IN THE SUPREME COURT

OF FLORIDA

CASE NO. 71,312

IN RE: PROPOSED MEDIATION AND ARBITRATION RULES

COMMENTARY OF THE FAMILY LAW SECTION
ON PROPOSED RULES IMPLEMENTING
FLORIDA STATUTES §§44.301 - .306

MAURICE JAY KUTNER
Chairman, Family Law Section
28 West Flagler Street
12th Floor
Miami, Florida 33130
(305) 377-9411

IRA ABRAMS
ABRAMS & ABRAMS, P.A.
Co-Chairman, Family Law Section
Rules Committee
3341 Cornelia Drive
Coconut Grove, Florida 33133
(305) 858-8828

- and -

CYNTHIA GREENE
Chairman, Family Law Section
Amicus Commtttee
New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 371-5600

GENERAL COMMENTS

The Family Law Section of the Florida Bar is of the unanimous opinion that the newly enacted legislation, §44.301-.306, Florida Statutes, and the proposed Rules for the implementation of that legislation will serve to expedite resolution of civil disputes. Mediation is particularly significant in the area of family law for, as one author has stated:

> Unlike the adjudicatory process, the emphasis [in mediation] is not on who is right or who is wrong or who wins and who loses, but rather upon establishing a workable solution and resolution that best meets the family's own unique needs. Folberg, Divorce Mediation - A Workable Alternative, 1982 ABA Nat'l Conf. Alternative Means of Family Dispute Resolution 11,16.

The proposed rules exempt family law from the arbitration process. It is proper to do so, if for no other reason but that mediation is a more appropriate and workable alternative to the relatively confrontational atmosphere inherent in arbitration proceedings where the issues are essentially fully litigated.

Furthermore, the Family Law Section is seriously concerned that if the arbitration provisions of the new law were to be applied to family law matters, the provisions of F.S.§44.303(5) [which requires that the Court assess attorney's fees and costs in the event the trial judge in a de novo action does not grant a "more favorable" result to the party seeking relief than the result reached in the arbitration proceedings] would seriously prejudice the rights of children and economically disadvantaged or dependent spouses in family cases. If this section of the new

law were applied to family law matters, it would totally eliminate the need and ability to pay test for the award of attorney's fees, foreclose economically disadvantaged persons from access to the courts and, as a practical matter, it would require that a spouse who is dissatisfied with the arbitration results have a crystal ball and be able to accurately predict that the result reached in a trial de novo will be "more favorable" to that party than the result reached in arbitration. In equity matters, and particularly in family law cases, this is difficult, if not impossible to do.

By the same token, the confidentiality of mediation proceedings is highly contributory to the resolution of family disputes.

The Family Law Section has been granted permission by the Florida Bar to lobby for changes in the legislation. Those points are covered in the attached letters of November 1 and November 24, 1987 addressed to the sponsor of the legislation.

A special committee of the Board of Governors of the Florida Bar has expressed its concern over the possible use of blanket referral orders by the court without regard for the facts and circumstances of each particular case. The Bar suggests that Rule 1.700 be modified to require a hearing prior to referral of any case to mediation or arbitration, either sua sponte or on application of a party, for the purpose of determining the appropriateness of referral of the case to mediation or arbitration, as the case may be; and that the court be required to make certain findings of fact that the case is suitable for referral and

that referral will not cause undue economic hardship to any party. The Family Law Section agrees with the suggestion of the Florida Bar.

Proposed Rule 1.700(e) entitled "Disqualification of a Mediator or Arbitrator" adopts the procedures set forth in F.R.Civ.P. 1.432. However, in addition thereto the Family Law Section believes that a disclosure procedure similar to that which is used by the American Arbitration Association in its commercial arbitration rules should be added to subsection (e) of proposed Rule 1.700. It would require that a person appointed as a mediator or arbitrator shall have a duty to disclose to the court any circumstances likely to affect his or her impartiality, including any bias or any financial or personal interest in the result of the proceedings or any past or present relationship with the parties or their counsel. Upon receipt of such information, regardless of the source from which is comes, the court shall determine whether the mediator or arbitrator should be disqualified; the court shall thereafter inform the parties of its decision, which is conclusive.

COMMENTS ON PROPOSED MEDIATION RULES

Rule 1.730(c), entitled "Court's Action" should be reworded so that the court would be empowered to consider whether a mediation agreement in family law cases serves the best interests of the parties' minor child(ren) as well as the best interests of the parties themselves. At present, the court may reject an agreement of the parties which does not serve the minor childrens' best interests. This discretion of the court should be preserved.

Proposed Rule 1.740, entitled "Family Law Mediation" provides that "every effort should be made to expedite mediation of parental responsibility issues." The Family Law Section, in accord with the Supreme Court Matrimonial Law Commission, believes that parental responsibility issues should clearly be given priority over any and all other issues in family law cases with the sole exception of emergency matters. Proposed Rule 1.740, therefore, should be amended accordingly.

Proposed Rule 1.760(b) dealing with qualifications for family mediators, provides that for certification by the Supreme Court, a mediator of family law and dissolution of marriage issues must possess certain qualifications including, in the case of non-lawyers and non-physicians, a Master's Degree in social work, mental health or psychological sciences, a current license in a mental health field and five (5) years' practice experience in the licensed professional field. Furthermore, proposed Rule 1.740 provides that only lawyer-mediators may mediate family cases in which there are complex or substantial tax, financial or property issues.

The Family Law Section respectfully submits that the latter category of cases can be effectively mediated by Certified Public Accountants, as well as attorneys, provided the C.P.A. has received proper training in family mediation. Therefore, proposed Rules 1.740 and 1.760(b) ought to be broadened to permit Certified Public Accountants (licensed to practice in Florida) to mediate the financial aspects of family and dissolution of marriage cases, with the provisos contained in subsections (3), (4) and (5) of

proposed Rule 1.760(b).

Proposed Rule 1.760 would also allow members of the Florida Bar in good standing to serve as mediators in family and dissolution of marriage cases upon completion of certain training requirements. There is no question but that attorneys can be competent and qualified mediators. Indeed, at least one writer has postulated that an attorney may have a "significant advantage" as a family mediator by virtue of his or her knowledge of the law and the legal consequences of the various decisions made by a divorcing couple. Coombs, R., "Non Court-Connected Mediation and Counseling in Child Custody Disputes", 17 Family Law Quarterly 469 (Winter, 1984). However, for the lawyer-mediator to enjoy such an advantage, the Family Law Section believes that it is essential that the lawyer-mediator possess specific legal knowledge in the area of family law.

Therefore, the Section submits that the attorney qualification rule should include a requirement that the attorney family mediator should be either Board Certified in the area of marital and family law or should be required to attest that he or she has devoted at least 50% of his or her practice as an attorney to family law matters for a period of five (5) years preceeding certification as a family mediator.

COMMENTS ON PROPOSED ARBITRATION RULES

The proposed arbitration rules exclude from their ambit proceedings under Chapters 61, 63, 88 and 742, Florida Statutes. They also exclude cases referred to mediation pursuant to Rule 1.700 (a). It may therefore be safely assumed that the arbitra-

tion rules do not apply to any family law matters. However, they do not exclude equity actions, such as claims for injunctive relief, which are often joined with dissolution of marriage claims.

Therefore, proposed Rule 1.800, entitled "Case Eligibility for Court-Ordered Non-Binding Arbitration" should be amended to provide that where any arbitrable claims are joined with claims which are non-arbitrable but subject to mediation, then all claims will be subject to mediation (or resolution by the court) and there will be no splitting of claims in the same action between mediation and arbitration.

CONCLUSION

The Family Law Section commends the Mediation and Arbitration Committee of the Supreme Court for its work in formulating the proposed Rules, which are, by and large, well done. The changes suggested above, if adopted, should improve the final product even further.

RESPECTFULLY SUBMITTED,

MAURICE JAY KUTNER
Chairman, Family Law Section
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12th Floor
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