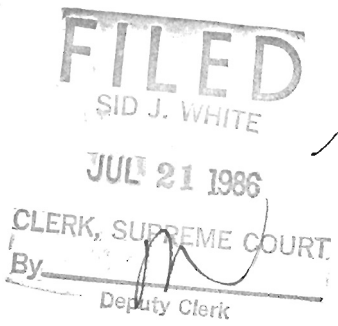
IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,309

THE FLORIDA BAR RE:

AMENDMENT TO RULES OF JUDICIAL ADMINISTRATION RULE 2.050 (TIME STANDARDS)



BRIEF OF THE FLORIDA CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS AS AMICUS CURIAE

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SUMMARY OF ARGUMENT

ISSUE I

The proposed time standards actively discriminate against the preparation for and scheduling of contested domestic relations cases which account for more than one-half (1/2) of all civil non-jury filings. This litigation is every bit as complicated and time consuming as other civil non-jury trials, the financial stakes are equally as high, but the emotional turmoil seems to be even more intense.

It is unrealistic to believe that contested domestic relations actions deserve less lawyer attention or consume less judicial effort than other legal or equitable non-jury matters. There is no justifiable reason to set them apart. The minimum timetable should therefore be twelve (12) months from the date of filing to the date of final disposition.

ISSUE II

If the time standards for contested domestic relations cases are to be only 180 days, then this type of litigation is already seriously disadvantaged, first because of the "built in" time limitations under the Rules of Civil Procedure, and secondly, from the now required use of form interrogatories to elicit basic financial information. Accordingly, the quest for discovery will tend to be not only a race toward the "clock," but also an uphill battle by the proponent to forestall new and increased efforts to "stonewall" or intentionally delay production of financial disclosures. Further complicating such a situation will be the predetermined policy under the proposed time standards for "non-continuances," Rule 2.085(c).

The rules of the discovery game should be fair for each circuit court non-jury action, and therefore, the time requirements of the twelve (12) months should apply to all.

ISSUE III

Domestic relations litigation many times is terminated by a reconciliation of the parties and a reunion of the family.

A timetable of only 180 days from the date of filing to the date of final disposition will frustrate such efforts and may lead only to a quick end to a marriage, rather than a systematic plan to save it.

The integrity of the husband-wife's relationship and minor children are more important priorities than increased judicial efficiency. Other options should first be explored, such as specialized family courts or court ordered counseling or mediation.

STATEMENT OF THE FACTS AND OF THE CASE

This Court, on May 14, 1986, rendered a decision which proposed amendments to trial court administration, Rule 2.050, Fla.R. Jud.Adm. This decision also proposed a new rule, 2.085(a)-(e), which established time standards for all Florida trial and appellate proceedings, _____ So. 2d _____, 11 FLW 216 (Fla. May 14, 1986).

The decision was later the subject of a corrected opinion which appeared on May 30, 1986, _____ So. 2d _____, 11 FLW 234 (Fla. May 30, 1986).

Within the appropriate time, The Florida Bar, pursuant to Rule 9.330, Fla.R.App.P., filed and served a Motion for Rehearing.

On July 1, 1986, the Florida Chapter of the American Academy of Matrimonial Lawyers petitioned for permission to appear as amicus curiae, Rule 9.370, Fla.R.App.P., and to file a brief in connection with the pending Motion for Rehearing. On July 8, 1986, this Court entered an Order granting the Academy's Motion and ordering its brief to be served on or before July 18, 1986.

STATEMENT OF THE ISSUES

ISSUE I

A PROPOSED TIME STANDARD OF 180 DAYS FROM THE DATE OF FILING TO THE DATE OF FINAL DISPOSITION FOR A CONTESTED DOMESTIC RELATIONS CASE, BUT A DIFFERENT TIME STANDARD OF 360 DAYS FOR FINAL DISPOSITION OF ANY OTHER CONTESTED CIVIL NON-JURY ACTION, IS BOTH ARBITRARY AND DISCRIMINATORY.

ISSUE II

THE PROPOSED TIME STANDARDS OF 360 DAYS FROM FILING TO FINAL DISPOSITION FOR CONTESTED NON-JURY CIVIL CASES AND YET ONLY 180 DAYS FROM FILING TO FINAL DISPOSITION FOR DOMESTIC RELATIONS CASES MAY ENCOURAGE OR, IN THE ALTERNATIVE, BENEFIT A PARTY WHO IS ENGAGING IN FLAGRANT VIOLATIONS OF DISCOVERY RULES OR "STONEWALLING" THE OTHER PARTY AS TO LEGITIMATE PRE-TRIAL FINANCIAL DISCLOSURE.

ISSUE III

THE PROPOSED TIME STANDARDS OF 180 DAYS FOR FINAL DISPOSITION OF A CONTESTED DOMESTIC RELATIONS CASE MAY PREVENT RECONCILIATION OR IMPEDE SETTLEMENT OF MARITAL DISPUTES BETWEEN THE PARTIES.

ARGUMENT

ISSUE I

A PROPOSED TIME STANDARD OF 180 DAYS FROM THE DATE OF FILING TO THE DATE OF FINAL DISPOSITION FOR A CONTESTED DOMESTIC RELATIONS CASE, BUT A DIFFERENT TIME STANDARD OF 360 DAYS FOR FINAL DISPOSITION OF ANY OTHER CONTESTED CIVIL NON-JURY ACTION, IS BOTH ARBITRARY AND DISCRIMINATORY.

With the advent of Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), the increased recognizability and calculations for special equities, Ball v. Ball, 335 So. 2d 5 (Fla. 1976), Landay v. Landay, 429 So. 2d 1197 (Fla. 1983), and Gregg v. Gregg, 474 So. 2d 262 (Fla. 3d DCA 1985), and the entrusted duty to secure for a dependent spouse and minor children adequate support, Walter v. Walter, 464 So. 2d 538 (Fla. 1985), in-depth pre-trial preparation is no longer an option for the Florida marital and family lawyer, it is now an absolute necessity!

Counsel is cautioned time and time again to present clear and convincing trial evidence of the contributions of the parties, the nature and origin of the assets, and their fair market value, Upstill v. Upstill, 435 So. 2d 979 (Fla. 4th DCA 1983), Hu v. Hu, 432 So. 2d 1389 (Fla. 2d DCA 1983), and Chisari v. Chisari, 433 So. 2d 1309 (Fla. 2d DCA 1983). In this regard, proper valuation is critical since an ommission or failure to do so may lead to a reversal with yet further increased judicial labor at the trial level, Manzella v. Manzella, 473 So. 2d 39 (Fla. 3d DCA 1985).

Great care should also be taken to avoid mixing "marital" and "non-marital" properties in the same equitable distribution

formula, lest its results produce havoc and chaos, Palumbo v. Palumbo, 439 So. 2d 232 (Fla. 5th DCA 1983).

Now lastly, but most recently, counsel must be prepared to calculate, for the benefit of the trier of fact, the present value of pension and retirement benefits and to call up their reasonable actuarial projections and income potential, Diffenderfer v. Diffenderfer, _____ So. 2d _____, 11 FLW 280 (Fla. June 26, 1986), and Bogard v. Bogard, _____ So. 2d _____, 11 FLW 287 (Fla. June 26, 1986).

Recalling such obligations and directives, can it now seriously be questioned that the pre-trial services required of a marital and family lawyer are any less tedious or burdensome from that of a civil litigator in the non-garden variety type case? Are not such family law cases as complex and time-consuming as other civil non-jury matters, such as commerical or construction related litigation? Has not this Court already certified both areas of practice as specialized?

If each of these attorneys are not mutually observant and conscientious in their degree of trial preparation, will not their respective clients suffer approximately the same degree of financial disadvantage?

For example, may not the defendant, as might the husband or father, be forced into poverty or even bankruptcy, or further, be tempted to flee the state to avoid the payment of a judgment? Or what of the needy wife or injured plaintiff, where does she or he now turn?

Do these courtroom losses, based upon inadequate preparedness, then turn into tomorrow's malpractice actions? Or Rule 1.540 proceedings? Or suits to collaterally attack a final judgment or support order? Does not the well intentioned efforts of the proposed time standards then lead only to future increased caseloads?

Also, can it not be said that the proposed amendments, which were initially designed to ease seemingly crowded trial dockets and appease the public, later may be used by dissatisfied marital litigants to fuel the fires of already heated resentment against both the bench and bar?

The answer to these questions is perfectly obvious - marital and family law is a part and parcel of civil litigation - it is but another division, such as commercial or personal injury law. It cannot and should not be treated differently! To do so is either to ignore reality or else to turn one's head and relegate the lives and personal fortunes of Florida's families, divorced population and minor children to an inferior standard of justice not equally shared by other citizens.

Contested domestic relations cases deserve the same judicial attention as do all other civil matters. If the proposed time standards are to be adopted, then the same deadlines should be given to <u>all</u> circuit court civil non-jury actions.

ISSUE II

THE PROPOSED TIME STANDARDS OF 360 DAYS FROM FILING TO FINAL DISPOSITION FOR CONTESTED NON-JURY CIVIL CASES AND YET ONLY 180 DAYS FROM FILING TO FINAL DISPOSITION FOR DOMESTIC RELATIONS CASES MAY ENCOURAGE OR, IN THE ALTERNATIVE, BENEFIT A PARTY WHO IS ENGAGING IN FLAGRANT VIOLATIONS OF DISCOVERY RULES OR "STONEWALLING" THE OTHER PARTY AS TO LEGITIMATE PRE-TRIAL FINANCIAL DISCLOSURE.

Access to financial information, or "informal discovery," cannot ordinarily be done in most domestic relations cases before the filing of a petition. Usually, the wife has little more than "checkbook" knowledge of the parties' finances and no earthly idea as to the extent of their assets, liabilities, or the total of their net worth. On the other hand, the husband, or his accountant, retains all important documents and thus effectively controls its release, as well as preserving for himself an initial tactical advantage.

Further compounding this problem, the marital and family lawyer will constantly be racing against the "clock" for even minimal financial discovery, if the proposed time standards become law, because the rules of civil procedure have been amended and now form interrogatories must first be used which are limited to approximately twenty-five (25) in number, including subparagraphs, and only three (3) years in duration. Even if these interrogatories are propounded with a notice to produce, Rules 1.340 and 1.350, Fla.R.Civ.P. and Appendix, Form 3, and served with the summons, the respondent does not have to comply until forty-five (45) days after service, and at that point, 25% of the time to the date of final disposition has already expired.

But what if the respondent, instead of responding, objects to the requested discovery? Counsel must then decide whether to compel compliance and spend additional time getting an enforcement hearing (the clock is still ticking), or else go forward to trial with the hope that his client is sufficiently armed with "self-help" financial evidence to carry the day, and that the trial judge will back the client by not permitting the defaulting party to rebut such evidence, Rule 1.380(d).

The choice counsel must then make in this regard is difficult to evaluate because first, the proposed rules make no mention of, or give a definition to, a "complex case." Secondly, even if the action is identified as "complex," Rule 2.085(b)(1), there is no allowance for an extension beyond the 180 days, and lastly, the trial court may give a more overriding priority to "case control," Rule 2.085(b), and thus put all immediate discovery problems on the "back burner" for summary disposition at a pre-trial or scheduling conference.

If at that time the ruling goes against the requested discovery, or is deferred, what choices are left? To pursue the discovery in the time remaining is one option, but what if the pre-trial or scheduling conference is not held, as is true in many circuits, until the day before trial?

Even if some time remains for other discovery techniques, is there enough time left on the "clock"? What if such discovery turns up new financial avenues? Will there be enough time to explore them?

One thing that seems to be the final "death blow" for discovery enforcement under the proposed time standards is a predetermined policy of "non-continuances," Rule 2.085(c).

The proposed amendments all but abdicate the discretion of a trial court in this regard because it is expressly stated "Continuances should be few....," Rule 2.085(c).

Hopefully, assuming that discovery violations constitute "good cause" for a first continuance, can the client then come back for more and cite continuing or persistent "stonewalling" tactics or evasion of orders compelling discovery? Is this construed to be "good cause" the second time around?

Or what about the situation where wishing to be "partially fair," but not truly open to full financial disclosure, your opponent argues not the merits of your entitlement to discovery, but rather plays upon the sympathies of a busy trial judge and urges him to adhere strictly to the time standards because this court has told him to do so? Where does this leave you if you lose on your discovery request?

Finally, one would ask, why does the domestic relations branch of civil law have to suffer in this manner with only 180 days to prepare and try a complicated case, while the other civil specialties enjoy a 100% more time advantage?

Are not the opportunities for hiding assets, concealing financial information, and destroying records basically the same for both areas of law, but yet even more probable in domestic relations

actions where emotions run high and uncooperativeness is the norm, rather than the exception? If so, why not treat the two the same!

Is not a shortening of the time to final disposition of a contested domestic relations case really an aid and convenience to a spouse or parent who intends to blatantly resist discovery or set upon a sophisticated scheme of "double dealing" in order to avoid truthful disclosure?

Given this thought, should not the goal of increased court efficiency yield to a policy which permits "fair dealing," even though time delays will eventually be encountered and caseloads remain the same or increase? Is it not better to have a well reasoned judicial decision then merely an immediate one which may be unjust because it is based upon scantily furnished or gathered financial data?

In summary, the goals of justice should be the same for all litigants -- truth and equal access to a fair trial. For that reason, and the others expressed under this issue, contested domestic relations cases should be accorded the same time standards as all other civil non-jury matters.

ISSUE III

THE PROPOSED TIME STANDARDS OF 180 DAYS FOR FINAL DISPOSITION OF A CONTESTED DOMESTIC RELATIONS CASE MAY PREVENT RECONCILIATION OR IMPEDE SETTLEMENT OF MARITAL DISPUTES BETWEEN THE PARTIES.

Many times a spouse or parent, in a fit of emotion or anger, will commence family law litigation only to later regret, in the light of day, his or her actions.

It is not at all uncommon for a client to instruct the attorney to take no further affirmative action because the parties are now "talking" or attempting to "reconcile," or that it may be in the best interests of the family unit or minor children to let things "cool down" before proceeding to a temporary custody or support hearing or to a non-jury trial.

Not wishing to forego strategic advantage or show one's hand, counsel most of the time does not present to the court an order to place the cause on the inactive list of cases, or to abate it, but instead relies upon Rule 1.420(2)(e) as a steady guide for concluding the action.

If the proposed amendments are enacted, the foregoing examples may not at all be possible in the future because the established time standards may well overtake the desires of the parties to work things out between themselves. They, in effect, will be "silenced."

By insisting upon final disposition within 180 days, the proposed rules in reality require the parties to be adversarial and to prepare for trial even if they don't want to. The only solution is to

pay substantial legal fees and either litigate or voluntarily dismiss the action, 1.420(a)(1), if the time limitations do not permit settlement negotiations to effectively work. At this point, one should consider asking: do these proposed amendments then help the ends of justice in such situations?

Of equal concern is an underlying goal of the time standards against continuances, Rule 2.085(c), Fla.R.Jud.Adm., and thus an implied undercutting of F.S. 61.052(a)(b)(2) 1, 2, 3, even in a given situation where counseling must, of necessity, continue past the initial three (3) months and then extend beyond the hypothetical "final disposition" date, Rule 2.085(d)(C), Fla.R.Jud.Adm.

Noting the express purpose behind "no fault," F.S. 61.001, the fact that the State of Florida is a party to each marriage contract and that it is the established public policy of this state that a dissolution cannot be granted merely upon the consent of the parties, Posner v. Posner, 233 So. 2d 381 (Fla. 1970), Riley v. Riley, 271 So. 2d 181 (Fla. 1st DCA 1972), and Little v. Little, 298 So. 2d 474 (Fla. 1st DCA 1974), it is submitted that the goal of increased judicial efficiency should not be reached at the expense of the loss of troubled marriages. Florida courts should strive to keep the family unit together and preserve a husband-wife relationship! Other options are certainly available to clear the civil dockets, such as establishing specialized divisions for family courts in the twenty (20) circuits and permitting these courts to set their own trial timetables or else to propose a rule that will insure final disposition of

all contested domestic relations cases within 180 days after they are noticed by the parties for trial, 1.440, Fla.R.Civ.P.

CONCLUSION

Since former spouses and divorced parents must, of necessity, live with the after-problems created by the dissolution of their marriage, they, better than anyone else, can appreciate the consequences and long-range effects which will result from a trial, especially where the judge may not react in exactly the way they believe is appropriate, and thus, leave them with still further emotional ties or economic predicaments to solve in the future.

The present court system works well and lends itself to effective communication between the parties, amicable resolution of complex custody and financial issues, and possible reconciliation of the parties. It should therefore be maintained without change.

Forcing marital partners to combat in 180 days without viable options will result only in more trials, not less!

Further, the proposed rule changes will also lead to fewer voluntary financial disclosures, encourage evasion in the discovery process, and in the long run, will cost the parties more to litigate within a shorter period of time.

Lastly, there is no valid factual or legal reason to exempt contested domestic relations cases from the same time standards (360 days) applicable to all other non-jury civil actions.

Perhaps the most appropriate and equitable solution, if time standards are to be enacted, is either to establish specialized family courts in each circuit and empower them to set up their own time

deadlines, or to set a definite date for final disposition of all circuit court civil non-jury trials. This date should be 180 days from the service of a notice for trial, 1.440, Fla.R.Civ. P.

Respectfully submitted,

MICHAEL R. WALSH, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail, postage prepaid, to STEPHEN A. RAPPENECKER, ESQUIRE, Chairman, Rules of Judicial Administration Committee, Post Office Box 566, Gainesville, Florida 32602, JOHN F. HARKNESS, JR., ESQUIRE, Executive Director, The Florida Bar, Tallahassee, Florida 32301-8226, MICHAEL NACHWALTER, ESQUIRE, Board of Governors, 400 Edward Ball Building, 100 Chopin Plaza, Miami Center, Miami, Florida 33131, and to MIRIAM E. MASON, Chairman of the Family Law Section, The Florida Bar, Post Office Box 2409, Tampa, Florida 33601-2409, this 18 day of July, 1986.

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