Originally published in the Florida Bar Family Law Section Commentator, Volume XXIV, No. 4 (Fall 2010)

A Parenting Plan Must Include a Parental Responsibility Order and a Time-Sharing Schedule

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Section 61.13(2), Florida Statutes (2009), is a tightly packed statute. It controls the parenting orders that a trial judge can enter after the parents separate, prejudgment and post judgment. This statute is sometimes not understood by trial counsel in a Chapter 61 case. This is unfortunate because this statute limits the orders that can be entered, and it creates a presumption that shared parenting must be ordered in every case; a presumption that the trial judge is powerless to overcome if counsel has not pleaded the case correctly. If neither party pleads for sole parenting, this presumption will trump the best interest of the child, because due process requires the court to order shared parenting even if that is not in the child's best interest if neither party has asked for sole parenting. *See, e.g., Furman v. Furman*, 707 So. 2d 1183 (Fla. 2d DCA 1998).

To unpack this statute, this discussion begins with a bit of emphasis: ***IF YOU READ NOTHING ELSE HERE, PLEASE READ THIS: The "parental responsibility" order and the "time-sharing schedule" order are TWO SEPARATE AND DISTINCT ORDERS THAT MUST BE IN A PARENTING PLAN UNDER Fla. Stat. §61.13(2).***

So, a "shared parenting" order has nothing to do with the "time-sharing schedule" and a "sole parenting" order has nothing to do with the timesharing schedule. The facts of each case determine what is an appropriate parental responsibility order and what is an appropriate time-sharing order.

Fla. Stat. §61.046(14) (2009) defines "Parenting plan" as "a document created to govern the relationship between the parents relating to decisions that must be made regarding the minor child and must contain a time-sharing schedule for the parents and the child."

Fla. Stat. §61.046(14)(a) requires the parenting plan to be "1. Developed and agreed to by the parents and approved by a court; or 2. Established by the court ... if the parents cannot agree to a plan or the parents agreed to a plan that is not approved by the court."

Fla. Stat. §61.13(2)(b) says a "parenting plan approved by the court must, at a minimum, describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child; the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent; a designation of who will be responsible for any and all forms of health care, schoolrelated matters including the address to be used to school-boundary determination and registration, and

other activities; and the methods and technologies that the parents will use to communicate with the child."

So, it appears that an order for "parental responsibility" must be included in the "parenting plan," and the parental responsibility order has nothing to do with the timesharing schedule, which is a separate concept and a separate order.

"Parental responsibility" is not defined anywhere. **However, "shared parental responsibility" is defined in Fla. Stat. §61.046(17) app. 3 (2009): "Shared parental responsibility" means a court ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which *both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly*."** (*Emphasis supplied.)* This concept is nothing new. It first entered Florida law in 1982. **So, *"parental responsibility" means the responsibility to make parenting decisions for the child after the parents separate*** and the "parental responsibility" order must spell out how the parents will make parenting decisions now that they are separated.

Since 1982 there are only three options for the "parental responsibility" order allowed by Fla. Stat. §61.13(2)(c)2: (1) ***sole parental responsibility***to one parent over some or all aspects of the child's life; (2) ***shared parental responsibility***, in which the parents confer, consult and agree on all parenting decisions; or (3) ***shared parental responsibility with ultimate responsibility*** to one parent or the other over certain named aspects of the child's life or over all aspects, such as education, extra-curricular activities, medical treatment, etc., if the parents do not agree on decisions in those aspects of the child's life.

Fla. Stat. §61.13(2)(c)2, *requires the court to order "shared parental responsibility" in every case "unless the court finds that shared parental responsibility would be detrimental to the child."* So, this statute assumes that nearly all separated parents are going to behave, cooperate, communicate, and be nice to each other when it comes to raising their children, because this law requires the court to order shared parental responsibility in every case, unless a party pleads and proves shared parenting would be detrimental to the child.

It is, of course, nonsense to assume nearly all separated parents can do this. Although this is nonsense, most lawyers and parties indulge in this nonsense by routinely pleading only for "shared parenting" in their petitions.

Nearly all petitions ask only for a "shared parenting" order and very few ask for "sole parenting" or allege a detriment to the child if "shared parenting" is ordered, even though in most litigated cases the parties have never demonstrated a capacity to share any parenting decisions. **Shared parenting should not be agreed upon where the parents**

cannot in fact share parenting decisions. Most mediators and almost all settlement agreements also indulge in the statute's nonsensical assumption by routinely providing in settlement agreements that the parties will "share parenting" even when there is considerable evidence that the parents are incapable of sharing a single parenting decision. Cases with these agreements often return to court post judgment because the parties cannot confer together and make joint parenting decisions.

Parental responsibility after parents separate. It is not what you think. In cases in which a settlement agreement or a judgment said the parents will "share parenting" family judges are frequently asked in post judgment motions to decide if a child should take medication for ADHD, depression, a bipolar condition, etc., or to decide which school the child will attend, or which church the child will attend, etc., because the parents cannot "confer with each other" and "share" these parenting decisions and neither one has any authority to make the decision alone because the order in their case requires them to "share parenting decisions."

In my experience, however, medical providers - doctors, hospitals, etc. - are not bothered by a "shared parenting" order, if they ever learn of it at all. They will generally take the consent of one parent if medical treatment is needed. It seems that most of them assume the parent presenting the child for treatment is the "custodial parent" or "primary residential parent", maybe because the child lives most of the days of the year with the presenting parent. *However, these terms do not exist in Florida law and they have no meaning under Florida law.* It seems that medical providers and many parents assume the "custodial parent" has "the right" to make all medical decisions for the child, but this is a false assumption.

Since 1982, Florida law, that is, Fla. Stat. §61.13(2), has required separated parents to "share parenting" decisions unless a court has ordered that would be detrimental to the child, in which case the court can order "sole parenting" to one parent or the other over some aspect of the child's life, say, medical care or education, or over all aspects of the child's life.

Occasionally, medical providers find themselves in a bind, when both parents appear and do not agree on a treatment, and then the parties must come to the court to argue their positions about the merits or disadvantages of a proposed treatment. Medication for a diagnosis of ADHD or a bipolar condition is a very common post judgment dispute between parents.

However, there is no authority that a judge in a Chapter 61 case has the power to make such a parenting decision. A Chapter 61 judge has no authority to become a "super parent". On the contrary, the statute, §61.13(2), Fla. Stat., allows the judge only to "pick a parent" by making a "sole parenting" order over an aspect of the child's life, such as medical care, if the parents do not agree about parenting decisions in that aspect.

A Chapter 61 case is a case between separated parents. On the other hand, a Chapter 39 case is a case in which one or both parents are alleged to have abused, abandoned or neglected the child so that the child is dependent until the parents are rehabilitated or the parents' parental rights should be terminated. In a Chapter 39 case the judge is authorized to make parenting decisions concerning the child, for medical treatment or otherwise, if the child does not have a functioning parent. *See, e.g.,* Fla. Stat. §39.407(2) (a) (2009). So, a Chapter 39 judge has the power to be the child's "super parent". There is no similar provision in Chapter 61 because in a Chapter 61 case the child has two functioning parents. Therefore, one or both of the parents must make all parenting decisions after the parents separate.

If the parents have a "shared parenting" order, in a settlement agreement or a judgment, and they do not agree on a parenting decision, then they cannot "share" a decision and they cannot make a "joint" parenting decision. In this event one of them must return to court and file a supplemental petition that asks for a "sole parenting" order. The supplemental petition must allege the disagreement on a parenting decision, that the disagreementis detrimental to the child, and that the petitioner asks for "sole parental responsibility" over an aspect or all aspects of the child's life. After a trial on such a supplemental petition, the judge in a Chapter 61 case has the authority to "pick a parent" to make the parenting decision. The Chapter 61 judge can only order either "shared parenting" or "sole parenting" and then only after "due process of law" has been complied with.

"Due process of law" trumps the "best interest of the child". Procedural law, that is, "due process of law", requires that a party must plead in a petition that shared parental responsibility would be detrimental to the child and plead facts demonstrating the detriment before the court has authority to order anything other than "shared parental responsibility," because the statute says the court must order shared parental responsibility in every case unless detriment to the child is proven if that is ordered. Further, a petition can be decided only after a trial on the merits of the petition.

"Due process" requires "notice and an opportunity to be heard," so if a party does not ask for a particular relief allowed by law in a complaint or petition, *the court has no authority to grant the relief even if it is obvious that the best interests of the child require shared parenting not be ordered, say because the parents bicker and fight and cannot talk to each other or behave civilly or politely around each other.*

Case law says that a finding that the parents are unable to confer together and share parenting decisions is a detriment to the child sufficient for a sole parental responsibility order to one parent. *See, e.g., Roski v. Roski*, 730 So. 2d 413 (Fla. 2d DCA 1999). This is also common sense, for which no appellate decision is needed. If parents were ordered in a case to "share parenting" and in fact the parents do not share

parenting decisions, the child might suffer because neither one of them has unilateral authority to make sole parenting decisions. The child might also suffer because, having been ordered to make joint parenting decisions, dysfunctional parents bicker and fight about parenting decisions.

Any argument between the parents is detrimental to the child. No citations are necessary for that proposition. *See, e.g.,* Carla Garrity & Mitchell Baris, *Caught in the Middle: Protecting the Children of High-Conflict Divorce* (Lexington Books 1994).

So, a parent seeking sole parental responsibility must plead for sole parental responsibility. A trial court has no authority to order sole parenting if there is no pleading asking for sole parenting and an allegation of a detriment to the child if shared parenting is ordered. *See, e.g., Furman v. Furman*, 707 So. 2d 1183 (Fla. 2d DCA 1998); *McDonald v. McDonald*, 732 So. 2d 505 (Fla. 4th DCA 1999); *McKeever v. McKeever*, 792 So. 2d 1234 (Fla. 4th DCA 2001).

So, in every case that is litigated, the parties should both plead in the alternative for all three options for parental responsibility allowed by the law, that is, (1) sole parental responsibility over some or all parenting decisions to one parent or the other; (2) unlimited shared parental responsibility over all parenting decisions; or (3) shared parental responsibility with ultimate responsibility over some or all parenting decisions to one parent or the other. Fla. Stat. §61.13(2)(c)2.

Case law allows the third alternative and explains what it means. *See Watt v Watt*, 966 So. 2d 455 (Fla. 4th DCA 2007); *Hancock v Hancock*, 915 So. 2d 1277 (Fla. 4th DCA 2005); *Schneider v. Schneider*, 864 So. 2d 1193 (Fla. 4th DCA 2004). These cases say the court can give one parent "ultimate authority" over some or all aspects of the child's life as part of a "shared parenting" order, because this is literally what the statute says the court can do. An "ultimate responsibility shared parenting order" allows the parent given "ultimate authority" over an aspect of the child's life the authority to make a decision when the parents do not agree. The other parent can make a motion to have that parenting decision reviewed by the court. Note: This third alternative may not be in the child's best interest because it gives the parties a means to continue the lawsuit ad infinitum.

A question not answered by the case law is whether a request for "shared parenting" in a petition is sufficient notice to the other side for an order for either (2) unlimited shared parental responsibility over all parenting decisions, or (3) shared parental responsibility with "ultimate responsibility" to one parent over some or all parenting decisions. The better practice for lawyers and parties, of course, is to plead in the alternative for all three options so there is no question that the other side was put on notice and then the court has the authority to order one of the three alternatives allowed by Fla. Stat. §61.13(2).

So, to summarize Fla. Stat. §61.13(2): The concept of "shared parenting" has nothing to do with the "time-sharing schedule". "Shared parenting" does not mean "joint custody." "Joint custody" is NOT a concept under Florida law. "Shared parenting" does not mean "the child must live half the time with each parent."

"Shared parental responsibility" or "shared parenting" and "sole parental responsibility" or "sole parenting" are concerned with parenting decision making and how parenting decisions will be made now that the parents are separated. If the parents cannot demonstrate a capacity to share parenting decisions, for whatever reason, then the court should not order "shared parenting". Rather, the court should order either "sole parenting" or "shared parenting with ultimate responsibility" to one parent.

The goal of every lawsuit is to end the dispute with a decision. Ordering dysfunctional parents to "share parenting" will not end the dispute. On the contrary, it will continue the disputes and the lawsuit. This is not in the child's best interest. *See, e.g., Roski v. Roski*, 730 So. 2d 413 (Fla. 2d DCA 1999). An inability of the parents to communicate and cooperate and share parenting decisions is a sufficient detriment to support a sole parenting order. *Id.*

Of course, a family judge inherits many cases in which the parties agreed in a settlement agreement to "share parenting," even though they cannot actually do that. These cases often return to court for post judgment disputes, such as asking the judge to approve a course of medical treatment, pick a school, approve an extracurricular activity, etc. When these cases come back to court, the court's authority post judgment is the same as it was prejudgment. The court can only "pick a parent" to make a sole parenting decision that the parties cannot agree on, and the court can order "sole parenting" only after a trial on a supplemental petition in which a party asks for "sole parenting" and alleges a detriment to the child if "shared parenting" is ordered, e.g., an inability of the parents to agree on a parenting decision.

The time-sharing schedule should be very detailed. A parenting plan must also include a timesharing schedule that spells out the child's contact with both parents throughout the year. My time-sharing schedules are typically three or four pages long, single spaced. If appropriate, the time-sharing schedule may order supervised contact or no contact at all with a parent. Fla. Stat. §61.13(3) (2009) lists 20 factors that the court must consider in establishing a parenting plan and a time-sharing schedule.

The psychotherapist doing a "parenting evaluation" or a "social investigation" in which a parenting plan or time-sharing schedule are recommended must also consider these factors in the report.