Managing and Mitigating the Imposition of Time-Sharing Restrictions on Your Clients

By Steven P. Spann, Esq.

Scenario 1: You get a frantic call from an old client. The "Ex" did it again. She relapsed and got picked up for another DUI. You file an emergency motion and get an expedited hearing. The Judge remembers the Ex and is not amused. Opposing counsel's zealous advocacy is unavailing and the Judge suspends the Ex's time-sharing. "Come back when you've got your life together." Your client is radiating vindication. "You are," your client tells you, "the very best." Opposing counsel asks the Judge, "What does my client need to do to get her time-sharing back?" "File a motion in six months and we'll see."

Scenario 2: After closing arguments, the Judge, entirely inscrutable during the two-day trial, peruses her notes and, after what feels like an eternity, finally speaks. "I'm granting the mother's petition to modify time-sharing. I find that the mother has established a substantial and material change in circumstances and, further, that it is in the best interest of the minor child that she primarily resides with the mother." Your client squeezes your hand in gratitude. "But," the Judge continues, "I'm setting a case management conference in 30 days and I want both parties at that time to present what steps the father must undertake to return to his equal time-sharing."

Scenario 3: A young father comes to your office for a consultation. He tells you he attended a final hearing on his paternity case where the Judge ordered supervised visitation twice per week and told him that he could come back in a year to revisit whether he could start unsupervised time-sharing. "Did the Judge tell you what you needed to do to get unsupervised?" "No."

As family law practitioners, we have all faced scenarios like those above, where we have advocated for or rallied against suspensions, restrictions, or modifications to a party's access and time-sharing with her or his children. There is a split among the District Courts of Appeal as to whether, and under what circumstances, a court is required to set forth specific steps a party must complete to return to unsupervised time-sharing, have a time-sharing restriction lifted, and/or return to their prior, pre-modification time-sharing schedule. Although the Florida Supreme Court recently issued an opinion providing some clarity on this issue, the conflict among the District Courts of Appeal is not entirely resolved. The goal of this article is to provide an overview of the current state of the law on this topic. Part I addresses whether a court is required to implement "concrete steps" to enable a party to return to the prior, pre-modification time-sharing schedule. Part II provides an overview of those cases where a party's time-sharing is reduced to supervised or is altogether suspended for a "temporary" but seemingly indefinite period of time. Finally, Part III discusses *Ryan v. Ryan*, which case, I suggest, is a useful model for managing and mitigating time-sharing suspensions and restrictions without running afoul of the appellate courts.

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Part I: Post-Judgment Modifications

The day before this issue of the Commentator was scheduled to go to print, the Florida Supreme Court released its opinion in *C.N. v. I.G.C.*, SC20-505, April 29, 2021, which resolved in part, whether it is "judicial error" if the trial court fails to "give a parent 'concrete steps' to restore lost time-sharing and return to the premodification status quo." *C.N.* came before the Supreme Court after the Fifth DCA certified conflict in *C.N. v. I.G.C* with the Fourth District Court of Appeal's opinion in *Ross v. Botha* as well as similar cases from the Second and Third Districts. This split emanated from a line of cases from the Second District which held that it was judicial error if a trial court did not fix benchmarks to enable a party to return to her or his premodification time-sharing when the time-sharing was reduced after a supplemental petition for modification. The outcome of the Second District cases, seemed entirely inconsistent with *res judicata* and as discussed below, was soundly rejected by the First and Fifth District Courts of Appeal (as well as by Judge Barbara Lagoa in her concurrence in *Solomon v. Solomon*). Now, the Florida Supreme Court has spoken and resolved the conflict. Sort of.

Providing the proper context on this issue requires some unpacking of the noteworthy cases. In *Perez v. Fay,* the trial court granted the father's supplemental petition to modify time-sharing and parental responsibility. During the pendency of the case, the mother was limited to supervised time-sharing, twice per week for four hours each session, which apparently went well except for one "incident during which the mother allegedly 'whisked' the child away from the time-sharing supervisor and had a 'private' conversation" with the child." Otherwise, the reports from the supervised time-sharing were encouraging. Still, when the trial court granted the father's petition, it not only continued the mother's supervised time-sharing but reduced it to only four hours per month. The Second District Court of Appeal reversed, finding the judgment "*legally deficient* on its face because it [did] not set forth what steps the mother must take to regain primary residential custody and/or meaningful unsupervised time sharing with her daughter." (Emphasis added).

While it is understandable that the mother should be entitled to resume "meaningful unsupervised time-sharing" in the future, should the trial court have the discretion to permit the mother "to regain primary residential custody[?]" How can practitioners reconcile this direction with the long-held paradigm that any modification of parenting plans requires proof of a substantial and material change in circumstances? This "extraordinary burden" is designed to "promote the finality of the judicial determination of the custody of children." In *Dukes v. Griffin,* the First District Court of Appeal confronted these questions head on.

After six years of "rocky" post-divorce co-parenting, the father, Griffin, filed a petition seeking majority time-sharing. Upon consideration of Ms. Dukes' misconduct related to time-sharing, the trial court granted the father's petition, "flipped" the time-sharing schedule, and reduced Dukes' time-sharing to "weekends, holidays, and summers." On appeal, Dukes argued that the trial court erred by "failing to set forth steps in the final judgment by which [she] could reestablish majority time-sharing," specifically relying on *Perez*. The First District Court of Appeal rejected her argument, holding there is "no underlying law requiring trial courts to enumerate steps for dissatisfied parties to re-modify time-sharing schedules, alleviate time-sharing restrictions, or regain primary residence and majority time-sharing." Rather, the Fifth District held that future modifications should be sought pursuant to section 61.13, Fla. Stat and certified conflict with *Perez* and *Witt-Bahls* (discussed infra).

The Second District Court of Appeal revisited this issue in *T.D. v. K.F.*, in which the trial court granted

the father's petition for modification and awarded him majority time-sharing. The mother, an Orange County resident, was permitted unsupervised time-sharing but only in Lee County, where the father resided with the child. The Second District Court of Appeal noted that the court's order "contain[ed] no explanation for this modification of the nature and location of the mother's time-sharing, and it provides no steps for the mother to follow to regain any time-sharing—whether supervised or not—with the child in Orange County." The opinion concludes that, "because the order that modified the mother's time-sharing did not identify any steps that [she] could take to regain *her former time-sharing* with her child, we reverse and remand for further proceedings on this single issue." (Emphasis added). Here again, after what was no doubt a laborious trial, the Second District Court of Appeal required the trial court to outline steps to return the mother to her pre-modification time-sharing.

In 2020, the Fifth District Court of Appeal entered the fray with *C.N. v. I.G.C.* There, the trial court granted the father's supplemental petition and "reduc[ed] the Mother's custodial time-sharing by almost two-thirds." The mother, also relying on *Perez*, argued that the court erred by not establishing the steps needed to return to her prior time-sharing. Citing to *Dukes* and Judge Lagoa's concurrence in *Solomon*, the Fifth District Court of Appeal opined that section 61.13, Fla. Stat., "neither authorizes nor requires the trial court to set forth the specific steps necessary to reestablish timesharing."

The Second District Court of Appeal recently reevaluated this issue in *Mallick v. Mallick*, issuing an opinion that "steer[s] the law of this district closer to that of the First and Fifth but only insofar as they hold that the failure to specify such steps or benchmarks is not legal error." In this appeal, the mother did not challenge the modification, arguing instead "only that the trial court erred by failing to delineate what she must do to regain majority timesharing with the child and by otherwise failing to outline how she may regain 'meaningful' time-sharing." The Second District Court of Appeal expressly receded from *Grigsby* and its prior jurisprudence, rejecting the idea that failure to delineate benchmarks is error as a matter of law but it did not swing entirely into the camp of the First and Fifth District Courts of Appeal. Rather, the Second District Court of Appeal leaned into the underlying principle that actions in family law are in equity and that "[t]he very first sentence in chapter 61 instructs that '[t]his chapter shall be liberally construed and applied.' §61.001, Fla. Stat. (2017)." In essence, *Mallick* eschews the bright-line approaches of the other Districts, holding that cases need to be determined on the individual facts of the case, imploring the trial courts to "exercise [their] discretion in light of all material circumstances."

The Florida Supreme Court finally accepted jurisdiction to bring some order to the Courts. In *C.N.*, the Court held that "a final judgment modifying a preexisting parenting plan is not legally deficient simply for failing to give specific steps to restore lost timesharing." However, the Supreme Court would not go so far as to agree with the Fifth District Court of Appeal's proposition "that section 61.13(3), Florida Statutes, does not authorize trial courts to include such steps in a final judgment modifying a parenting plan." This opinion, echoing the analysis in *Mallick*, seems to suggest that it is in the discretion of the court whether "concrete steps" for the restoration of pre-modification would be in the best interest of the child.

So where does this leave the family practitioners? It is important to note that *C.N.* and the other cases above stem from post-judgment modification of pre-existing time-sharing schedules. *C.N.* arguably leaves open the possibility that a court's establishment of concrete step to the restoration of a premodification time-sharing schedule could be affirmed. How do we reconcile this with *res judicata* and moreover, how does that possibility

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square the prohibition against prospective time-sharing modifications? Unanswered by the Supreme Court is whether concrete steps are required or merely discretionary when a party's time-sharing is indefinitely suspended or reduced to supervised.

Part II: Indefinite Supervised or Suspended Time-Sharing

While "[i]t is the public policy of this state that each minor child has frequent and continuing contact with both parents," a trial court is within its authority to impose time-sharing suspensions and restrictions under bona fide exigent and emergency circumstances. Under such circumstances, is the trial court required to enumerate steps to allow the restricted parent to return to the status quo time-sharing schedule? In the Third and Fourth District Courts, the case law conclusively requires trial courts to enumerate "the specific steps [a party] must undertake in o time-sharing with the minor child…." Failure to do so is, as a matter of law, error.

One of the foundational cases is *Hunter v. Hunter*, in which the Third District Court of Appeal affirmed a one-year suspension of the father's time-sharing. The underlying judgment, entered on the mother's supplemental petition for a modification of time-sharing, stated that the father would be entitled to file a petition for a reinstatement of time-sharing but did not provide clear guidance as to what conditions must be met to permit the reinstatement. The Third District Court of Appeal affirmed the temporary time-sharing restriction but found the omission of reunification steps to be reversible error. "These deficiencies mandate remand for clarification of the conditions under which [the father] may regain visitation."

One of the other most cited cases in this area is the Second District Court of Appeal opinion in *Grigsby v. Grigsby*. In *Grigsby*, the mother appealed from an interlocutory order entered during a pending divorce in which the trial court "temporarily" suspended the her time-sharing after finding that she had engaged in one of "the worst case[s] of parental alienation that [it] had ever seen." Here too, the Second DCA affirmed the temporary suspension but nevertheless held that the trial court erred by "omit[ting] a ruling on the specific steps the Mother must take to reestablish time-sharing…," famously opining "the court must give the parent the key to reconnecting with his or her children." In the cases that have followed *Hunter* and *Grisby*, the Third and Fourth District Courts have established a seemingly bright-line rule that, where there is a total deprivation of unsupervised time-sharing, it is incumbent upon trial courts to create the metrics that the parent will need to satisfy to return to unsupervised time-sharing.

The specificity of the steps to be taken was explored in detail in two crucial Fourth District appeals, notably in *Witt-Bahls v. Bahls I* and *Witt-Bahls v. Bahls II*. *In Witt-Bahls I*, when asked what steps the Mother needed to take to restore her unsupervised time-sharing, the court replied that it "would not give 'a magical answer'" and placed the onus on the mother to "'do what she thinks is best for herself and her son.'" Unsurprisingly, this approach did not pass muster with the Fourth District Court of Appeal, that on remand, ordered the trial court to establish the steps for the mother to resume unsupervised time-sharing. The Fourth District Court of Appeal stated, though, "[w] e do not mean to suggest the trial court was obligated to set out every minute detail of the steps to reestablish unsupervised timesharing." On remand, the trial court still missed the mark.

Witt-Bahls returned to the Fourth District Court of Appeal only a few months later. This time, the trial court ruled that the mother could resume unsupervised time-sharing when the child's therapists approved. "The trial court believed its ruling injected the needed specificity required by our [prior] opinion. Unfortunately, it did not."

In addition to improperly delegating authority to a third party, the order still "fail[ed] to provide the mother with the key to reconnecting with her son." This time, the Fourth District Court directed the trial court "to *specifically enumerate* the conditions which the mother must satisfy to obtain unsupervised visitation." (Emphasis added.)

The Third District Court of Appeal has consistently reversed cases which resulted in indefinite suspension of unsupervised time-sharing. In a brief opinion in *Tzynder v. Edelsburg*, the Third District Court of Appeal reversed a final judgment which reduced the father's time-sharing to "one time per week" of supervised time-sharing. The underlying modification was affirmed, but the Third District Court of Appeal instructed the trial court to "amend the final judgment to identify the necessary steps which Tzynder must take in order to reestablish unsupervised timesharing with the parties' minor child."

Two years later, in *Solomon v. Solomon*, the trial court adopted and incorporated into a final divorce decree, the report of an examining psychologist, who "recommended supervised visitation between the husband and the children, which 'should begin with a goal of ending in a short time frame'" after the entry of the final judgment of dissolution of marriage. The psychologist recommended periodic review of the husband's progress and whether to increase his time-sharing. The Third District Court of Appeal reversed, concluding that the psychologist's plan "failed to set forth specific benchmarks or identify for the husband the steps necessary to terminate the supervised timesharing."

In sum, the Second (until very recently), Third, and Fourth Districts are in lockstep that, when a parent's time-sharing is restricted to only supervised time-sharing, failure to provide reunification benchmarks was erroneous as a matter of law. A parent should have clearly established, attainable benchmarks to resume unsupervised time-sharing. Whether this principle applies when a parent unsuccessfully defends a post-judgment modification and time-sharing is reduced remains a matter of debate.

Part III: *Ryan* Alternative

In reviewing the case law, the trends crystalize and coalesce into two categories: those cases where a parent's unsupervised time-sharing is indefinitely suspended and those where a parent's time-sharing is reduced after a modification action. Under the former, as illustrated in the cases from the Third and Fourth Districts, the parent must be given the "keys" to resume unsupervised time-sharing, whether the suspension is the result of an emergency hearing or after a full trial on a divorce or modification proceeding. On the contrary, when a time-sharing schedule is modified after a supplemental petition, it is not "legal error" not to outline steps to return that parent to the pre-modification time-sharing. However, that does not foreclose the possibility that the court would not have *discretion* to establish such concrete steps. So how do we, as practitioners, manage these scenarios? The answer may lie in a case from the Third District Court, *Ryan v. Ryan*.[47]

In *Ryan*, the mother's unsupervised time-sharing was suspended after a substance abuse relapse. The mother argued on appeal that the underlying order did "not specify the conditions that must now be met in order to lift the limitations on visitation…."[48] The order, however, did require the parties to schedule a case management conference within thirty days, during which time, the mother was to wear a SCRAM bracelet and submit to a substance abuse evaluation. Although the order did not expressly delineate when the mother's time-sharing would be restored, the Third District Court found "no error in this procedure, as it provides a clear path toward reconsideration of the timesharing limitations if enumerated conditions are met."[49] I would offer that *Ryan* offers an excellent model to be employed by the family law bench and bar.

Using *Ryan*, I would suggest the efficacy and

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utility of a model where, when time-sharing is suspended or restricted, the court schedules a subsequent full hearing, or conducts a timely case management conference on the case, where a case plan can be more fully realized and the steps to resume time-sharing can be developed and subsequently monitored. It also gives the attorneys time to plan and confer with one another to present the case plan to the court at that time as well as to ascertain whether the parent whose time-sharing was restricted has complied with the court's initial directions. This methodology would promote the child's best interests.

Steven P. Spann, Esq. *is a partner of Orshan, Spann & Fernandez-Mesa. Mr. Spann focuses his practice on complex family and matrimonial law litigation, including, but not limited to, divorce, child custody, equitable distribution of assets and liabilities, child support, alimony, relocation, modification/post-divorce proceedings, and, paternity matters Mr. Spann also serves as the lead attorney on the firms appellate practice, where he is responsible for legal research, drafting of appellate briefs, and appearance before the District Courts of Appeal for oral argument.*

Mr. Spann is a graduate of Temple University's Beasley School of Law in Philadelphia, Pennsylvania. During law school, Mr. Spann was a member of the Moot Court Honor Society and was a finalist in the law school's annual appellate advocacy competition, the Samuel Polsky Competition. Mr. Spann was also recognized with an award for Outstanding Trial Advocacy and received the Barrister's Award for Outstanding Trial Advocacy as a participant in the law school's Integrated Trial Advocacy Program.

In addition to his juris doctor, Mr. Spann holds a Master's degree in Educational Leadership with a concentration in Higher Education Administration from Appalachian State University and a Bachelor's degree in English from North Carolina State University. Prior joining the firm, Mr. Spann worked for fifteen years in higher education administration, most recently at Philadelphia University where he served for five years as the Associate Dean of Students while attending law school. Mr. Spann also previously worked locally at the University of Miami and Barry University.

Mr. Spann is a member of the Family Law Section of the Florida Bar and the Florida First Family Law Inn of Court. In addition, Mr. Spann frequently participates in charitable and community service events and is on the Board of Directors of the Rotary Club of Coral Gables and Bet Shira Congregation in Pinecrest, Florida.

Endnotes

1 *C.N. v. I.G.C.*, 291 So. 3d 204 (Fla. 5th DCA 2020).
2 *Ross v. Botha*, 867 So. 2d 567, 571 (Fla. 4th DCA 2004)
3 I.e., *T.D. v. K.F.*, 283 So. 3d 943, 947 (Fla. 2d DCA 2019); *Solomon v. Solomon*, 251 So. 3d 244, 246 (Fla. 3d DCA 2018).
4 *Solomon v. Solomon*, 251 So. 3d 244, 246 (Fla. 3d DCA 2018).
5 *Perez v. Fay*, 160 So. 3d 459 (Fla. 2d DCA 2015).
6 *Id.* at 461.
7 *Id.* at 466.
8 *Wade v. Hirschman*, 903 So. 2d 928, 933 (Fla. 2005).
9 *Dukes v. Griffin*, 230 So. 3d 155 (Fla. 1st DCA 2017).
10 *Id.* at 156.
11 *Id.*
12 *Id.* at 157.
13 *T.D. v. K.F.*, 283 3d 943 (Fla. 2d DCA 2019).
14 *Id.* at 945.
15 *Id.* at 947.
16 *C.N. v. I.G.C.*, 291 So. 3d 204 (Fla. 5th DCA 2020).
17 *Id.* at 206.
18 *Id.* at 207.
19 *Mallick v. Mallick*, 2D19-1183, 2020 WL 6106287 at *1 (Fla. 2d DCA Oct. 16, 2020).
20 *Id.* at *2.
21 *Id.* at *5.
22 See e.g., *Arthur v. Arthur*, 54 So. 3d 454 (Fla. 2010).
23 Fla. Stat. § 61.13 (2020).
24 See *Gielchinsky v. Gielchinsky*, 662 So. 2d 732 (Fla. 4th DCA 1995); Smith v. Crider, 932 So. 2d 393 (Fla. 2d DCA 2006).
25 *Pierre v. Bueven*, 276 So. 3d 917 (Fla. 3d DCA 2019).
26 *Lightsey v. Davis*, 267 So. 3d 12 (Fla. 4th DCA 2019).
27 *Hunter v. Hunter*, 540 So. 2d 235 (Fla. 3d DCA 1989).
28 *Id.* at 238.
29 *Id.*
30 *Grigsby v. Grigsby*, 39 So. 3d 453, 456 (Fla. 2d DCA 2010).
31 *Id.*
32 *Id.* at 457.
33 *Witt-Bahls v. Bahls*, 193 So. 3d 35 (Fla. 4th DCA 2016).
34 *Witt-Bahls v. Bahls*, 203 So. 3d 207 (Fla. 4th DCA 2016).

35 *Id.* at 38.
36 *Id.* at 39.
37 *Id.*
38 *Id.* at 208.
39 *Id.*
40 *Id.* at 209.
41 *Id.*
42 *Tzynder v. Edelsburg*, 184 So. 3d. 583 (Fla. 3d DCA 2016).
43 *Id.* at 583.
44 *Solomon v. Solomon*, 251 So. 3d. 244, 246 (Fla. 3d DCA 2018).
45 *Id.* at 245.
46 *Id.* at 246.
47 *Ryan v. Ryan*, 257 So. 3d 1168, 1169 (Fla. 3d DCA 2018).
48 *Id.* at 1170.
49 *Id.*