases are decided by elected judges. This is especially true in cases involving marital and family law due to the relatively limited nature of appellate review and the great deference that is accorded to trial court findings of fact. See Canakaris v. Canakaris, 382 So2d 1197 (Fla. 1980). See also Falabella v. Wilkins, 656 So2d 256 (Fla. 5th DCA 1995) holding that when the delayed entry of a final judgment raises questions about the independent fact finding of the court, and important issues of child custody lie in the balance, such a judgment cannot be upheld regardless of whether the evidence is sufficient to support it.

Because the entry of a final judgment in any contested divorce case is a solemn judicial responsibility demanding careful attention and thought, several district courts have reversed final judgments that were prepared by counsel and signed verbatim by the court without having first made any rulings from the bench or given any direction to counsel in drafting the judgment.

In White v. White, 686 So2d 762 (Fla. 5th DCA 1997), the appellate court reversed such a final judgment stating:

> It is the court's unique responsibility to make the decisions on the various issues of the case based on the pleadings before it and its view of the evidence presented. The court does not fulfill this responsibility by merely choosing the better proposed judgment or the better option or options

> contained in competing proposed judgments presented by the attorneys. Often the attorneys, without appropriate guiding instructions, will make findings of fact and even rulings of law that the court, without such prompting, would never have considered.

Two years later the Fifth District held the same way in two more cases. In Corporate Management Advisors v. Boghos, 756 So2d 246 (Fla. 5th DCA 2000) the appellate court reversed a final judgment in a non-marital case holding that a trial courts's "uncritical verbatim adoption" of one party's proposed findings of fact, without any changes, belies the appearance of justice and creates the potential for overreaching and exaggeration by the attorney preparing the fact findings.[7] The Fifth DCA expressly noted that an appellate court must consider "a trial court's lack of participation in drafting the final judgment." Boghos supra at 248. Likewise, in Rykiel v. Rykiel, 795 So2d 90 (Fla. 5th DCA 2000)[8] the Fifth DCA reversed a final judgment in a divorce case because the trial court had simply adopted the proposed final judgment "verbatim, blindly [and] without making in-court findings." In other cases also the Fifth District has discussed the same problem. E.g. Polizzi v. Polizzi, 600 So2d 490 (Fla. 5th DCA 1992); Wattles v. Wattles, 631 So2d 349 (Fla. 5th DCA 1994);

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[7] The federal appellate courts have expressed similar concerns. See e.g. Colony Square Co. v. Prudential Ins. Co. of America, 819 F2d 272 (11th Cir. 1987); Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1373 n. 46 (11th Cir. 1997).

[8] Quashed on other grounds at 838 So2d 508 (Fla. 2003).

Peterson v. Brown, 787 So2d 979 (Fla. 5th DCA 2001).

The Third District Court of Appeal is in accord with this and has expressed the same concerns. In Waldman v. Waldman, 520 So2d 87, 89 n.4 (Fla. 3d DCA 1988) the court stated:

> At the conclusion of the proceeding and without indicating what its judgment would be, the trial court requested counsel for both parites to submit written final argument and orders. Thereafter, and without a hearing, the trial court adopted verbatim the final judgment drafted by counsel for Mrs. Waldman. We condemn this practice. We admonish the bench and bar that, particularly in domestic relations cases, findings of fact and conclusions based thereon are of critical importance. When an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming.....The trial court's order is replete with argumentative overdetailed partisan matter.....The better practice, indeed the preferred practice, is for the trial court to indicate on the record its findings and conclusions. The reviewing court deserves the assurance that the trial court has come to grips with apparently irreconcilable conflicts in the evidence...and has distilled therefrom true facts in the crucible of his conscience.....The parties to this action are no less deserving of such assurances.

See also the comments made by other district courts on this subject. E.g. Cornett v. Cornett, 713 So2d 1083, 1086 (Fla. 2d DCA 1998); Scalabroni v. Scalabroni, 807 So2d 793, 794 (Fla. 2d DCA 2002); Kelly v. Kelly, 790 So2d 1185 (Fla. 2d DCA

2001); Cole Taylor Bank v. Shannon, 772 So2d 546, 551 (Fla. 1st DCA 2000).

The Final Judgment in the present case, as in Waldman, more closely resembles advocacy than it does disinterested fact-finding. In particular, the provision in the Final Judgment directing the Wife to advise Adam about what a rogue his father is, hardly comports with Florida law which places an obligation on a custodial parent to encourage and nurture the relationship between the child and the non-custodial parent. See e.g. Schultz v. Schultz, 522 So2d 874 (Fla. 3d DCA 1988). How can it be in the best interest of Adam for his mother to disparage the Husband in an attempt to create an emotional separation in addition to the physical separation?

Unfortunately, the process of providing proposed orders has a tendency to lead to this, which is why the process needs to be circumscribed. The Fourth DCA's scrutiny went as far as to find that there was sufficient evidence in the record to support an order terminating contact between the Husband and Adam. That is not the scrutiny that is needed when a 25-page Philippic entitled "Final Judgment" is signed and filed verbatim in less than two hours after the end of closing arguments after a 17 day trial without the trial court having announced any findings from the bench to guide counsel's drafting of this life-altering order. Sufficiency of the evidence is completely beside the point, especially when the Husband's ability to present his own evidence and to contradict the Wife's evidence was so severely hampered, as discussed under

Point I in this brief. The issue here is not whether the evidence was sufficient to support the judgment, but rather, whose judgment was it?

The focus should be on the degree of participation the trial judge had in effectuating the court's decision-making function, i.e. drafting the order that will end all contact between this father and son. As the Fifth DCA noted in Corp. Mgt. Advisors v. Boghos, supra at 248, the appellate court must consider "a trial judge's lack of participation in drafting the final judgment." Instead, the Fourth DCA below focused on the trial judge's participation in the trial proceedings prior to the entry of the Final Judgment. That was erroneous and contrary to the approach taken by other district courts. It is also somewhat meaningless because a trial judge almost always participates in the trial proceedings over which the judge presides. The issue is whether the judge has truly participated in rendering the order of the court. If the judge has improperly abdicated that ultimate responsibility to counsel, then of what significance is it that the judge sufficiently participated during trial?

The Fourth DCA was led astray after misreading two opinions from the Fifth DCA and then concluding that the Fifth District's earlier line of cases is no longer followed in that district. The Fourth DCA below cited Douglas v. Douglas, 795 So2d 99 (Fla. 5th DCA 2001) and Thomas v. Thomas, 781 So2d 540 (Fla. 5th DCA 2001). Neither of those cases retreats from the Fifth DCA's Rykiel line of cases, in fact,

Judge Sharp, who authored the Rykiel opinion, also authored the Douglas opinion and Judge Peterson was on the panel of all three cases (Rykiel, Douglas and Thomas).

The Douglas opinion merely stated that in Rykiel "there were numerous indicia of the judge's lack of participation and knowledge in the final judgment" whereas the Douglas case involved a higher level of participation which the appellate court found distinguishable from Rykiel. The Thomas opinion also finds Rykiel distinguishable for the same reason. The Fifth DCA in Thomas affirmed the final judgment after finding it to be supported by competent substantial evidence because the appellate court found the trial court in that case did not abdicate its judicial decision-making responsibility. If the Fifth DCA had instead found that the trial court did abdicate its responsibility, the Fifth DCA would not have affirmed the final judgment even though it may be supported by competent substantial evidence.

The Fourth DCA below was in error to read the Douglas case or the Thomas case as a retreat from the earlier line of cases from the Fifth DCA.

The Fifth DCA could not overrule its own line of earlier case law, in any event, except through an en banc proceeding under Fla.R.App. P.9.331. If one three-judge panel purported to overrule another panel on the same court, it would not "overrule" anything. It would only create conflict within the same district as well as among the several districts. There is, in fact, a "split of opinion on this court [the 5th DCA] as

to the propriety of this practice". See Ford Motor Co. Starling, 721 So2d 335, 337n. 4 (Fla. 5th DCA 1998). However, there is a viable line of cases from the Fifth District, as well as from other districts, which cannot be reconciled with the decision of the Fourth District in the present case.

The Fourth DCA's opinion creates confusion and disharmony among the district courts and this is a subject matter that is extremely important to the jurisprudence of this state. This subject is obviously a political hot potato, but every district court has expressed some opinion on it. Those opinions are not in complete harmony although they predominantly express similar concerns and it is most respectfully submitted that the time is ripe for this court to address this subject and provide a clearer level of guidance to trial courts on a state-wide basis. This is a matter that directly affects the public's confidence in the independence of the judiciary.

In the present case, the Fourth DCA affirmed the Final Judgment on the basis that (as stated in the last paragraph of the opinion):

> 1. The trial court had actual knowledge of and participated in the trial proceedings;
>
> 2. The record contains evidence supporting the material findings of fact.

Since both of these factors are irrelevant to the issue and the Fourth DCA's test

is out of kilter with the approach of other district courts, the Fourth DCA's opinion should be quashed.[9]

III. WHETHER THE FOURTH DCA CREATED CONFLICT AND ERRED BY FINDING THAT THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN REFUSING TO APPOINT A GUARDIAN AD LITEM FOR ADAM?

The Fourth DCA mentioned two reasons for rejecting the Husband's argument regarding the appointment of a guardian ad litem for Adam. First, because the Husband belatedly asked for it after trial had already begun; and second because the trial court did not "terminate parental rights" but merely "suspended visitation rights". (See Perlow v. Berg-Perlow, supra at 216). However, the Fourth DCA directed the trial court's attention to §61.401, Florida Statutes, should any subsequent proceedings occur pertaining to custody or visitation.

Section 61.401, Florida Statutes, provides that the court may appoint a guardian ad litem for a minor child in any action involving custody or visitation, but that a

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[9] The appropriate appellate inquiry should instead be whether an appearance of impropriety has so permeated the proceeding as to justify a suspicion of unfairness, or whether the record establishes that the final judgment does not reflect the trial court's independent decision on the issues of a case. See Cole Taylor Bank v. Shannon, 772 So2d 546 (Fla. 1st DCA 2000).

guardian ad litem must be appointed if there is an allegation of "child abuse, abandonment or neglect as defined in Section 39.01." Section 39.01 (2) defines "abuse" to include any willfull act that results in physical or mental harm or that is likely to cause a child's emotional health to be impaired. In this case, the Wife spent 17 days at trial trying to prove exactly that. Considering what the Wife was trying to prove at trial and the findings of fact made by the Final Judgment against the Husband, there is no question that this is a case where a guardian ad litem must be appointed pursuant to Section 61.401, coupled with Section 39.01(2). For the Fourth DCA to simply call the trial court's attention to it is not enough because it is not discretionary. It is mandatory.[10]

The fact that the Husband did not ask the trial court to appoint a guardian ad litem until mid-way into the trial (See T. 11/1287) does not excuse the trial court's failure to appoint a guardian ad litem. For one thing, the "parental alienation syndrome" was not pleaded before trial and, as of just a few months before trial, the Wife was not taking the position that all contact should be ended. The Husband found himself defending against these charges for the first time at the final hearing. For

[10] It should be noted that Adam's therapist, Dr. Ellinger, testified that it was important here for a neutral party, not just the Wife's paid experts, to evaluate both the Husband and the Wife. (R. 14/2418). A guardian ad litem could have caused that to happen and that is just one example of how a neutral party could have played an important role.

someone trying to represent himself, his motion should not be considered too late to address even though it was made during the course of trial.

More importantly, we are not talking about the Husband's interests. We are talking about Adam's interests that the statute seeks to protect, and which the Husband cannot waive by being tardy, even if he was tardy. Since this was not discretionary, a guardian ad litem should have been appointed by the trial court sua sponte even if neither party had asked for it.

Aside from the language of the statute itself, case law from other district courts construing Fla.R.Civ.P. 1.210(b) requires the appointment of a guardian ad litem whenever the child's interests are adverse to the parent's interests. See Mistretta v. Mistretta, 566 So2d 836 (Fla. 5th DCA 1990). The Fourth DCA has itself previously recognized that a parent's interests are considered adverse to the child when the parent seeks to end the child's relationship with the other parent. See Gilbertson v. Boggs, 743 So2d 123, 128 (Fla. 4th DCA 1999).

The Fourth DCA stated this case only involves a suspension of visitation rights rather than a termination of parental rights. From Adam's point of view, that distinction becomes pretty blurred. Regardless of what it may be called, Adam's mother was seeking to end all contact between Adam and his father. Not just visitation but telephone calls, e-mails, videos, indirect greetings through third

persons...everything the Wife's lawyer could think of as he was drafting the Final Judgment. To say this doesn't constitute a sufficient termination of parental rights or a sufficient adversity between parent and child to require (not just permit) the appointment of a guardian ad litem makes very little sense. Even the trial court's Final Judgment itself recognizes that it is "severing the parental ties". (See R. 2494)[11]

The Fifth DCA has held that it is reversible error not to appoint a guardian ad litem before changing a child's surname. Cothron v. Hadley, 769 So2d 1148 (Fla. 5th DCA 2000). The Fifth district has also held it is error not to appoint a guardian ad litem for a child whose mother sought to terminate visitation rights. Harris v. Harris, 753 So2d 774 (Fla. 5th DCA 2000). But, in the Fourth District it is not necessary to appoint a guardian ad litem before severing all ties between a child and his father.

The Fourth District's ruling in this case conflicts with other district courts as well as with the language of the statutes that "require" (not just "permit") the appointment of a guardian ad litem under these facts.

CONCLUSION

[11] The Fourth DCA below cited Hunter v. Hunter, 540 So2d 235 (Fla. 3d DCA 1989) as a case standing for the proposition that a trial court may order child support to be paid by a parent whose visitation rights have been suspended. In that case, visitation was suspended for one year, not ten years.

This case presents an opportunity for this court to resolve several conflicts in Florida law and, at the same time improve the public's perception of the independence of the judiciary, and at the same time correct a horrendous wrong done to an eight year old child and his father. This court should quash the Fourth District's opinion with instructions to reverse the Final Judgment in its entirety and reinstate Judge Colton's temporary custody order entered shortly before trial, and to order the Wife to return Adam to this country and to the jurisdiction of the court. The Husband should also be awarded attorney's fees and suit money to litigate the issues of this case at a new final hearing where he is represented by competent counsel and where Adam is represented by a guardian ad litem. The Husband's separately filed motion for appellate attorney's fees should also be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing document has been furnished by U.S. Mail this 26th day of June 2003 to: **Joel M. Weissman, Esq.** and **Doreen M. Yaffa, Esq.**, Weissman, Yaffa & Desmond, P.A., 515 N. Flagler Drive, Suite 1100, West Palm Beach, FL 33401, counsel for Respondent.

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The undersigned counsel for Petitioner certifies that the size and style of type used in this document is 14 Point Times Roman.

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