IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

**IN RE: MATTER OF:**

MARIO JIMENEZ
Petitioner/Father,

and

KAREN WIZEL
Respondent/Mother.

FAMILY DIVISION
Case No.: 11-21207-FC-04

JUVENILE DIVISION
Case No.: D13-15193A-B (D003)
(closed)

DOMESTIC VIOLENCE DIVISION
Case No.: 12-17840-FC-04 (closed)
Case No.: 12-17838-FC-04 (closed)
Case No.: 11-10881-FC-04 (closed)

**MEMORANDUM IN SUPPORT OF EMERGENCY PETITION FOR IMMEDIATE UNSUPERVISED VISITATION**

ARGUMENT

**Equal rights to care, custody, and control of minor children:**

A) A parent's right to raise a child is a constitutionally protected liberty interest. This is well-established constitutional law. The U.S. Supreme Court long ago noted that a parent's right to "the companionship, care, custody, and management of his or her children" is an interest "far more precious" than any property right. May v. Anderson, 345 U.S. 528, 533, 97 L. Ed. 1221, 73 S.Ct. 840, 843 (1952). In Lassiter v. Department of Social Services, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 120 S.Ct. 2153, 2159-60 (1981), the Court stressed that the parent-child relationship "is an important interest that 'undeniably warrants deference and absent a powerful countervailing interest protection.'" quoting Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed 2d 551, 92 S.Ct. 1208 (1972).

B) A parent whose time with a child has been limited to only supervised visitations clearly has had his or her rights to raise that child severely restricted. In Troxel v. Granville, 527 U.S. 1069 (1999), Justice O'Conner, speaking for the Court stated, "The Fourteenth Amendment

provides that no State shall 'deprive any person of life, liberty, or property, without due process of the law.' We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.' The Clause includes a substantive component that 'provides heightened protection against governmental interference with certain fundamental rights and liberty interest" and "the liberty interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interest recognized by this Court." Logically, these forms of fundamental violations are inherently a federal question.

C) The compelling state interest in the best interest of the child can be achieved by less restrictive means than supervised visitations or sole custody for that matter. A quarter-century of research has demonstrated that joint physical custody is as good or better than sole custody in assuring the best interest of the child. As the Supreme Court found in *Reno v. Flores*, 507 U.S. 292, 301 (1993): "'The best interest of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion -- much less the sole constitutional criterion -- for other, less narrowly channeled judgments involving children, where their interest conflicts in varying degrees with the interest of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately." Narrow tailoring is required when fundamental rights are involved. Thus, the state must show adverse impact upon the child before restricting a parent from the family dynamic or physical custody. It is apparent that the parent-child relationship of a married parent is protected by the equal protection and due process clauses of

the Constitution. In 1978, the Supreme Court clearly indicated that only the relationships of those parents who from the time of conception of the child, never establish custody and who fail to support or visit their children are unprotected by the equal protection and due process clauses of the Constitution. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Clearly, divorced parents enjoy the same rights and obligations to their children as if still married. The state through its family law courts, can impair a parent-child relationship through issuance of a limited visitation order, however, it must make a determination that it has a compelling interest in doing so. Trial courts must, as a matter of constitutional law, fashion orders which will maximize the time children spend with each parent unless the court determines that there are compelling justifications for not maximizing time with each parent. Throughout this century, the Supreme Court also has held that the fundamental right to privacy protects citizens against unwarranted governmental intrusion into such intimate family matters as procreation, child-rearing, marriage, and contraceptive choice. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 926-927 (1992).

D) Contrary to the state court's consistent disregard for the equal right of this Petitioner to care, custody, control, and management of his natural minor children, and its corresponding continuum of supervised visitations in favor of the Respondent, the federal Due Process and Equal Protection rights extend to both parents equally. In Caban v. Mohammed, 441 U.S. 380, (1979) the Supreme Court found that a biological father who had for two years, but no longer, lived with his children and their mother was denied equal protection of the law under a New York statute which permitted the mother, but not the father, to veto an adoption. In Lehr v. Robinson, 463 U.S. 248 (1983), the Supreme Court held that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to

participate in the rearing of his child,' Caban, [citations omitted], his interest in personal contact with his child acquires substantial protection under the Due Process Clause." (Id. at 261-262). To further underscore the need for courts to consider the constitutional protections which attach in family law matters, one need only look to recent civil rights decisions. In Smith v. City of Fontana, 818 f. 2d 1411 (9th Cir. 1987), the court of appeals held that in a civil rights action under 42 U.S.C. section 1983 where police had killed a detainee, the children had a cognizable liberty interest under the due process clause. The analysis of the court included a finding that "a parent has a constitutionally protected liberty interest in the companionship and society of his or her child." Id. at 1418, citing Kelson v. City of Springfield, 767 F. 2d 651 (9th Cir. 1985). In Smith the court stated "We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents." Id. In essence, the Supreme Court has held that a fit parent may not be denied equal legal and physical custody of a minor child without a finding by clear and convincing evidence of parental unfitness and substantial harm to the child, when it ruled in Santosky v. Kramer, 455 U.S. 745, 753 (1982), that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment."

In the instant state proceedings, Petitioner has been continually deprived of the full right to equal care, custody, control, and management of the minor children, and the same approaching **two years and eight months**, without any requisite showing of past or potential harm – of any kind – upon the minor children.

**Other errors committed in this case:**

**I. The Court erred by improperly modifying the terms of the foreign divorce decree and relitigating the issues that have already been litigated with full notice and opportunity to be heard in the foreign court, a court of competent jurisdiction.**

Florida courts are willing to recognize judgments of dissolution rendered in foreign countries under principles of comity or voluntary cooperation. See *Pawley v. Pawley, 46So. 2d 464 (Fla. 1950)*. In order to be entitled to comity, the foreign judgment must incorporate the elements which would support it if it had been rendered in Florida. See *Gonzalez v. Rivero, Melero, and Option One Mortgage Corp, 51 So. 3d 534 (Fla. App. 2010)*. For instance, the grounds relied upon for divorce must be sufficient under Florida law. Jurisdictional requirements pertaining to residency or domicile and basic due process and notice requirements must also be met. *Id.* at 535.

Moreover, in *Gonzalez v. Rivero, et al.*, the Court found that to allow the relitigation of issues that have been fully litigated in a foreign court of competent jurisdiction where full notice and opportunity to be heard has been provided to both parties, would be to violate the principles of comity. In that case, one of the parties to the divorce attempted to invalidate the sale of jointly owned property located in Miami that had been authorized and approved by a Spanish court after proper notice and opportunity to be heard had been provided to both parties to the proceeding. The Court indicated that the party was now collaterally estopped from pursuing further litigation. Id. See also *Al-fassi v. Al-fassi, 433 So. 2d 664 (3d DCA 1983)* (foreign country court decree relating to child custody).

In *Popper v. Popper, 595 So. 2d 100 (Flu. 5'h DCA 1992)*, the Court held that a party was barred from collaterally attacking a foreign divorce decree. In that case, one of the parties was attacking a Mexican decree which had incorporated a separation agreement that provided for the support and custody of the parties' children. In making its determination, the Court reasoned

that the party seeking to attack the foreign judgment had personally appeared before the Mexican court and acquiesced to the court's jurisdiction. *Id.* at 103. As such, he was barred from attacking the validity of the foreign decree.

Similarly, in *Pawley v. Puwley, 46 So. 2d 464(Fla.), cert denied, 340 US. 866, 95 L. Ed, 632, 71 S. Ct 90 (1950)*, which involved a post-dissolution action for alimony, where the final judgment of dissolution was based on constructive service, the Court held that the party seeking to attack the foreign judgment was barred by laches and equitable estoppel from questioning the validity of the foreign divorce decree. *Id.* at 474. The Court reasoned that the party had chosen to ignore the foreign proceedings and to "sit by idly, silently and in an attitude of acquiescense..." and therefore was estopped from questioning the validity of the foreign divorce decree. *Id.* at 473-474.

The Court has also stressed the importance of finality of judgments in dissolution of marriage proceedings. For instance, in *Davis v. Dieujuste, 496 So. 2d 806 (Fla. 1986),* the Court held that "where a trial court has acquired jurisdiction to adjudicate the respective rights and obligations of the parties, a final judgment of dissolution settles all such matters as between the spouses evolving during the marriage, whether or not these matters were introduced in the dissolution proceeding, and acts as a bar to any action thereafter to determine such rights and obligations." Id. at 5 12. Moreover, even if a Court were authorized to revisit issues that have been settled by a final judgment of dissolution of marriage, such as a custody determination, a modification of timesharing or parental responsibility in Florida requires a showing of a "substantial, material, and unanticipated change of circumstances." See Fla. Stat. § 61.13 (3). See *Crittenden v Davis, 89 So. 3d 1098 (4th DCA 2012).*

In the instant case, there was a final judgment of dissolution of marriage granted by a Nicaraguan court, a court of competent jurisdiction. After a full hearing, where proper notice and opportunity to be heard was provided to both parties, the Nicaraguan court granted the divorce of the parties and ordered that they were to have equal timesharing of their minor children. As such, the Mother is estopped from questioning the validity of a foreign decree, where she was present at the hearing, and submitted herself to the foreign court's jurisdiction. Mother should have made her allegations at the original proceedings in Nicaragua, of which she had full notice and opportunity to be heard. As a result, Mother is barred by laches and estoppel from attacking the validity of the foreign decree and modifying the timesharing arrangements duly entered by the Nicaraguan court.

Moreover, it is our position that the foreign judgment of divorce was implicitly recognized and granted comity by the Court, as evidenced by the Court issuing a Pick-Up Order in favor of Father on August 23, 2011. Said Order stated that the minor children were to be placed in the physical custody of Father in accordance with the stipulations of the Nicaraguan divorce decree.

Thereafter, on July 20, 2012, the Court granted Mother's Motion to Suspend Timesharing and suspends Father's timesharing without there being a showing of a substantial change of circumstances that would warrant a modification of the timesharing schedule ordered by the Nicaraguan divorce decree. Instead of modifying the timesharing on the basis of the series of "emergency" motions that have been filed, a Supplemental Petition for modification of timesharing should have been filed in order for the Court to order a modification of timesharing in accordance with Fla. Stat. 61.13 where the parties would have also had an opportunity to present evidence.

Upon information and belief, the evidence would have shown that the majority of Mother's allegations originate from a time prior to the Nicaraguan divorce and as such she is estopped from relitigating the already decided custody issues from the foreign forum.

**II. The Court violated Father's due process rights when it suspended Father's timesharing and ordered supervised visitation without providing Father with adequate notice of the hearing and an opportunity to cross-examine the evidence presented against him.**

Florida courts have repeatedly held that it is a violation of a parent's due process rights for a court to temporarily modify child custody without providing the parent notice and opportunity to be heard. See *Ryan v. Ryan, 784 So. 2d 1215, 121 7-18 (Fla. 2d DCA 2001); Wilson v. Roseberry, 669 So. 2d 1152, 1154 (Fla. 5th DCA 1996); Gielchinsky v. Gielchinsky, 662 So. 2d 732, 733 (Fla. 4th DCA 1995).* Only under extraordinary circumstances may a court enter an order granting a motion for temporary custody of a child without providing notice to the opposing party. *Loudermilk v. Loudermilk, 693 So. 2d 666, 667-8 (Fla. 2d DCA 1997).* Such an order requires an emergency situation such as where a child is threatened with harm, or where the opposing party plans to improperly remove the child from the state. *Id.* at 668.

In the instant case, the Father was not afforded due process of law. First, Father was not given notice of the July 20th hearing where the court granted Mother's Emergency Motion to Suspend Timesharing and ordered that he be allowed only supervised visitation with the minor children pending further order of the Court. Mother had filed the Emergency Motion to Suspend Timesharing and that very same day the Court held a telephonic hearing to address Mother's Motion without providing Father adequate notice thereof. In fact, Father received actual notice of the July 20th telephonic hearing only after answering the telephone and being addressed by the Judge who was already presiding over the hearing. Furthermore, in making its determination, the

Court based its decision on hearsay evidence and did not provide Father with the opportunity to cross-examine the evidence presented against him.

Specifically, the Court relied on the University of Miami Child Protection Team Report ("CPT Report") which was presented at the hearing and attached to Mother's Motion. Hence, Father did not have the opportunity to cross-examine the expert witness/es responsible for writing the CPT Report. The Court simply accepted and adopted the CPT report and the allegations contained therein as "truth" to the detriment of Father and suspended Father's timesharing schedule without providing him with the opportunity to meaningfully present his case. Moreover, the Court was not advised of the fact that two DCF investigations had been previously investigated and closed with a finding of "no indicator" as to the allegations of abuse by Father. The final DCF investigation, from which the CPT Report was issued and upon which the Court had relied in making its determination, was actually closed on July 20, 2012, the same day the telephonic hearing was held. The Court was not advised of this either. This denial of his due process rights in July, resulted in Father and the minor children having no physical contact for the next five months.

Moreover, on December 7, 2012, the Court ordered that Father shall continue supervised timesharing and that there shall be no telephonic communications between him and the minor children. Once again, the Court relied on mere allegations of pleadings and hearsay in making its determination. For instance, the Court's decision was mainly based on Dr. Vanessa Archer's Psychological Evaluation Report which expressed concerns as to Father's ability to parent the minor children due to what the psychologist characterized as Father's "fanatical", "excessive", and "intrusive" religious beliefs. However, Father did not have the opportunity to cross-examine

Dr. Archer and provide evidence to contradict her allegations. As such, Father was deprived of his due process rights in both the July 20th telephonic hearing and the December 7th hearing.

Additionally, there was no emergency situation which would require the Court to bypass Father's due process rights when ordering the modification of Father's timesharing. Although Mother raised allegations of abuse by the Father towards the minor children, these allegations were proven time and again to be unfounded. In fact, the Department of Children and Families have twice investigated the abuse allegations and closed out the investigations with a finding of "no indicator". Even Dr. Archer's report acknowledges that Father poses no risk of physical abuse and harm to the minor children.

In the instant case, on December **7,** 2012, the Court ordered that Father shall continue supervised visitation with the minor children and stressed that Father was not to have any telephonic communication with the minor children. The Court's determination was primarily based on Dr. Archer's Psychological Evaluation Report wherein she describes Father's religious views as "fanatical", "intrusive", and "excessive". Dr. Archer's report alleges that Father's "repeated religious references are extremely scary for the children-and his inability to recognize this raises significant concerns with respect to his ability to provide an emotionally supportive and nurturing environment for the children." Dr. Archer apparently determines Father's inability to parent the children solely on the basis of Father's religious beliefs without providing a clear, affirmative showing of how Father's religious beliefs are emotionally harming the minor children as alleged in the report.

**III. The Court violated Father's First Amendment right of free exercise of religion when it ordered that Father was to have only supervised visitation and banned telephonic communications between Father and minor children on the basis of Dr. Archer's Psychological Evaluation Report, which alluded to Father's inability to parent the minor children due to Father's religious practices and beliefs.**

A curtailment upon a parent's right to free exercise of religion constitutes an impermissible infringement on religious freedom. *Rogers v. Rogers, 490 So. 2d 1017, 1019 (Fla. 1st DCA 1986).* Although a trial court may consider religion as a factor in a custody determination, it may not condition award of custody upon the curtailment of the parent's religious activities or beliefs, as such a restriction would interfere with the parent's free exercise rights. *Briskin v. Briskin, 660 So. 2d 1157, 1159 (4th DCA 1995).*

Allowing a court to select one parent's religious beliefs and practices over the other's, in the absence of a clear showing of harm to the child, would constitute a violation of the First Amendment. *Mesa v. Mesa, 652 So. 2d 456 (Fla. 4th DCA 1995).* Hence, the trial court's child custody determination must be predicated on evidence of harm, as opposed to mere speculation of harm to the child. *Mendez v. Mendez, 527 So. 2d 820, 821 (Fla. 3d DCA 1987).* "Harm to the child from conflicting religious instructions or practices...should not be simply assumed or surmised; it must be demonstrated in detail." *Id.* Otherwise, interference with religious matters in child custody cases absent an affirmative showing of compelling reasons for such action is tantamount to a manifest abuse of discretion. *Id.*

In the instant case, on December 7, 2012, the Court ruled that Father was to have only supervised visitation and that there was to be no telephonic communications between Father and the minor children. In making its determination, the Court heavily relied on Dr. Archer's Psychological Evaluation Report. In said report, Dr. Archer expressed apprehension as to Father's ability to parent the minor children as a result of Father's religious practices and beliefs. Dr. Archer concludes that Father be allowed only supervised visitation, as she "remains extremely concerned about the emotional safety of the children if left unsupervised in his care" due to what she describes as Father's "fanatical", "excessive", and "intrusive" religious beliefs.

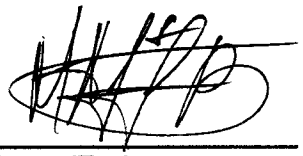
Except for mere speculation and "concern" for the children's emotional safety, Dr. Archer's report fails to demonstrate in detail just how Father's religious beliefs are psychologically harming the children. The report is devoid of any compelling evidence to show Father's religious beliefs are harming the children. Therefore, the Court's December 7th Order is tantamount to a manifest abuse of discretion. As such, the Court violated Father's right to free exercise of religion, as established under the First Amendment, when it relied on Dr. Archer's Report in making its determination that Father was to have only supervised visitation and that telephonic communications between Father and children were to be prohibited pending further order.

Moreover, the Court's strong reliance on Dr. Archer's Report and her almost exclusive reliance on Father's religious beliefs as a factor for her recommendations contained therein, demonstrates that Father's religious beliefs was not just one of several factors that the Court took into consideration when making its determination, but rather it was the only factor prompting the Court's decision to award Father supervised visitation and prohibiting telephonic communications between Father and children. By adopting and following Dr. Archer's recommendations, the Court espoused Dr. Archer's unsubstantiated concerns regarding Father's religious beliefs and their deleterious effects on his ability to parent the minor children. Therefore, the Court's made its decision to award Father only supervised visitation solely on the basis of Father's religious beliefs. As such, the Court's action constitutes a direct curtailment of Father's religious activities or beliefs.

What is more, the Court simply accepted Dr. Archer's reports as truth without affording Father the opportunity to contest the allegations contained therein and the opportunity to provide evidence to the contrary. Unlike in Mendez, where at least the religious parent had an

opportunity to cross-examine the testimony of expert witnesses, in this case Father was deprived of the opportunity to cross-examine Dr. Archer and her views as to the detrimental effect of Father's religious beliefs on his ability to parent the minor children. Notably, Father had recently undergone another psychological evaluation by Dr. Michael DiTomasso to whom Father was referred by DCF. In his evaluation, Dr. DiTomasso offered a different opinion and recommendation regarding Father's religious beliefs.

Respectfully submitted.



By:_____
Signature of Petitioner/Father
Mario Jimenez, M.D.

**CERTIFICATE OF SERVICE**

I certify that a copy of this document was emailed to the person(s) listed below on September 29th, 2014.

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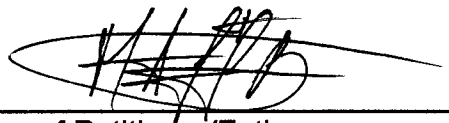

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