DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ELLEN MARY ALENCE f/k/a ELLEN MARY MATHESON,

Appellant,

v.

JOHN MCGREGOR MATHESON,

Appellee.

No. 2D21-1780

December 7, 2022

Appeal from the Circuit Court for Hillsborough County; Helene Daniel, Judge.

Bridget Remington and Ellen E. Ware of Ware Law Group, Tampa, for Appellant.

No appearance by Appellee.

ATKINSON, Judge.

Ellen Mary Alence (mother) appeals the trial court's order granting John McGregor Matheson's (father) motion to dismiss the

mother's second amended supplemental petition for modification of the partial final judgment of dissolution as to parenting and timesharing issues only. Because the mother sufficiently alleged a substantial, material, and unanticipated change of circumstances, we reverse the trial court's order dismissing with prejudice the mother's second amended supplemental petition and remand for further proceedings.

The parties were married in 1995 and had two children together, a daughter and a son. The parties' children have been minors throughout the original dissolution proceedings and the underlying postdecretal proceedings.

The mother filed a petition for dissolution in 2011. The trial court bifurcated proceedings, first holding a trial on parenting and timesharing issues and then holding a trial on all the remaining issues raised by the parties. Regarding the issues of parental responsibility for and timesharing with their two minor children, the mother presented evidence that the father had been diagnosed with pedophilia. In her proposed parenting plan, the mother sought sole parental responsibility and requested that the father have supervised timesharing. At trial, the father admitted to having a

deviant sexual attraction to teenage boys. The father opposed the mother's proposed parenting plan and sought shared parental responsibility.

In its partial final judgment on parenting and timesharing issues, the trial court made the following findings: the father had a deviant sexual attraction to teenage boys, he had attended high school boys' swim meets to take close-up pictures of teenage boys in speedos which he saved on his computer to use for prurient purposes, and during the dissolution proceedings, he had groomed a teenage boy as a potential sexual partner. Based on these findings, the trial court concluded that it had a responsibility to protect the parties' minor children from the risks associated with their father's condition, including the risk that he would groom or pursue other children for sexual gratification in their presence. However, the trial court disagreed with the mother that her proposed parenting plan—which granted the mother sole parental responsibility and the father only supervised timesharing—was required to protect the children. Instead, the trial court awarded shared parental responsibility and created a step-up timesharing plan that incrementally increased the father's timesharing upon the

completion of specific tasks until the parties had equal timesharing. The parties were ordered to employ a parenting coordinator to assist them in making parenting decisions in the children's best interests.

The trial court also fashioned safety measures to protect the children from the risks associated with the father's sexual deviancy. The trial court ordered the father to continue and successfully complete treatment for sexual deviancy, follow his therapists' directions, submit to and pass[1] a polygraph test three times per year, install antipornography software on his home computer and any computer to which he has access, and require his son to wear long board shorts while swimming in the pool at the father's home. The safety measures also prohibited the father from having any contact with child-related organizations and activities (other than those involving the parties' children), allowing children other than his daughter and son in his home, and bathing or cosleeping with his children. The mother appealed the partial final judgment, and

[1] For the father to pass the polygraph, the polygrapher must find that there is no polygraph evidence to suggest that the father is engaging in risky behavior—for example, viewing child pornography or grooming young men—that would pose risks to his children.

this court affirmed. *See Matheson v. Matheson*, 187 So. 3d 1244 (Fla. 2d DCA 2016) (table decision).

In 2015, the trial court granted the father's supplemental petition to modify the parenting plan. The trial court eliminated the safety measure prohibiting the father from allowing other children to visit his home. This safety measure was replaced by a provision permitting other children to visit the father's home *only* while the parties' children were in the father's care but requiring the father to institute a household rule that all male children were to wear long board shorts while swimming in the pool. The mother appealed the order modifying the parenting plan, and this court affirmed. *See id.*

In 2017, the mother filed a supplemental petition to modify the parenting plan (original petition), alleging that there was a substantial, material, and unanticipated change in circumstances because after the entry of the partial final judgment and 2015 modification order, the father had ceased treatment for his sexual deviancy, failed to inform the court, and engaged in risky behaviors against his therapists' recommendations. The father's alleged risky behaviors included taking pictures of children that were not the parties' children; attending children's sporting events in which his

children were not participants; applying for positions of authority over children; "engag[ing] in an excessive and unreasonable pattern of nearly constant socializing with other people's children in his home;" arranging playdates for his children with male teenagers without his children's request or input; hosting sleepovers with other children at his home; taking other children on overnight, out-of-state trips; and demanding that his son attend older teenage boys' baseball games. The mother noted that the parties' children and their friends were around the same age as boys that the father had admitted to being sexually attracted to at the original trial on parenting and timesharing issues in the 2011 dissolution proceeding. She also alleged that the father's behavior had negatively impacted the children's mental health. The father filed a motion to dismiss the original petition, arguing that the mother's original petition was barred by res judicata. The trial court denied the father's motion. Shortly after the trial court entered its ruling on the father's motion to dismiss the original petition, the parties' case was reassigned to a different trial judge.

Since the father had not filed a response to the original petition, the mother amended her petition as a matter of course

(first amended petition). *Cf.* Fla. Fam. L. R. P. 12.190(a). In the first amended petition, the mother alleged substantially the same facts as in the original petition. However, she added one allegation that the father had biased the polygraph process so that polygraphs were no longer an effective safety measure for determining whether the father was engaging in behaviors that pose a risk to his children. The father again filed a motion to dismiss based on res judicata. The trial court granted the father's motion without prejudice. Shortly after the trial court entered its ruling on the father's motion to dismiss the first amended petition, the parties' case was again reassigned to a different trial judge.

The mother timely filed a second amended supplemental petition (second amended petition). In the second amended petition, the mother alleged a substantial, material, and unanticipated change in circumstances based on the same conduct alleged in the original petition and the first amended petition. However, she added more allegations that were not included in the first two versions of her petition. She alleged that the father had masturbated to pictures of children, that the father's conduct has strained his relationship with the parties' daughter and caused his

daughter to exhibit a "trauma response," and that the father had failed court-ordered polygraphs.

The mother also added allegations that the parties could not agree on major decisions regarding the children's healthcare and education. She alleged that the father had unilaterally changed the children's pediatrician without the mother's knowledge or consent, failed to share the children's medical information with the mother, refused to communicate using the software recommended by the parties' parenting coordinator, failed to participate in the meetings about the children's education, hindered decisions made at educational meetings that he chose not to attend, unilaterally changed the children's school zone by moving out of the school district, deferred medical decisions to the children, coached the children against receiving medical treatment and testing, refused to follow doctors' and dentists' recommendations for the children's medical treatment because of the expense to him, and refused to provide a prescription albuterol inhaler to one of the children.

The new allegations also included that the father had neglected the children's health and educational needs. With respect to the children's health, she alleged that the father had allowed the

children's medical insurance to lapse even though he knew that the children were involved in extracurricular activities that can cause physical injury and that his daughter has a heart condition. She also alleged that the father had concealed the lapse in medical insurance, refused to share information with the mother so that she could obtain new health insurance for the children, obtained insufficient temporary medical insurance that did not cover the children's preexisting conditions, deferred medical decisions to the minor children, alienated the children from their therapist, prioritized extracurricular activities over the children's health, disputed the necessity of dental treatment, and refused to provide a prescription albuterol inhaler to one of the children. With respect to the children's educational needs, she alleged that the father hindered the efforts and recommendations of their son's teachers and therapists to implement a 504 educational plan for the son, have the son tested for a learning disability, have him evaluated for dyslexia, and enroll him in reading therapy.

The mother alleged that the facts alleged in her second amended petition amounted to a substantial, material, and unanticipated change in circumstances since the entry of the

partial final judgment and that modification of the parenting plan was in the best interests of the children. She requested that the trial court modify the parenting plan to award her sole parental responsibility or, alternatively, ultimate decision-making as to educational and healthcare decisions. She also requested that the trial court craft additional safety measures to protect the children from the risks associated with the father's condition.

The father filed a motion to dismiss the mother's second amended petition, arguing that her allegations were conclusory and barred by res judicata. The trial court granted the father's motion. In its order, the trial court noted that the mother's concerns about the children's medical treatment and insurance were "best suited to be addressed in the form of enforcement or contempt proceedings," so the trial court reserved ruling on these allegations until the mother filed a motion for contempt or enforcement.

However, with respect to the mother's other allegations, the trial court concluded that the father's alleged conduct did not constitute an "extraordinary" and unanticipated change in circumstances warranting modification and that the second amended petition did not allege how modification would be in the

best interests of the children. The trial court agreed with the father that the relief requested by the mother was barred by res judicata because the trial court had previously created safety measures based on the father's condition and the parties had already litigated the issue of sole parental responsibility in the 2011 dissolution proceeding. Thus, the trial court dismissed the second amended petition with prejudice.

"The standard of review of a final order dismissing a petition with prejudice is de novo." *Mendez v. Mendez Lopez*, 271 So. 3d 72, 73 (Fla. 3d DCA 2019) (emphasis omitted). "[T]o state a cause of action in a petition for modification, the pleader must allege ultimate facts establishing an entitlement to modification . . . ." *Korkmaz v. Korkmaz*, 200 So. 3d 263, 265 (Fla. 1st DCA 2016). "When determining the merits of a motion to dismiss, a court . . . must accept the facts alleged therein . . . as true, with all reasonable inferences drawn in favor of the pleader." *Id.* (quoting *Elbaum v. Elbaum*, 141 So. 3d 658, 660 (Fla. 4th DCA 2014)). "After the trial court enters the original final judgment decree [in dissolution proceedings], it is res judicata of the facts and

circumstances at the time the judgment became final." *Wade v. Hirschman*, 903 So. 2d 928, 932–33 (Fla. 2005).

After its entry, the final judgment is presumed to be reasonable; however, "[t]his presumption may be overcome when changes in circumstances have arisen which warrant and justify modification of the original decree." *Id.* at 933; *see also* § 61.13(3), Fla. Stat. (2018). A trial court may only modify a final parenting plan upon a party meeting her "extraordinary" burden, *Hollis v. Hollis*, 276 So. 3d 77, 79 (Fla. 2d DCA 2019) (quoting *Wade*, 903 So. 2d at 933), to establish "a substantial, material, and unanticipated change in circumstances and a determination that the modification is in the best interests of the child," *C.N. v. I.G.C.*, 291 So. 3d 204, 206 (Fla. 5th DCA 2020) (quoting § 61.13(3)).

To warrant modification, the alleged change in circumstances must not have been reasonably contemplated at the time of the original judgment. *Hollis*, 276 So. 3d at 79. A "parent requesting the modification must establish more than 'an acrimonious relationship and a lack of effective communication in order to show a substantial,' " material, and unanticipated change of circumstances. *Korkmaz*, 200 So. 3d at 266 (quoting *Sanchez v.*

Hernandez, 45 So. 3d 57, 62 (Fla. 4th DCA 2010)); *see also Hollis*, 276 So. 3d at 80; *Ring v. Ring*, 834 So. 2d 216, 217 (Fla. 2d DCA 2002). Courts have found a change in circumstances sufficient for modification when one parent has engaged in a course of conduct of failing to comply with the parenting plan, *see Wade*, 903 So. 2d at 935; hindering the other parent's attempts to foster the child's health, education, and stability, *see Ezra v. Ezra*, 299 So. 3d 466, 469 (Fla. 3d DCA 2020); or neglecting the child's health needs and providing an unstable home life and education, *see San Marco v. San Marco*, 961 So. 2d 967, 969–71 (Fla. 4th DCA 2007).

The trial court erred by concluding that the allegations in the mother's second amended petition were facially insufficient because she alleged that since the entry of the original judgment and the 2015 modification, the father had engaged in risky behaviors and a course of conduct with respect to the children's healthcare and education, which amounted to a substantial, material, and unanticipated change in circumstances and that modification would be in the best interests of the children.

Although some of the mother's allegations—for example, the father's unilateral decisions to move and to change the children's

pediatrician, refusal to share health information, and refusal to use the communication software recommended by the parenting coordinator—suggest that the parties have had "a lack of effective communication," *Korkmaz*, 200 So. 3d at 266, the mother has alleged more than a mere breakdown of communication. Rather, she alleged that since the entry of the partial final judgment and the 2015 modification, the father had engaged in a pattern of conduct that hindered her, her children's doctors', and her children's educational professionals' attempts to foster the children's health and education. These allegations, if proven, could establish a substantial, material, and unanticipated change in circumstances. *Cf. Ezra*, 299 So. 3d at 469 (affirming modification where "the record unequivocally establishe[d]" that since the original judgment "the father ha[d] both passively and overtly hindered the mother's arduous attempts to foster the happiness, mental health, academic prowess, and overall stability of the children").

She also alleged that the father has engaged in a pattern of conduct that seeks to undermine the mother's attempts to foster the children's health and education by unilaterally changing the children's pediatrician and school zone, refusing to share important

medical information, encouraging the minor children to make their own medical decisions against the advice of their pediatrician, refusing to participate in educational meetings, undermining professional recommendations to improve the son's academic performance, and refusing to provide prescription medication to one of the children. This conduct, if proven, could also constitute a substantial, material, and unanticipated change in circumstances. *Cf. id.* (noting that the record included evidence that the father occasionally reduced the child's dose of prescription medication without consulting a medical professional); *San Marco*, 961 So. 2d at 970 (concluding that there had been a substantial, material, and unanticipated change in circumstances where the mother failed to provide the child with adequate medical attention).

The trial court noted that the mother's allegations about the children's healthcare and medical insurance were "best suited" to be resolved by a motion for enforcement or contempt, not modification. However, the mother's allegations, even if they could also be the subject of a motion for enforcement or contempt, may properly be the subject of a petition for modification. In relevant part, section 61.13(3) provides that "[a]determination of parental

responsibility, a parenting plan, or a time-sharing schedule may not be modified without a showing of a substantial, material, and unanticipated change in circumstances and a determination that the modification is in the best interests of the child." The mother's allegations that the father has engaged in a course of conduct neglecting his children's healthcare and educational needs, refused to continue treatment for his psychological condition, engaged in behaviors that increased risks to his children that are associated with his condition, and made a series of unilateral decisions affecting the children's health and education could amount to a "substantial, material, and unanticipated change in circumstances." *See id.* And district courts have affirmed modification orders in which the trial court modified parenting plans based on evidence that one parent failed to provide adequate medical treatment or engaged in a course of conduct hindering the other parent's efforts to provide for the child's health. *See Ezra*, 299 So. 3d at 469; *San Marco*, 961 So. 2d at 968–70. While a party *could* raise these allegations in a motion for enforcement of the original judgment, the allegations, if true, could also establish grounds for modification of the parenting plan.

Further, the mother alleged that since the entry of the partial final judgment and the 2015 modification order, the father engaged in a course of conduct that increased the risks to his children associated with his diagnosis with sexual deviancy, undermined the efficacy of the safety measures adopted by the trial court in the partial final judgment, violated the partial final judgment, and negatively impacted his children's mental health. *Cf. Ezra*, 299 So. 3d at 469; *Wade*, 903 So. 2d at 935. The mother alleged that the father has increased the risks to the children associated with his sexual deviancy by failing to continue his court-ordered therapy, engaging in risky behaviors involving children, and pressuring his children to interact with their male peers who are now the same age as children to whom the father admitted that he had been sexually attracted. These allegations suggest that the father may have been using his children to facilitate meeting teenage boys to groom them for prurient purposes—a risk that the trial court sought to avoid by crafting the safety measures in the partial final judgment. The mother has alleged that the safety measures in the original parenting plan, as modified by the 2015 modification order, are no

longer effective at protecting the children from the risks associated with the father's condition.

Taking her allegations as true, *see Korkmaz*, 200 So. 3d at 265, the mother has alleged a substantial, material, and unanticipated change in circumstances and that modification is in the best interests of the children's mental health, physical health, and educational success. Thus, the trial court erred by dismissing the mother's second amended petition with prejudice.

The trial court also erred by concluding that res judicata barred the mother's requests for the creation of new safety measures, sole parental responsibility or, alternatively, sole decision-making as to education and healthcare decisions. A final judgment and parenting plan in a family law matter "is res judicata of the facts and circumstances *at the time the judgment became final*." *Wade*, 903 So. 2d at 932–33 (emphasis added). However, final judgments and parenting plans may be modified upon a showing of a substantial, material, and unanticipated change in circumstances. *C.N.*, 291 So. 3d at 206.

In a petition for modification, the petitioner generally alleges new facts that arose after the entry of the final judgment—not the

facts to which the final judgment is res judicata, *cf. Wade*, 903 So. 2d at 932–33—and the trial court determines whether these new facts satisfy the standard for modification. *Cf. Korkmaz*, 200 So. 3d at 265 ("[I]f the petitioning parent fails to allege that the circumstances have materially and substantially changed since the original judgment, there is no legal basis to modify the . . . order [or judgment]."). If the petitioner does not allege new facts that have arisen since the entry of the final judgment but alleges instead facts that the parties litigated or reasonably contemplated at the time the original judgment was entered, then the proper conclusion is that the petitioner has not met the standard for modification. *Compare id.*, *with Neale v. Balcerak*, 627 So. 2d 1310, 1311 (Fla. 1st DCA 1993) (concluding that the former wife's second motion for enforcement of child support arrearages was barred by res judicata because the trial court's order on the former wife's first motion for enforcement, which sought the same arrearages, was conclusive as to the issue raised in the second motion).

In her second amended petition, the mother alleged that the father began engaging in the alleged conduct *after* the entry of the partial final judgment and the 2015 modification—in other words,

she alleged new facts. Before entering the order dismissing the second amended petition with prejudice, trial court had not entered a final order denying the mother's requests for sole parental responsibility or ultimate decision-making *based on the circumstances alleged in her second amended petition*. *Cf. Neale*, 627 So. 2d at 1311. As explained above, the mother "allege[d] ultimate facts establishing an entitlement to modification, ultimate facts reflecting a substantial, material, and unanticipated change in circumstances." *See Korkmaz*, 200 So. 3d at 265. Thus, the trial court erred by concluding that her requests for sole parental responsibility and ultimate decision-making were barred by res judicata.

We reverse the trial court's order dismissing the mother's second amended petition with prejudice and remand for further proceedings in accordance with this opinion.

Reversed and remanded.

SLEET and LABRIT, JJ., Concur.

Opinion subject to revision prior to official publication.