IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, WEST PALM BEACH, FLORIDA

CASE NO.: **4D11-3632**

LT NO: **06-4608 FM**

S.M.,
Appellant,

v.

R.M.,
Appellee.

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Initial Brief

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PRELIMINARY STATEMENT

Mother appeals a "Sua Sponte Shelter Order" of Seventeenth Circuit family court Judge Renee Goldenberg. This Court has jurisdiction to review under Fla. R. App. P. 9.030(b)(1)(B) and 9.130(a)(3)(C)(iii). References herein to the Appendix use "App." with labeled number, and page if applicable. References to the Supplemental Appendix use "SA" with labeled number, and page or attached exhibit "Ex." if applicable. Appellant is also called "Mother"; Appellee is also called "Father". The parties' minor child is "child" or "KM". All emphasis is added unless otherwise noted.

FACTS AND PROCEEDINGS BELOW

The appealed Sua Sponte Shelter Order (App.1), ("Shelter Order") was entered October 5, 2011, *about ten minutes into a specially set two-hour family court hearing*. This hearing had been first scheduled July 29, 2011, more than two months earlier, to hear Father's "Emergency Motion to Resume Hearing on Temporary Change of Contact and Access, Supplement Thereto and Other Relief" ("Emergency Motion to Resume Hearing") (App.28), filed July 25, 2011.

Also set to be heard at the same hearing was Mother's Response (App.26) to the Father's instant motion, seeking, *inter alia,* an injunction to prohibit Father's widespread out-of-court dissemination of a custody evaluation report, and asking

for the proceedings to commence at the point at which prior hearings on Father's similar motions making the same allegations and seeking the same relief had been abated several months earlier by the predecessor judge -- before the Mother had been able to put on her witnesses or cross-examine all of the Father's witnesses. (App.26)

Father's instant motion was the latest in a series of repetitive motions styled as "emergency" or "urgent" that he had filed over the prior six months instigated by "parental alienation" suggestions and recommendations contained in a custody evaluation report issued January 13, 2011, by Martha Jacobson, Ph.D. (App.36, ExC)[1] None of Father's motions sought to have the child sheltered. (App.28) (App.26)(App.31)(App.33)(App.34)(SA.5). Proceedings on Father's earlier motions had been abated while therapy was sought for the child. There was no "emergency". There was no evidence of any change in the child or circumstances during this period of time.

The hearing had lasted less than ten minutes before the judge began filling in the blanks of a pre-printed and partially pre-completed[2] "Shelter Order" which happened to be on her desk. The Shelter Order purported to transfer legal and

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[1] This report was never finally admitted into evidence.

[2] Certain findings were already checked off on the form. (App.1)(See Nos. 7 and 9)

physical custody of the parties' seven (7) year old daughter to the Department of Children and Families ("DCF") while simultaneously placing the child -- who previously had resided her entire life primarily with the Mother -- into the "temporary" residential custody of the Father. It also barred all contact between the Mother and child. (App.1)

During the hearing, two lay witnesses were called by the Judge, and permitted to testify briefly as to their opinions, based mostly on hearsay and speculation, regarding purported "mental injury" to the child allegedly caused by the Mother. The Mother was not permitted to cross-examine the witnesses, or to present any of her witnesses who were present, including the child's therapist of longest duration, a child psychiatrist, and a forensic psychologist. (SA.1)

One of the witnesses was relatively inexperienced DCF investigator Matthew Wilcox ("Wilcox"). (App.20- 4, 5, 19-21, 24, 45) Wilcox repeatedly had been told by his superiors that there was "no legal sufficiency" (App.20- 46-49, 75) (App.21, 6) for DCF to take this case, and that it was a family law case. The other witness, Guardian ad Litem Juliette Lippman, Esq., apparently took everything uttered by Wilcox as gospel, and reiterated it. Lippman was asked only three questions during her testimony by the Judge to which she answered, "Yes, your honor." or "I do." to every one. (SA.1- 4)

BACKGROUND

Mother and Father divorced in 2006.[3] The Final Judgment designated the Mother as primary residential parent, with shared parental responsibility and timesharing for the Father of every other weekend, one weeknight, and various holidays and vacation time. (App.36, ExA)

On June 21, 2010, Father filed a petition to modify the timesharing, alleging:

> "...since January 2010, the minor child's previously diagnosed selective mutism went untreated through March 2010. The child is becoming more and more alienated from her father and the Former Wife is becoming more empowered in her improper conduct". (App.37)

Father's petition incorporated an attachment, a previously prepared but unfiled petition for modification dated 6 months earlier (App.37), in which the Father requested reduced child support, equal timesharing, and ultimate decision making over mental health decisions for the minor child, alleging:

> "the minor child is under major distress, caused at least in part by the Former Wife's ongoing conduct and/or own psychological illnesses".

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[3] When the child was 20 months old, the Father claimed in his Petition for Dissolution of Marriage that the Mother put the child to bed too early which "materially interfered with [his] ability to spend quality time" with her and the Mother "obstructs the child from having any exposure to her Hispanic culture and roots." Wife denied those allegations and stated that so long as Husband properly controls his mental illnesses -bi-polar, anxiety, sleep disorders (night terrors) and anger management- with medication and follow up visits to his physicians, she expected him to enjoy open, frequent, and liberal visitation with the child. (SA.12)

On October 12, 2010, prior trial judge Arthur Birken appointed Martha Jacobson, Ph.D. (App.36, ExB) to make a parenting plan recommendation and do psychological evaluations. Her report was completed and faxed on January 13, 2011.

On January 14, 2011, the Father amended his petition for modification. Citing to and attaching the custody evaluation report, (App.36), Father now alleged that the child "has exhibited profound psychological symptoms... and other serious dysfunction". The Father also alleged that "*upon information and belief,* the Former Wife has severely alienated the minor child from the Former Husband..." He asked for sole temporary custody, with supervised visitation or no contact for the Mother, and modification of the child support. (App.36) He also filed an "urgent" motion to have Jan Faust[4] appointed as the child's therapist (App.33), as recommended to him by evaluator Jacobson.

On February 18, 2011, the Father filed a renewed "urgent" motion to have Jan Faust appointed as the child's therapist. (SA.5) (Judge Birken, after hearing four days of testimony in this matter, refused to appoint Jan Faust over the Mother's objection.)

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[4] Jan Faust is a long time friend and referral source for Martha Jacobson and both were involved in creating the "parental alienation emergency" causing the Mother to lose custody in *Schmitz v. Schmitz*, 890 So. 2d 1248 (Fla. 4th DCA 2005).

Of note: the Mother has no "psychological illnesses". (App.39) Neither the Father, nor any other witness in this case ever has specified any described act or omission of the Mother that is supposedly harming the child. Nor has the Mother interfered with the Father's timesharing. (App.19- 22-24) Nor has the Father or any witness in this case claimed to have observed the Mother -- an early childhood educator who lives in a well-kept home (App.20- 84,85)(SA.11) -- by act or omission doing anything inappropriate, harmful or dangerous to the child, herself, or anyone else. (App.20- 91, 93, 94, 100-103)

Commencing upon his receipt of the hearsay document, Father began disseminating the custody evaluation report outside of court to numerous third parties: school and medical personnel, friends, acquaintances and others. (App.35) (App.19- 60-62, 67-69, 72-75) He used it to facilitate staged events and develop witnesses. He found a new need to have police officers attend all timeshare exchanges, and shared it with them. (App.19- 76-77) He made repeated contact with DCF, having investigators come to his home to observe the child while in his care, telling them about the child's upset or frightened behavior at timeshare exchanges, conveniently witnessed by scary armed male police officers. (App.19, pp 76-77)

In January, Father had DCF investigator de Villiers to his home; in later testimony she indicated that her finding of "mental injury" by the Mother was based on the Jacobson custody evaluation report. (SA.6- 193-195) Father later called the DCF Emergency Abuse Hotline after the child had been with him at his home for approximately five hours. (App.19- 40-41). The responding DCF investigator was Matt Wilcox (App.20)

From January 2011 on, the contested custody evaluation report, with its errors, omissions, unfounded speculations, and unsound conclusions not based in fact or psychological research (App.39) was distributed to all of the Father's witnesses, including the two lay witnesses who testified at the below instant hearing. It tainted those witnesses and influenced their opinions and perceptions. This compounded over the months as each new witness also based his or her opinion on information received about the opinions of earlier witnesses. DCF investigator Wilcox based his opinion on the custody evaluation report and the first DCF investigator's conclusions that in turn were based on the custody evaluation report. (SA.6- 191-195)

Cross-examination of the first DCF investigator de Villiers who never met the Mother but made verified findings of abuse reveals the following:

> Q So you basically took parts of Dr. Jacobson's report and inserted them into your own conclusions, correct?

A Correct. I would not be able to verify mental injury without the professional's input of that.

Q And then your recommended disposition mirrors all the dispositions that Dr. Jacobson's does because you took them out of her report, correct?

A Right, because I would agree with it.

Q Did you do anything to verify Dr. Jacobson's report?

A I'm sorry?

Q Did you do anything further to verify Dr. Jacobson's report?

A No. My job is not to question the professionals.

(SA6- 194)

The Guardian ad Litem based her opinion on the opinion of Wilcox. Ultimately, Judge Goldenberg later issued her "Sua Sponte Shelter Order" that is the subject of this appeal based on the Guardian ad Litem's opinion, which was based on investigator Wilcox's opinion and Wilcox's opinion, which in turn was influenced by the first DCF investigator's opinion which in turn was based on the custody evaluation report that never has been admitted into evidence.

From February through April, 2011, a hearing was held before Judge Birken on the Father's various "urgent" or "emergency" motions, taking place over four half-to-full days. (App.5) (App.31) (App.33) (App.34) The Father presented all of

his witnesses, including the first DCF investigator from January who testified that her finding of "mental injury" was based upon the Jacobson custody evaluation report given to her by the Father. (SA.6- 194-195) Before the Mother had opportunity to present her side of the case, Judge Birken interrupted and abated the hearing -- to be resumed later, if necessary -- and ordered the minor child into therapy. (App.5)

On June 15, 2011, the Father submitted to Judge Birken an "Emergency Motion to resume hearing on temporary change of contact and access, etc."[5] On June 17, 2011, Judge Birken unexpectedly recused himself from the case in a *sua sponte* order for reasons unknown to Mother's counsel, but no query has been raised by Father's counsel. (App.29)

On June 19, 2011, the Father had the child for Father's Day. Father had police attend the morning timeshare exchange. Then, after spending almost five hours with the child and his own parents at his home, he contacted the DCF "Child Abuse Hotline." Wilcox came to the Father's home, was shown the custody evaluation report, and became convinced to join Father in a campaign to establish that the Mother was "mentally injuring" the child. (App. 20- 50, 51) On July 25, 2011, the Father again filed his "Emergency Motion to resume hearing on

[5] This was not copied to Mother's counsel who discovered it on or about October 6, 2011, during a review of the court docket. (App. 5)

temporary change of contact and access, etc." for newly assigned Judge Renee Goldenberg. (App.28) The Father sought the following relief:

> *(1) resume the abated hearing for a temporary change of custody,*
> *(2) appoint a guardian ad litem,*
> *(3) order the Former Wife into immediate therapy, and*
> *(4) award Father his attorney's fees.*

The Father's motion was not a pleading comporting with the requirements of the Broward County Unified Family Court Administrative Order on Emergency Motions: it was neither verified, nor certified by Father's counsel as being an emergency nor that it was filed in good faith. (App. 38)

On July 29, 2011, Judge Goldenberg called a non-evidentiary hearing, at which, over the objections of Mother's counsel, she appointed Juliette Lippman, Esq., to be Guardian ad Litem. The judge claimed that she had no choice because "Father's lawyer states that there is a finding of abuse by DCF 7/22/11 awaiting action by this Court." (App.24) She also scheduled the Father's "Emergency Hearing" for September 15, 2011, and ordered the parties to attend mediation beforehand. (App.23)

At the same hearing, the Mother provided Judge Goldenberg with the "Former Wife's Response to the Emergency Motion", explaining that the Father's latest "Emergency Motion" was at least the third similar dramatic motion filed since the issuance of Jacobson's custody evaluation report in January, that it was

not an "emergency", and that the Father has been staging events and developing tainted witnesses. (App.26) Judge Goldenberg's response was to set the Mother's Response to Father's Emergency Hearing to be heard simultaneously with the Father's latest Emergency Hearing. (App.23)

On or about September 14, 2011, without there having been any further hearings or overt communications on the issue, Judge Goldenberg, on her own initiative, and having somehow become aware that the Guardian had not completed her work, had her office inform Mother that she had rescheduled the "emergency" hearing from September 15, 2011, to one hour on October 3, 2011 and mailed an order re-setting the hearing. (App.17)

On September 20, 2011, the Mother filed a "Motion for Extension of Time" to file her amended counter-petition (the case was not yet at issue), and also a separate "Motion to Continue" the rescheduled hearing now set for October 3, 2011, hearing because her expert witness psychiatrist Joel Klass, M.D., was not available on the rescheduled date. Both motions were noticed for hearing on September 27, 2011. (App.15)(App.16)

On September 26, 2011, the Guardian ad Litem sent her report to counsel for the parties and filed a "Notice of Completion of Guardian Report" with the Court. (App.1)(App.12) Upon receiving the Guardian's report, which contained

essentially a unexpected rehash of the Jacobson custody evaluation report speculations, recommendations and observations tainted by the assumption that the Jacobson report was unassailable, Mother filed an "Amended Motion to Continue" the October 3, 2011, hearing. (App.11) The late arrival of the Guardian's report allowed for insufficient time to conduct discovery and failed to allow the minimum 20 days provided for in both the Judge Goldenberg's order of July 29, 2011, and in §61.403(5), Fla. Stat. (2011).

On September 26, 2011, Mother's counsel received an email from noreply@17th.flcourts.org cancelling her previously scheduled hearings of September 27, 2011. (App.13) Upon contacting the J.A. to renotice the hearings for another date that week, Mother's counsel was advised that Judge Goldenberg was unavailable for any hearings the entire week and that a substitute judge was hearing only her uncontested matters. (App.10)

On September 27, 2011, the prescheduled mediation took place with Perry Itkin, Esq., resulting in an impasse. (App.9)

At motion calendar on October 3, 2011, Mother sought a continuance of the October 3, 2011, hearing. With no intervening hearings on the issue and approximately 10 weeks after the court's order appointing the Guardian, the court, however, suddenly determined that the hearing was more of an "emergency" than

the prior ten weeks would have dictated, and that it had to occur with 48 hours, and that the 20 days' time allowed between the time of the Guardian's report and the hearing date required both under §61.403(5), Fla. Stat. (2011) and the Court's own order of July 29, 2011, suddenly no longer applied. She gave the Mother two days, rescheduling the evidentiary hearing to Wednesday, October 5, 2011, and extending the allotted time from one hour to two hours. (App.6)(App.8) She also granted Mother's "Motion for Extension of Time to File her Amended Counter-Petition", allowing her 10 days. (App.7) The case still was not at issue as of the date of the October 5, 2011 hearing.

On October 5, 2011, the hearing began in this matter, just before lunch, and almost a full hour late, as the Judge was returning to or arriving in her office from another location. Judge Goldenberg called and questioned the Father's two witnesses, Juliette Lippman, Esq., and Matt Wilcox, the case worker from DCF. *This was the only evidentiary hearing ever held before Judge Goldenberg in this matter.* Over the objections of Mother's counsel, these lay witnesses were permitted to present their opinions, based on hearsay evidence. Both stated that Wilcox had made "verified findings of mental injury to the child based upon the Mother's alienation". At times in his testimony, Wilcox came close to disclosing that he repeatedly had been advised by the DCF attorneys and his superiors that

there was NO LEGAL SUFFICIENCY to his verified findings of "mental injury". (SA.1, 7-11)(App.20-ExC) The judge appeared to be unwilling to accept this and to be soliciting a way to get around the problem that she wanted to be having a shelter hearing and wanted to issue a shelter order, notwithstanding that DCF had refused to file a petition to shelter the child. (SA.1- 8, 10-13) The judge "overruled" the executive agency's decision[6]. (SA.1- 20)

Refusing to allow the Mother the opportunity to cross-examine either witness, or to present any of her evidence or witnesses, Judge Goldenberg thereupon apparently abdicated jurisdiction, and asked the DCF worker if he wanted her to sign a Shelter Order. (SA.1- 12) Conveniently, right at hand on top of the Judge's desk was a pre-printed form - partially completed with findings checked off (never seen in any family court by Mother's counsel) titled "Sua Sponte Dependency Shelter Order", which the Judge immediately began to write on and fill in. (App.1)

The Dependency Order essentially provides the Father with the relief he requested in his amended petition for modification. (App.36)

SUBSEQUENT BUT RELATED DEPENDENCY PROCEEDINGS SPAWNED BY THE FAMILY COURT'S OCTOBER 5, 2011 ORDER

[6] Actually, it appeared that the judge conflated a custody order under Fla. R. Juv. P.. 8.300 with a shelter order, because she made reference to a mandatory hearing within 24 hours -- which would be a shelter hearing following custody. (SA.1- 19)

The day after entry of the Shelter Order, on October 6, 2011, an *ex parte* proceeding (for which neither Mother nor her counsel received notice) was held in the Palm Beach County Juvenile Court before Judge Karen Martin. (SA.2) Father, his counsel, and Guardian ad Litem Juliette Lippman appeared (somehow having been provided notice of the hearing) along with an attorney for DCF. DCF took the position that this was merely a family court order transferring custody from one parent to the other, and not a dependency situation. (SA.2- 6)

Earlier that day, prior to the hearing in Palm Beach County on October 6, 2011, Father made another call to the DCF Child Abuse Hotline. (SA.10)

On October 7, 2011, DCF confirmed in writing that they would not be filing a petition for dependency. (SA.3) Father then filed his own petition for dependency.[7] (App.4)

STANDARD OF REVIEW

To the extent that this court treats this non-final appeal from family court proceedings as a petition for writ of certiorari from dependency proceedings (as it is not clear), the standard of review to be applied is whether the trial court departed from the essential requirements of law by showing "that the trial court made an

[7] The Father's Petition was "served" upon the Mother this past Friday by leaving same open and apparent at the front desk at the busy medical clinic where she works during her absence.

error so serious that it amounts to a miscarriage of justice." *State v. Smith*, 951 So.2d 954, 958 (Fla. 1st DCA 2007)

An adjudication of dependency must be based upon substantial competent evidence in the record below. *AMT v. State of Florida*, 883 So. 2d 302 (Fla. 2d DCA 2004) A transfer of child custody under Chapter 61, Fla. Stat. must be based on substantial competent evidence and is reviewed under an abuse of discretion standard. *Alois v. Alois*, 937 So. 2d 171 (Fla. 4th DCA 2006); *Vazquez v. Vazquez*, 922 So. 2d 368 (Fla. 4th DCA 2006).

The trial court's factual findings in its Shelter Order must be sustained if supported by competent substantial evidence. *See Stephens v. State*, 748 So. 2d 1028, 1031-32 (Fla. 1999); *Levey v. D'Angelo*, 819 So. 2d 864 (Fla. 4th DCA 2002). The trial court's legal conclusions are reviewed under a de novo standard of review. *See, e.g., Jackson v. State*, 925 So. 2d 1168 (Fla. 4th DCA 2006).

SUMMARY OF ARGUMENT

This Court, as well as the other Florida District courts, repeatedly has emphasized, in case after case, due process principles to be adhered to prior to an emergency family court order changing child custody under Chapter 61, Fla. Stat. (2011) as well in connection with the emergency removal of children from their homes pursuant to shelter hearings under Chapter 39, Fla. Stat. (2011).

In this case, both lines of precedent are implicated. This case has managed to violate the Mother's due process rights repeatedly in multifarious ways. At the proceedings below, the family court appears to have attempted an end run around. Chapter 61 and its interpretive case law, by characterizing the situation before it (inappropriately, it is argued) as a Chapter 39 dependency case. In attempting to effect what could not be accomplished without a substantial evidentiary hearing in family court, this case was recast by the family court judge as a dependency case, but then, ironically, ran afoul of the due process requirements inherent in child dependency cases.

Appellant Mother's position is that this case should be decided on the threshold issue that it is simply not a Chapter 39 case. The facts do not fit within that statute. It is not a case properly warranting government intervention to take custody of a child. It is, rather, a garden variety family court case alleging "mental injury" (via "parental alienation") of a child that repeatedly has been speculated to have been caused somehow by the Mother, albeit without any evidence or even allegations of any requisite described act or omission of the Mother to be hypothesized to have caused the "mental injury". There is not even evidence that, whatever the condition of the child, she has been "injured".

Given that this Court appears to have requested a briefing on the due process

requirements in shelter hearings under Chapter 39 (and in particular the apparent inconsistency in the Fla. R. Juv. P.. 8.305(b)(3) and the due process requirements of §39.402(8)(c)(3), Fla. Stat. (2011) and to address the possibility that what transpired at the proceedings below was in fact a Chapter 39 shelter hearing (and not a Chapter 61 hearing), this brief discusses the issues from that perspective as well.

POINT I

THE TRIAL COURT DENIED MOTHER'S RIGHT TO DUE PROCESS BY CIRCUMVENTING CHAPTER 61 UNDER THE GUISE OF A "SUA SPONTE" CHAPTER 39 SHELTER HEARING .

This court and its sister courts in Florida repeatedly have held, in adjudicating appeals of family court child custody (timeshare) issues, that the custody of a child may not be changed without due process, defined as adequate notice and an opportunity to be heard. *See, Cervieri v. Cervieri,* 814 So. 2d 528 (Fla. 4th DCA 2002)(Trial court's attempt to quickly and efficiently resolve sensitive family issues ran afoul of basic procedural requirements: notice and an opportunity to be heard... essential in hearings where a trial court changes the custody of minor children.) See also, *Montemarano v. Montemarano,* 792 So. 2d 573 (Fla. 4th DCA 2001); *Busch v. Busch*, 762 So. 2d 1010 (Fla. 2d DCA 2000);

Roque v. Paskow, 693 So.2d 999 (Fla. 4th DCA 1997).

The Due Process clauses of the Fifth and the Fourteenth Amendments provide that the government may not deprive people of life, liberty, or property without due process of law. U.S. Const. amend. V, XIV. The government must respect the essential rights of its citizens while exercising its authority, and those rights include individuals' fundamental liberty interests as parents in the care, custody, and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982).

Article I, section 9 of the Florida Constitution provides a similar guarantee that "no person shall be deprived of life, liberty or property without due process of law." In state family courts, the due process rights of parents involved in child custody disputes involve several procedural rights including adequate notice and adequate hearing. The concern is for fundamental fairness. In child custody cases, the concern also is to assure that the best interests of the child have been established, and this issue, when in dispute, would dictate a full and fair adversarial hearing. The precept of fundamental fairness implicates how courts deal with guardians ad litem, *ex parte* communications with a party, in camera interviews of children, discovery transparency, and evidentiary issues.

The "notice" requirement of the due process definition is established law. It

can be violated in a number of ways, such as insufficient notice that a proceeding is going to be held, or insufficient notice of issues to be heard at the proceeding. *E.g.*, in *Bainbridge v. Pratt*, 68 So. 3d 310 (Fla. 1st DCA 2011) the appellate court held that the trial court may not order an annual, rotating time-sharing plan where neither parent requested such a plan in the pleadings, nor argued for the plan at the final hearing.

(Of note, the court's primary basis for reversal in *Bainbridge* was that "the bare assertion made by the trial court" about what was in the "best interest of the minor child" simply did not fly where there was no evidence to support the assertion. In the instant case, the Sua Sponte Shelter Order shares with the *Bainbridge* court's order the defect of conclusory opining in the absence of evidence.) Another example of many: in *Ryan v. Ryan,* 784 So.2d 1215 (Fla. 2d DCA 2001), due process was held to have been violated when custody and visitation rights were terminated based upon the father's petition that did not request such relief or give the mother notice that the trial court could take such action.

Similarly, it is established law that due process requires a meaningful opportunity to be heard, which includes both offering and rebutting evidence. In *Pierce v. Tello,* 868 So. 2d 1253 (Fla. 4th DCA 2004), the trial judge violated the

father's due process rights when she suspended the father's contact with his child based on an *ex-parte* faxed lab report stating that he had tested positive for illegal drugs. In *Roque v. Paskow,* 693 So.2d 999 (Fla. 4th DCA 1997), an order modifying temporary custody following an "emergency motion" violated the mother's due process rights to notice and an opportunity to be heard when she was not afforded adequate prior notice or the opportunity to present evidence to rebut the claims made against her.

In *Albert v. Rogers,* 57 So. 3d 233 (Fla. 4th DCA 2011), this Court reversed a trial court's modification of timeshare for multiple violations of due process, stating:

> She complains that the court relied on its independent investigation of the facts of the case in making its determination, and the court further erred by modifying existing visitation provisions without the issue being properly raised in pleadings, noticed for determination, or litigated below, and without there being any evidence that any change would be in the best interests of the children. We agree that the court erred, and reverse the order of contempt and modification of visitation.

Numerous Florida cases have noted that due process involves not merely being present and able to talk at a hearing, but also that a party have reasonable opportunity to do discovery and obtain evidence beforehand, i.e. to prepare to be heard, *e.g. Schmitz v. Schmitz,* 890 So. 2d 1248 (Fla. 4th DCA 2005); *Robinson v. Robinson,* 713 So. 2d 437 (Fla. 2d DCA 1998); *Miller v. Miller,* 671 So. 2d 849

(Fla. 5th DCA 1996); *Crifaci v. Crifaci*, 626 So. 2d 287 (Fla. 4th DCA 1993); *Fredericks v. Fredericks*, 575 So. 2d 808 (Fla. 4th DCA 1991); *Clayman v. Clayman*, 536 So. 2d 358 (Fla. 3d DCA 1988); *Kern v. Kern*, 333 So. 2d 17 (Fla. 1976).

Even an alleged "emergency" ordinarily is insufficient under Chapter 61, Fla.Stat. and related Florida family laws to violate due process. *E.g.* in *Loudermilk v. Loudermilk*, 693 So.2d 666 (Fla. 2d DCA 1997), the entry of an emergency order without notice to the father deprived him of his procedural due process rights. *See, e.g., Pope v. Pope*, 901 So. 2d 352 (Fla. 1st DCA 2005), in which the husband was improperly denied an evidentiary hearing when the trial court extended an order of protection.

When a true emergency exists, for situations imminently of threat to life and limb, recognizing the inadequacy of criminal prosecution after the fact, the Florida legislature and courts have taken pains to fashion narrow exceptions to allow the government to act swiftly, weighing the relative risks of harm, and to hold due process hearings later. One of these exceptions is the ability of the state to take a child into emergency custody pending a shelter hearing. But this is proper only *if* there is a true emergency.

Nothing in Florida Statutes Chapter 39 contemplates or permits a trial court

in the midst of family law litigation under Chapter 61 to conduct an unnoticed, unplead "sua sponte shelter hearing" like the one below. Unlike *all* of the reported decisions on the issue of due process in shelter hearings, no petition was filed or pending. This was not an emergency situation such as when the police are called and a parent is arrested. At the July 29, 2011 status conference, the trial court had the very same information about the DCF "verified finding of mental injury" that it received at the October 5, 2011, hearing, but ordered the parties into mediation, and set a hearing date for nearly two months later, which the judge later extended on her own while the Guardian ad Litem "investigated".

What constitutes an "emergency" in domestic proceedings requiring immediate court action was set forth by this court in *Stanley-Baker v. Baker*, 789 So. 2d 353 (Fla. 4th DCA 2001). It was reiterated by reference in *Schmitz v. Schmitz*, 890 So. 2d 1248 (Fla. 4th DCA 2005). (*Schmitz* coincidentally also involved an asserted "parental alienation" emergency sparked by the custody evaluation of Martha Jacobson, Ph.D. -- and the law firm of Guardian ad Litem Lippman in the instant case was then counsel for the father in *Schmitz* who asserted the "emergency"). In *Stanley-Baker*, this Court reversed the trial court's "emergency" change of custody based on the claim that the mother had withdrawn the child from counseling, causing her to fall behind academically and to miss

needed psychological treatment:

> "This and other courts have held that only under **extraordinary circumstances** may a trial court grant a party temporary custody of a child without affording prior notice to the opposing party **or an opportunity to be heard**... This court has explained that a true emergency situation might arise where, for example, a child is threatened with **physical** harm or is about to be improperly removed from the state."

Id. at 355.

In the instant case, Appellee Father has been building his timeshare modification case by repeatedly calling the DCF hotline, as well as by engaging police (App.19- 77) and DCF investigator involvement as a means to create the appearance of evidence upon which to modify the parties' established timesharing plan. It would seem that this inspired the trial court, below, to use Chapter 39, Fla. Stat. as a creative way to get around the inconvenient, time-consuming due process requirements of adjudicating the parents' disagreement in proceedings under Chapter 61.

Thus, on October 5, 2011, the Honorable Renee Goldenberg effectively abdicated jurisdiction as a family court judge, put on the hat of a DCF official, and took the child into state custody under the guise of the Sua Sponte Shelter Order being appealed. In one fell swoop, this judicial interference with the discretion of a state executive agency moved venue of the case to another county, instantly

cleared part of her docket, effected a transfer of child custody to the Father without having to bother with hearing evidence or determining what was in the child's interests (let alone *best* interests), and transmogrified a family court hearing -- without prior notice to the Mother, and without granting the Mother opportunity to be heard -- into a Chapter 39 dependency case.

This case may be reversed on the grounds that this was an overstepping denial of due process, and an abuse of discretion. There was no evidence of any "emergency" involving imminent harm to the child that would warrant this kind of immediate summary removal of the child from her home and the cutting off of all contact with her Mother, her primary caregiver since birth. Had there been, DCF supervisors would not have opined (contrary to the very motivated DCF worker Wilcox) that the case was "low risk" (App.20ExC), and DCF attorneys would not earlier have declined to file a dependency petition or told Wilcox that there was no legal sufficiency for such action. (App.20ExC) Moreover, someone, somewhere along the line would have been able to allege at least one specifically described bad act or omission committed by the Mother that supposedly was placing the child at imminent risk of "mental injury."

Ultimately, sending these proceedings to the juvenile court wastes judicial resources that are needed to protect children in cases involving real emergencies,

not cases of specious conniving or posturing by a parent seeking to manufacture advantage in a timesharing dispute. Public policy and considerations of judicial economy support that the appropriate forum for these issues are family court modification proceedings. "To hold otherwise only encourages conflicts and duplication of proceedings..." *In the Interests of L.S., a child,* 592 So. 2d 802 (Fla. 4th DCA 1992).

POINT II

MENTAL INJURY WITHOUT AN IDENTIFIED ACT OR OMISSION IS NOT APPROPROPRIATE FOR CHAPTER 39 PROCEEDINGS.

This court in *Baker v. State*, 980 So. 2d 616 (Fla. 4th DCA 2008) noted that the Florida legislature did not define "mental injury" as merely emotional consequences, but as:

> "injury to the intellectual or psychological capacity of a child," that is confirmed by a "discernable and substantial impairment in the ability to function within the normal range of performance and behavior." §39.01(41), Fla. Stat.

Inherent in this statement is the assumption that there exists some act or omission -- or at least some described causative condition or circumstance, culpable or not -- from which consequences, in this case "mental injury", may flow. *See, e.g., AMT v. State of Florida,* 883 So. 2d 302 (Fla. 2d DCA 2004)(Establishes a two prong

test for abuse: first, a wrongful act or omission must be established and second, direct consequences to the children flowing from that act or omission.) There is a complete dearth of cases under Chapter 39 involving the subject of presumed "mental injury" to a child in the absence of an existing established, alleged, or merely hypothesized act, omission, or condition with reference to which the "mental injury" can be discussed.

The *Baker* case, as have many other cases involving either Chapter 39 or criminal proceedings involving allegations of "mental injury" to a child, focused on whether the state had provided adequate evidence of the "mental injury" following an identified act. *See, e.g., Burrows v. State*, 62 So. 3d 1258 (Fla. 3d DCA 2011) (The analysis of "mental injury" comes into discussion only because there has been an established act that could or may have caused the "injury".)

Many of the cases in which "mental injury" is the subject of the appeal -- and what it is, or whether it exists or can be expected to follow from a particular act, and so forth -- consequently are criminal cases. *See e.g., King v. State*, 903 So. 2d 954 (Fla. 2d DCA 2005); (Child abuse is defined as intentionally inflicting physical or mental injury, committing an intentional act that is reasonably expected to result in physical or mental injury, or actively encouraging any person to commit such an act.) These cases have discussed whether the term will withstand

a challenge for vagueness, noting that a valid statute must provide persons of common intelligence and understanding with adequate notice of the proscribed conduct.

The Florida Supreme Court, in *Dufresne v. State*, 826 So. 2d 272 (Fla. 2002), found "mental injury" to be adequately defined under the statutes:

> ...the definition of "mental injury" now found in chapter 39 is a limiting definition, as opposed to a broad definition, which benefits the defendant. Thus, mental injury, as defined, *will be present only in limited circumstances, thereby discouraging arbitrary and discriminatory enforcement.*

For purposes of due process fundamental fairness, the first "limiting circumstance" would have to be that "mental injury" cannot be found for purposes of criminal law or Chapter 39 proceedings in the absence of a clearly defined act or omission. Thereafter, it may remain open to argument and evidence whether there was or reasonably could be a resulting "injury" from the claimed or proved act or omission, whether "mental injury" reasonably could be expected to flow from the act or omission, or the child is at risk of "imminent" or continuing "mental injury", whether or not an apparent "mental injury" was not an "injury" in fact but an organic or biological condition, whether an observed behavioral or cognitive or emotional state in a child was preexisting, or caused or aggravated by other influences, and so on.

But at the very least, in order for the state to point the finger at an individual as the causative agent, and either file criminal charges or remove an individual's child from him, some act or omission must be described with reasonable particularity such that it would "provide persons of common intelligence and understanding with adequate notice of the proscribed conduct". In this case, that has not been done.

There have been intermittent conclusory statements or speculations by Appellee Father in his pleadings, by the custody evaluator, and by the DCF investigators of "parental alienation". This theoretical, problematic and highly unsettled psychological construct (App.39) is difficult enough in family law he-said/she-said cases. (*Res ipsa loquitur*, the child doesn't like a parent; therefore the other parent must have done something to cause this.) It is difficult because the observed circumstance may or may not have been caused by any number of things. (App.39) Assumptions cannot be made, and evidence needs to be taken. A mental condition also not an "emergency" unless there is risk of imminent harm to life or limb to oneself or others. At issue in this case is the following, described by Father in his deposition of August 10, 2011:

> All I want is KM to hug me and kiss me again and say "Daddy, I love you. Daddy, I miss you", like she does with her mother every single day. That is what I want. That is why I'm here. And that is why we're going to keep spending money on this. (App.19- 71)

It is beyond the scope of this brief to go into whether or when it may be appropriate, in a family court setting, following a full and fair hearing, for a court to find, even in the absence of a demonstrated wrongful or harmful act or omission by one of the parents, that a child's interests might be better served in a custody placement with the other parent. In any event, that is a Chapter 61 proceeding, and these decisions are made on the child placement factors set forth in that statute. From the Father's deposition:

> Q Never did anything?
>
> A Never, show me, show me, show me, Ms. Macci. Show me that because I raise my voice a couple times that that's why, you know, this situation is so tragic and so severe that because I raise my voice a couple times all of a sudden KM just decided, she woke up one day and said, "I'm not going to speak to my father anymore. I'm going to hate him and his family and friends."
>
> Q It's not she just woke up one day. This has been an ongoing process that you felt that KM was disassociating herself since she was in preschool in 2008, correct?
>
> A Correct.

(App.19- 72)

In Jones v. AW, LJ and TJ, 519 So. 2d 1141 (Fla. 2d DCA 1988), the trial court's adjudication of dependency was reversed in a matter in which the underlying facts indicated that the children suffered intense adverse emotional turmoil and consequences from their parents' ongoing custody dispute and sexual

abuse allegations. The *Jones* court found those facts to be *insufficient* to declare the children dependent under Florida law. *Id.*

"Parental alienation", as a theoretical construct, or belief with regard to what one is observing in a family dynamic, or as a claimed situation in which a child "hates" one of the parents, cannot be a presumptive basis for "mental injury" under Florida law. The concept is still under construction. It is the subject of debate and disagreement in the psychological literature. It does not encompass any particular behavior or outcome. "Parental alienation" as a description is still in float; the description broadly includes many different kinds of family situations, behaviors, speech, personalities, circumstances, problems and outcomes, resulting from numerous causes. The definition is unsettled.

The psychological literature has strained, unsuccessfully to date (albeit there are various "camps" of thinking), to describe the concept consistently, and to eliminate situations in which a child's behavior is justifiable, or a normal or expected reaction to circumstances, or caused by unrelated physical, emotional or developmental factors. There is much disagreement, because if there is no consensus as to what a thing "is", there can be no discussion of what causes it or what it causes. So no consensus exists as to whether the phrase necessarily includes only situations that will result in short- or long-term developmental harm

to a child, or by what empirical means we can make that determination. There is even less consensus when "parental alienation" or "estrangement" is put forward hand-in-hand with the belief that it is the result of or the cause of "mental injury". This belief is even more tenuous when it is not founded upon evidence of any described acts or omissions of one of the parents.

Claims of "parental alienation" or "estrangement" from a parent, or misbehavior or emotional difficulties of any sort, only in the presence of one parent, cannot be a basis for presuming "mental injury" under Chapter 39. Even an alleged (albeit unproved) "discernable and substantial impairment in the ability to function within the normal range of performance and behavior" -- *supposedly occurring in this case only when the child is in the care of her Father* -- is not adequate to point a finger at the Mother, claim she must have caused it, and institute dependency proceedings against her. Perhaps the Father did something to cause it. Or maybe it's not an "impairment" at all, not what it appears to be.

Father's claims have grown more and more extreme with each pleading, from his original (App.37), to the petition he filed right after he received the Jacobson custody evaluation report (App.36), to his most recent (SA.4), the "Verified Petition for Dependency", in which he fails to mention that it was he himself who called in the DCF reports -- *while the child was with him and the*

Mother was nowhere around. If a DCF investigator observed the child crying while in the care of her Father, he still would not have seen the child "crying uncontrollably for days" or "refusing to move her bowels". Claims originating from the Father, unsupported by any independent evidence have been adopted and repeated. And no witness has observed the Mother doing anything that could cause such behaviors.

An apparent mental or behavioral condition, standing alone without any nexus to a wrongful act or omission (described such that persons of common intelligence and understanding have adequate notice of the proscribed conduct), cannot be defined as "mental injury", or be the basis for a Chapter 39 dependency case.

POINT III

THE HEARING AND ORDER BELOW FAILS TO COMPORT WITH THE REQUIREMENTS OF CHAPTER 39 IN A MULTITUDE OF WAYS, INCLUDING THE COMPLETE DENIAL OF DUE PROCESS.

In *LMB v. DCF*, 28 So. 3d 217 (Fla. 4th DCA 2010), a dependency judge entered a Shelter Order finding probable cause to believe that the child was dependent (abused, neglected or abandoned), basing its findings upon the four corners of a verified shelter petition filed by DCF, as well as the investigator's

testimony during the hearing, sheltering the child with the father. The child had been in the custody and care of the mother since birth, and the father had a pending paternity case seeking majority timeshare, similar to the way Appellee Father appears to be using DCF in this case.[8]

The court in *LMB v. DCF* held a shelter hearing and, as in the case at issue, refused to allow the mother to testify or to refute any of the allegations, repeatedly hushing up the mother's counsel. (SA.1) This court recognized that there were important issues at stake, capable of repetition yet evading review:

> The Florida Legislature has provided parents with a statutory right to present evidence at shelter hearings. §39.402(8)(c)3., Fla. Stat. (2009) (providing that at a shelter hearing, the court shall "[g]ive the parents or legal custodians an opportunity to be heard and to present evidence"). *See also* §39.402(5)(b)1., Fla. Stat. (2009) (providing that parents must be given notice that "[t]hey will be given an opportunity to be heard and to present evidence at the shelter hearing"). *LMB v. DCF*, 28 So. 3d at 218.
>
> This Court further stated (*LMB v. DCF*, 28 So. 3d at 219):
>
> In 1990, the legislature provided a statutory right for parents to present evidence at shelter hearings. Ch. 90-306, § 5, Laws of Fla. (adding the following language to section 39.402(8)(a): 'The parents or legal guardians of the child **shall** be given an opportunity to be heard and to present evidence at the detention hearing.'). The statutory right clearly controls over any perceived conflict within the language in the rule. The statutory right to be heard and to present evidence is

[8] §39.01(29), Fla. Stat. (2011) "False Report" means a report of abuse, neglect, or abandonment of a child to the central abuse hotline, which report is maliciously made for the purpose of: ...(c) Acquiring custody of a child; or (d) Personal benefit for the reporting person in any other private dispute involving a child.

> buttressed by notions of procedural due process: a parent should have a meaningful opportunity to be heard on the key issue of the "need for removal". *See J.P.*, 875 So. 2d at 718 ("Section 39.402 and rule 8.305 afford parents due process in judicial proceedings in matters involving the State's temporary removal of children from the home.").

A juvenile dependency proceeding has the potential to substantially affect the fundamental right of association between parent and child. As such, the courts and legislature have been zealous in guarding the protections afforded to parents in such proceedings such as due process and the right to counsel. §39.001, Fla. Stat. (2011) provides that one purpose of Chapter 39 is:

> To provide judicial and other procedures to assure due process through which children, parents, and guardians and other interested parties are assured fair hearings by a respectful and respected court or other tribunal and the recognition, protection, and enforcement of their constitutional and other legal rights, while ensuring that public safety interests and the authority and dignity of the courts are adequately protected.

§39.013, Fla. Stat. (2011) requires that parents must be informed of their right to counsel at every stage of dependency proceedings, and are entitled to appointed counsel if they are unable to afford one. The right to counsel is rendered meaningless if counsel is silenced by the court, and prevented from doing cross-examination or submitting evidence.

Fla. R. Juv. P. 8.305(b)(4) provides "at the hearing, all interested persons present shall have an opportunity to be heard and present evidence on criteria for

placement provided by law." *Also see, LMC v. Dep't of Children & Families*, 935 So. 2d 47 (Fla. 5th DCA 2006).

Fla. R. Juv. P. 8.655(3) provides, "At the [shelter] hearing all interested persons present shall have an opportunity to be heard on the criteria for placement as provided by law."

Fla. R. Juv. P. 8.305(b)(2) provides that in shelter proceedings "the court shall conduct an informal hearing", and subsection (b)(3) provides that "The issue of probable cause shall be determined in a nonadversary manner applying the standard or proof necessary for an arrest warrant." Subsection 803(b)(5) provides that "the court may base its determination on sworn complaint, testimony, or affidavit, and may hear all relevant evidence... to the extent of its probative value even though it would not be competent at an adjudicatory hearing".

These rules are not intended to limit information, suppress evidence, or abrogate due process, but to facilitate the obtaining of information. As Judge Canady explained in *In the Interest of JP, GP and JP, children. GP v. Family Continuity Program*, 875 So. 2d 715, 718 (Fla. 2d DCA 2004), although a State agency *could* possibly meet its burden of establishing probable cause to shelter a child through written submissions, **an informal and nonadversarial hearing does not mean that a parent is barred from responding or presenting his or**

evidence, or that due process is abrogated. The Second District Court reversed the trial judge who had refused to hear argument from the parents' counsel, and refused to hear evidence or testimony from the parents' witnesses. It affirmatively held that **parents have the right to be heard and to present evidence at a shelter hearing.** *Id.* at 719. Judge Canady noted that had it been the intent of those Rules to deny parents the right to be heard, there would be no need for a shelter hearing at all. *Id.*

KG v. DCF, 66 So. 3d 366 (Fla. 1st DCA 2011) held that the denial of the Mother's right to be heard (and the silencing of counsel) during a shelter hearing is a "miscarriage of justice" and a denial of due process. *Id.* at 368, 369, stating:

> Caselaw has consistently acknowledged that failing to honor a parent's right to be heard at a shelter hearing is a violation of due process. *See L.M.C. v. Dep't of Children & Families*, 935 So. 2d 47 (Fla. 5th DCA 2006); *S.M. v. Dep't of Children & Families*, 890 So. 2d 552 (Fla. 5th DCA 2005); *In re J.P.*, 875 So. 2d 715, 718 (Fla. 2d DCA 2005). In particular, "[i]f a parent is not permitted to be heard at the hearing, and only the [D]epartment's evidence will be considered, then the one—sided hearing would be a pointless formality. This is clearly not what the statute or rule contemplates." *L.M.B. v. Dep't of Children & Families*, 28 So. 3d 217, 219 (Fla. 4th DCA 2010).

There was no testimony (required by Fla. R. Juv. P. 8.305) as to why all contact with the Mother was the last restrictive means of protecting the child. There was no testimony as to why the child's home situation was a "substantial and immediate danger". There was no testimony as to the reasonable efforts made by

DCF to prevent or eliminate the need for removal of the child from the home (no efforts were made). Mother was not given notification of the **time, date, and location** of the next dependency hearing or told of the importance of the parties' active participation in all subsequent proceedings and hearings.

Instead, Judge Goldenberg informed the Mother's counsel, that these were now dependency proceedings, "and I understand that you are a *family* lawyer." (SA.1- 18)

The hearing and Shelter Order violated the statutory requirements of §39.402, Fla. Stat. (2011) in a multitude of ways:

1. NO NOTICE THAT THIS WAS TO BE A SHELTER HEARING: Subsection (5)(b) requires that parents be given prior **written** notice of the shelter hearing. No such prior notice – oral or written – was given. This was a "sua sponte shelter hearing" held when the parties came to court for a hearing on a motion in a family law case under §61, Fla. Stat. (App.1)

2. NO STATEMENT OF PROCEDURES: Subsection (3) requires that parents be given a statement setting forth a summary of procedures involved in dependency cases. Instead the judge asked: "Do we have a statement of procedures for the dependency court in Palm Beach? I don't think we do." Then Wilcox offered, "I can basically state how it will go." -- and talked about the child

going to DCF headquarters, and being photographed and fingerprinted. The Judge interrupted to ask if she could place the child with the Father. (SA.1- 14-15)

3. NO ADEQUATE NOTICE OF NEXT HEARING: Subsection (5)(a) requires that parents be given notice of the date, time and location of the next hearing. This was never done. The only information provided was that it would be in a Palm Beach County dependency court within 24 hours.

4. MOTHER WAS DENIED OPPORTUNITY TO PRESENT EVIDENCE: Subsection (5)(b)(1) states that the parents will be given an opportunity to be heard and to present evidence. Subsection (8)(c)(3) provides that the court shall give parents an opportunity to be heard and present evidence. Mother was not permitted to cross-examine the witnesses called by the trial judge, to present evidence, or to call her own witnesses. (SA.1)

5. MOTHER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL: Subsection (5)(b)(2) states that parents have a right to be represented by counsel. Mother's counsel repeatedly was hushed by the trial judge, not permitted to present evidence or call witnesses, and denigrated by the judge as being a "family lawyer", not a "dependency lawyer". (SA.1)

6. THE COURT WAS NOT APPROPRIATELY INFORMED BY DCF: Subsection (8)(f) requires the department to tell the court about various matters

(1)-(4) including past or current injunctions for domestic violence. Neither Wilcox nor Lippman informed the court of the prior domestic violence injunction against the Father. (SA.8)

7. NO VISITATION WAS ESTABLISHED: Subsection (9) requires that the court grant visitation rights absent **clear and convincing evidence** showing that visitation is not in the best interest of the child. The court instead summarily ordered **no contact** between Mother and child with **no evidence** at all supporting that determination.

8. NO TESTIMONY REGARDING SERVICES: Subsection (10)(a) requires the order to contain a written determination of whether the department has made a reasonable effort to prevent or eliminate the need for removal from the home that must include a description of the specific services which, if available, would prevent the removal. The court made a finding that "**no services were available**" without any testimony being offered by DCF on the issue.[9] (App.1)

9. THE CHILD WAS PLACED IN THE SOLE CUSTODY OF THE FATHER WITHOUT A HOME STUDY, AND WITH NO INQUIRY

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[9] The finding that no services were available was apparently made before the hearing even began because the boxes appear to have been checked off [No.9] and typed into the pre-printed form order sitting on the Court's desk which she only hand wrote on. (Note: Under No. 8, the box was also checked off that the child has no parent available to provide custody and care.) (App.1)

REGARDING WHETHER THIS WOULD BE IN HER BEST INTERESTS: No home study was performed before placing the child in the Father's custody despite the Guardian's testimony under oath that she performed a home study evaluation. (The GAL report makes no reference that a home study was performed (App.1) and no home study was ordered by the court to be performed prior to the hearing.) (App.24). *See*, Ch. 65C-30.001(62) F.A.C.

10. NO INFORMATION WAS GIVEN TO MOTHER REGARDING WHAT SHE SUPPOSEDLY DID WRONG: (We still don't know!) The Shelter Order below was, most significantly, deficient in failing to specify the facts forming the basis for the Court's conclusion of "mental injury", or how the mother supposedly caused it. The Shelter Order below was, most significantly, deficient in failing to specify the facts forming the basis for the Court's conclusion of "mental injury" or the mother's purported parental alienation.

An Order of Dependency was reversed by the court in *In the Interest of LT v. The State of Florida,* 532 So. 2d 1085 (Fla. 3d DCA 1988) in which there was a long history of mental health issues of both parents, and opining by court psychologists that the children would be a risk of neglect due to the parents' "impaired problem solving" or "impaired judgment" - and "vague and conclusory allegations" contained in the petition. Rejecting the opining and future

prognostications of a psychologist, the court stated, "If psychiatric predictions of future dangerousness may be *inaccurate* far more often than not, it scarcely requires a quantum leap in reasoning to conclude that mental health professionals may not be able to accurately predict prospective neglect [or abuse] in a dependency setting." *Id.* at 1090. The court further stated:

> [T]he mere fact that parents are not infallible and often err in the course of child rearing does not entitle the state to intervene. For the state to deprive parents or custody of their natural child, something more -- indeed according to the statutes a great deal more -- is required than a generalized conclusion that the parents lack the requisite "skills" to bring up a child."

In this case, the court relied upon apparent conclusions, predictions, and the opining of two lay witnesses to come to the conclusion that: "Child is in danger - the circumstances producing or likely to produce harm of a continuing nature." (App.1)

While Wilcox merely stated he made a "verified finding of abuse" based on parental alienation -- no details whatsoever were ever elicited by the trial court from Wilcox. (SA.1- 8) Wilcox then claimed that "the propensity for them to do it [parental alienation] again is present." (SA.1- 9) (Who "them" refers to is unknown.) Based upon this "propensity", the trial court entered its Shelter Order. (App.1)(SA.1-12)

Although there was testimony from Wilcox that this was the "worst case of

parental alienation he had seen" (App.1) -- this was also the *first* case of "parental alienation" he had ever seen.

> Q So how did you learn what you believe in terms of parental alienation?
>
> A By talking to my colleagues at work as well as referencing the psychological evaluation that was provided to me by Mr. Montero. ...
>
> Q Before seeing Dr. Martha Jacobson's report, had you heard of parental alienation?
>
> A Not necessarily called that, maybe not using those exact words to describe it, but as something that happens in between, using basically, they call it using children as pawns, I mean, just, you know, to be layman about it, using children as pawns. Well, then parental alienation came up, okay, well that's the same thing as using children as pawns.
>
> Q Okay. That is your interpretation?
>
> A Yes, ma'am.

(App. 20- 71, 72)

Guardian ad Litem Lippman chose to overlook and not even mention records and evidence provided to her by Mother of past domestic violence (police reports, photos and hospitalization records) (App.1)(SA.8) as well as Father's extensive psychiatric history (SA.9) dating back for more than ten (10) years, including a "lifetime problem" of night terrors (severe nightmares resulting in screaming and

thrashing - sometimes breaking things) and anger issues. She concluded that the Mother's language is "harmful" to the child, such as that Mother tells the child "not to be scared" and that she "will protect her" based upon "numerous conversations" with the Mother. It's unknown how these are examples of "harmful language", and it's unknown where the Guardian ad Litem heard them; she met with the Mother only twice, in formal settings with Mother's counsel present. The Guardian ad Litem, a lawyer with no psychology credentials, testified as to her pop psychology conclusions: "At best, she is catering to a seven year old child, at worst, it looks like she is projecting all of her fears, anxieties and disappointments onto her child." (App.1)

There is no Chapter 39 case law in which abuse or mental injury stems from a parent "catering to" a seven-year-old child.

The Guardian also stated that the child "is performing well academically and by all reports, is socializing with her peer group appropriately..." (App.1)

A hearing was held in the 15th Circuit Dependency Court, the day following the Broward sua sponte shelter hearing. DCF Investigator Wilcox apparently notified the Father and Guardian ad Litem Lippman as to the time and place of the hearing. Mother's counsel repeatedly and unsuccessfully contacted the Clerk's office, attempting to obtain this information. When the dependency judge inquired

about the absence of Mother and her counsel, Father's counsel falsely stated that Mother had been advised during the Broward hearing of the time, date and exact place the dependency hearing would occur. The Guardian ad Litem, another Florida attorney, remained silent during this knowing misrepresentation. (SA.2- 8-9)(SA.1)

Nothing in Florida Statutes Chapter 39 contemplates or permits a trial court to conduct a "sua sponte" shelter hearing like the one below. This was not an emergency. What transpired was egregious, arbitrary and inexcusable. Mother's rights to due process were violated in numerous ways. Compounding this, Judge Goldenberg refused to permit Mother to cross-examine Father's witnesses and refused to permit Mother to present her own witnesses -- including the child's therapist of longest duration, a child psychiatrist, and a forensic psychologist who were present and ready to testify.

Purporting to have not read the Guardian's report (in which case the court could not know what it contained), refusing to hear from Mother's counsel, and having asked the Guardian exactly three questions:

> THE COURT: Ms. Lippman, have you had an opportunity to do an investigation regarding the alleged emergency?
>
> MS. LIPPMAN: Yes, Your honor.
>
> THE COURT: And based upon your investigation is this matter an emergency regarding [the child]?

MS. LIPPMAN: Yes, Your Honor.

THE COURT: Then we are going to proceed with the hearing. Do you have a written report?

MS. LIPPMAN: I do.

the Judge declared, "The Court finds that the report of the guardian ad litem complies with the Order of Appointment of the Guardian ad Litem and is accepted. into evidence." (SA.1- 4, 6) She then asked whether Father's witness, the DCF worker (SA.1- 5-7) was going to testify, and promptly called and swore him in. It was a choreographed charade (SA.1- 7-8):

THE COURT: And would you say your name for the record.

MR. WILCOX: My name is Matthew James Wilcox, W-i-l-c-o-x. I am a child protective investigator for the Department of Children and Families Circuit Fifteen; Palm Beach County, Florida.

THE COURT: And you have filed reports regarding K.M.?

MR. WILCOX: Yes, ma'am.

THE COURT: I have the guardian ad litem's report in front of me and she said you had a verified finding?

MR. WILCOX: Yes, that's correct, ma'am...

After some testimony from Wilcox, he essentially admitted his personal bias and intent to continue working the case after his DCF superiors and the DCF legal department had overruled him (SA.1- 10):

> MR. WILCOX: I was considering on my own accord of doing what I call the nuclear option which was basically going and sheltering the child from the mother on a Friday night just because I believed in the case. I believe in this case so much.

At that point, this DCF investigator -- a childless (App.20- 45) young man who: admitted in his deposition to having graduated college in 2004 (App.20- 8), being approximately 33 years old (App.20- 24) (19 at the time of his DUI), having worked as a substitute teacher for about 6 months (App.20- 6-7), having been a DCF case manager for less than 2 years (App.20- 9) during which time he resigned under suspension without pay when a child under his supervision was shot and nearly killed (App.20- 19-20), having been a bartender at Miller's Ale House for a year, having gone to the Connecticut School of Broadcasting to study radio and TV, having been an FAU food service worker for 18 months, having been a salesman for Kaplan Online University, having been the subject of a Hot Line child abuse complaint himself (App.20- 5, 20), and having been a DCF investigator for about a year (App.20- 4) when he commenced this case -- proceeded to claim that he had 15 years' experience working with children. (SA.1- 10) The Judge decided to go with Wilcox's opinion. After making a number of inquiries regarding his opinions, including about DCF protocols and procedures, the Judge refused to let the Mother cross-examine this witness (SA.1- 12, 16, 20), and "overruled" the DCF legal department. (SA.1- 21)

* * *

It now appears that the trial court's custody decision has placed this child in harm's way. While filing his Response to Mother's Motion for Stay in this Court, and after DCF declined to seek a dependency determination for lack of probable cause, the Father filed his own Verified Petition for Dependency in the 15th Circuit on October 11, 2011 (SA.4) *Father's own sworn Petition alleges in every Count that the child is suffering harm in his care:*

> "While the minor child has access with the Father, her behavior includes but is not limited to constant uncontrollable crying for virtually hours and/or days, kicking walls, holding her hands over her face, refusing to eat, drink, urinate or move her bowels, scratching herself, and other extreme and destructive contact meant to hurt herself and/or have her returned to the Mother's care." (SA.4)

Additionally, the Father has continued to call the DCF hotline even after this Shelter Order was entered claiming "parental alienation". (SA.10)

CONCLUSION

Based upon the foregoing it respectfully is requested that this Court reconsider it previous decision to deny an Emergency Stay and grant same, transfer custody of KM back to the Mother, and stay all proceedings in the 15th Judicial Circuit dependency court, as well as - assuming a transfer of venue to Palm Beach County - clarify which jurisdiction is appropriate for continued hearings in this matter. It further is requested that this Court consider this non-final appeal a writ

of certiorari if it believes that to be more appropriate. It is requested that this Court reverse the Order below as a completely inappropriate exercise of ultra vires action by the trial judge and an encroachment upon the executive powers of the Department of Children and Families by issuing a "Sua Sponte Shelter Order", by holding a *sua sponte* shelter hearing with no prior notice, and to declare same to be violative of Chapter 61, Fla. Stat. (2011) due process requirements for the transfer of child custody, violative of Chapter 39, Fla. Stat. (2011) due process requirements, and violative of a multitude of other requirements of Chapter 39 including, but not limited to, the need for findings and substantial competent evidence of those findings.

In addition, we believe action by this Court is necessary to warn family court judges against allowing litigants to use and abuse DCF for personal advantage in custody cases. Family court judges should not be transferring their pending custody cases to the Juvenile Division merely because there is an allegation of abuse by a DCF investigator, a parent or a guardian ad litem.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document and Supplemental Appendix were provided by hand delivery to: Greg Lewen, Esq., 100 SE 3rd Avenue, Suite 2504, Fort Lauderdale, Florida 33394, Juliette Lippman, Esq., Kirschbaum, et al, 1301 E. Broward Blvd. Suite 230, Ft. Lauderdale, FL 33301, Andrea Tulloch, Esq., Department of Children and Families- CLS, 111 S. Sapodilla Ave, Suite 307, West Palm Beach, FL 33401, and Attorney General Pam Bondi, 1515 N Flagler Dr, Suite 900, West Palm Beach, FL 33401 on this 24th day of October, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated document is typed in either Times New Roman 14 point font or Courier New 12 point font and that all documents filed on this date have been or will be filed electronically with this Court on the same day as the paper filing.

Respectfully submitted,

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