Treacherous Waters: Navigating Time-Sharing Restrictions Post C.N.

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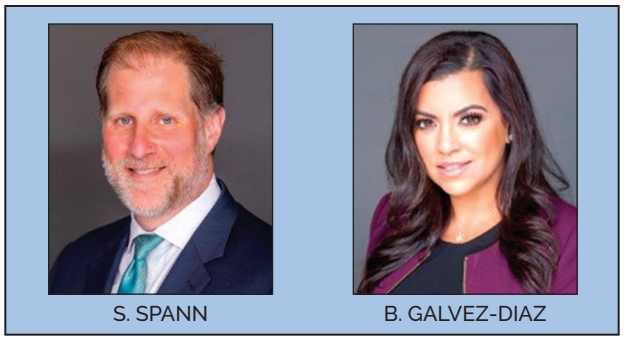
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In the previous edition of the Commentator, my article, "*Managing and Mitigating the Imposition of Time-Sharing Restrictions on Your Clients*," offered an overview of the conflict among the Florida District Courts of Appeal on whether a trial court is required to outline the steps a party must satisfy to lift a court-imposed time-sharing restriction or modification. The day after the "finished" product was submitted to the Commentator, the Florida Supreme Court issued its opinion in *C.N. v. I.G.C.*, 316 So.3d 287, 288 (Fla. 2021), addressing, in part, that conflict.

In *C.N.*, the Florida Supreme Court held that there is no requirement that a final judgment "*modif[ying] a preexisting parenting plan* must give a parent 'concrete steps' to restore lost time-sharing and return to premodification status quo." (Emphasis added.) *Id.* Instead, the Court held that "concrete steps" are a matter of judicial discretion. It is important to note that *C.N.* came before the Court on a modification action; the mother's time-sharing was not suspended or supervised, only reduced. The Supreme Court found that "[r]equiring the court to give concrete steps would essentially entitle a parent to be restored to the premodification status quo, albeit after satisfying court-identified conditions," an outcome the court found to be inconsistent with section 61.13(2)(c)1., Fla. Stat. The Supreme Court made it clear that concrete steps are not required in the context of a modification action, but it did not specifically discuss whether a trial court is required to provide concrete steps when time-sharing is suspended or restricted.

Since then, two district court opinions have been released which have expanded the holding in *C.N.*, by stating that concrete steps are no longer required if a parent's time-sharing is suspended or restricted to only supervised. These parents have been left in a state of perpetual, indefinite, supervised or suspended time-sharing. Has *C.N.* created a de facto termination of parental rights in family law proceedings?

This "sequel" article discusses the recent, post-*C.N.* decisions and suggests that, when a parent's access to her or his child(ren) is indefinitely restricted (be it suspended or supervised), the trial court should be required to create a case plan to enable the parent's access to be restored unless the party advocating for the indefinite restriction can demonstrate by clear and convincing evidence that the indefinite restriction without a case plan is in the best interests of the child(ren). The imposition of a higher burden is consistent with the importance that Florida has placed on the parent-child relationship. Please note that the article in no way should be read as to suggest that the trial courts in the cases discussed herein abused their discretion or acted improper or contrary to the children's best interest.

Parenting as a Fundamental Right

Ninety years ago, in *Frazier v. Frazier*, 147 So. 464, 465 (DCA. 1933), the Florida Supreme Court held that Florida "recognize[s] the natural, inherent, and consequently legal, right of parents to have

the custody of their children." *Id*. at 466. In that case, the former wife successfully petitioned to modify the parties' stipulated time-sharing schedule, which had the child rotating equally among the former wife, the former husband, and the former husband's mother. *Id*. at 465. The trial court granted the former wife's petition and reduced the former husband's time-sharing to maximum of two weeks per year, with the balance of time allocated to the former wife. *Id.* The Florida Supreme Court observed that, while neither of the parties were "paragon[s] of virtue in parenthood," that alone should not impinge upon "the inherent rights of parents to enjoy the society and association of their offspring, with reasonable opportunity to impress upon them a father's or a mother's love and affection in their upbringing." *Id*. at 466. The Supreme Court remanded to the trial court to reconsider the former husband's two weeks of time-sharing and to enter a new decree that did not "in effect, deprive the child's father of practically every vestige of his personal right to reasonably associate with and enjoy the companionship of his only child." *Id*. at 467.

This Constitutional commitment to a parent's "inherent right" to develop a relationship with her or his child(ren) is now enshrined in section 61.13(2)DCA1., Fl. Stat., which provides that "[i]t is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing." Notwithstanding that principle, there are occasions warranting a suspension or restriction of a parent's access to her or his child(ren), particularly where "a child is threatened with physical harm or is about to be improperly removed from the state." *Smith v.*

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Crider, 932 So. 2d 393, 398 (DCA. 2d DCA 2006). However, before *C.N.*, trial courts were obligated to provide some "concrete steps" to restore unsupervised, unrestricted time-sharing. *See e.g.*, *Witt-Bahls v. Bahls*, 203 So.3d 207 (DCA. 4th DCA 2016), *Solomon v. Solomon*, 251 So.3d 244 (DCA. 3d DCA 2018), and *Perez v. Fay*, 160 So.3d 459 (DCA. 2d DCA 2015). Based on a fair reading of the Florida Supreme Court's decision in *C.N.*, and the two appellate cases that followed, that no longer seems true.

Post *C.N.* Cases

In *Piccinini v. Waxer*, 5D20-528, 2021 WL 2746520, at *1 (Fla. 5th DCA July 2, 2021), the father appealed from a final judgment of paternity which "awarded him only supervised timesharing with the minor child." The father argued that the trial court not only erred by limiting him to supervised time-sharing but also by failing to enumerate the concrete steps he needed "to obtain unsupervised timesharing with his son." *Id.* The Fifth DCA affirmed on both issues. Citing to *C.N.*, the appellate court wrote, "the Florida Supreme Court… recently agreed with us that a final judgment modifying a preexisting parenting plan is not legally deficient simply for failing to give such specific steps." *Id.* The Fifth DCA noted that, if the father wanted to seek a modification of the supervised time-sharing, he could do so "upon the filing of a proper petition for modification…." *Id.* at Fn. 1. Although this case was not one modifying "a preexisting parenting plan," but establishing one, the Fifth DCA nonetheless expanded *C.N.*'s holding to encompass indefinite supervised time-sharing.

In *Barrack v. Barrack*, 4D21-536, 2021 WL 2767099, at *1 (Fla. 4th DCA June 30, 2021), the former husband appealed from an order that "temporarily transferred 'custody' of the minor child to the former wife; temporarily suspended former husband's decision making and contact with the child." While this opinion does not detail the facts of the case, it does state that the trial court "found that former husband 'simply cannot be a part of the mix until therapy is concluded or at least more progress is made.'" *Id.* The former husband argued that the trial court erred, *inter alia*, by failing to "include the 'concrete steps' that he must take to regain meaningful timesharing." *Id.* The Fourth DCA rejected this argument, holding, in light of the Supreme Court's holding in *C.N.*, "there is no such requirement." *Id.*

In only a matter of months, *C.N.* has been expanded from a modification action to indefinite time-sharing restrictions. As a result, it seems, relying only on preponderance of the evidence, a trial court could effectively terminate a party's parental rights. This expansion, however, does not entirely square with the Florida's commitment to a parent's Constitutional right to raise her or his child(ren).

Apparently, the trial courts thought that neither Barrack and Piccinini were "paragon[s] of virtue in parenthood" and felt, in their judicial discretion, that concrete steps were not required. However, if Florida's public policy is to promote a parent's frequent and continuing contact with her or his child(ren), a parent should not remain in time-sharing purgatory indefinitely without any guidance as to how to return to unrestricted time-sharing. Moreover, because a Constitutional right is at issue, it is respectfully submitted that the party seeking the indefinite restriction should be required to satisfy a higher burden of proof, i.e., clear and convincing evidence, that such an outcome is in the child(ren)'s best interest. In other words, family law courts should adopt policies similar to those required in dependency and termination of parental rights proceedings. This will strike a balance between a party's natural, constitutionally protected right to parent against the government's interest in protecting the child from harm.

Proceedings for Dependency & Termination of Parental Rights

In most dependency cases, if a child is adjudicated dependent and removed from a parent, courts are required to implement a case plan along with strict deadlines tailored to ensure that the parent is given sufficient due process and a meaningful opportunity to be reunified with their child(ren). These procedures also ensure that children do not languish in the system for an extended period of time. Thereafter, to terminate parental rights, the State must establish by clear and convincing evidence (1) the existence of one of the statutory grounds set forth in section 39.806, Fla. Stat. (e.g., failure to comply with a case plan or abandonment); (2) that termination is the least restrictive means of protecting the child from harm; and (3) that termination is in the best interest of the child. *See* § 39.802, Fla. Stat.; *see e.g.*, *A.H. v. Dep't of Child. & Fams.*, 144 So. 3d 662, 665 (Fla. 1st DCA 2014). Only in certain limited circumstances, e.g., abandonment or egregious conduct, would the court forgo a case plan and grant an expedited termination of parental rights. To meet the threshold of clear and convincing evidence, the highest burden of proof in civil proceedings, "[t]he evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). The importance of this heightened burden of proof is aptly captured by the Third DCA in *L.C.A.* , excerpted below:

> The fundamental right of parents to procreate and make decisions regarding "the care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) (citations omitted), is "recognized by both the Florida Constitution and the United States Constitution." *D.M.T. v. T.M.H.*, 129 So. 3d 320, 334 (Fla. 2013). This right "does not evaporate simply because they have not been model parents." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1395, 71 L. Ed. 2d 599 (1982). However, it is not absolute but "subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail." *In re Camm*, 294 So. 2d 318, 320 (Fla. 1974) (citations omitted).

In light of this body of law, it does not seem fair and reasonable that a parent in a family law proceeding could be completely deprived of access to her or his child(ren) based upon a mere preponderance of the evidence.

Conclusion

The post-*C.N.* decisions from the Fourth and Fifth DCAs expanded the Supreme Court's holding that concrete steps are not required in modification actions, to provide that concrete steps are also not required when a parent's time-sharing is suspended or restricted. Such an outcome seems incongruous not only with Florida Statute, which promotes frequent and continuing contact between parents and children, but also with the Florida Constitution's right to privacy, which encompasses the fundamental right to parent. *Von Eiff v. Azicri*, 720 So. 2d 510, 513 (Fla. 1998). This issue can be remedied or ameliorated by the adoption of certain Chapter 39 practices, the entire point of which is to strike the proper balance of a parent's right to access with their child and the government's interest in ensuring the safety and welfare of children.