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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA FAMILY LAW RULES OF PROCEDURE

CASE NO.: 89,955

RESPONSE OF THE FAMILY COURT STEERING COMMITTEE TO THE COURT'S ORDER OF OCTOBER 29, 1998

The Family Court Steering Committee ("the Steering Committee"), through its chair, Circuit Judge Karen K. Cole, pursuant to the responsibilities assigned to it by this Court and as requested by this Court in its order of October 29, 1998, in *Amendments to Florida Family Law Rules of Procedure*, responds as follows to the proposed amendments to: (a) Florida Family Law Rule of Procedure 12.610 (domestic and repeat violence injunctions), and (b) the proposed Florida Family Law Rule of Procedure 12.615 (civil contempt). Appendix A to this Response contains the text of the Steering Committee's recommended changes to the current proposed rules.

I. RULE 12.610: INJUNCTIONS FOR DOMESTIC AND REPEAT VIOLENCE

Proposed Rule 12.610 requires that all modifications to a domestic violence or repeat violence injunction be initiated by a "supplemental petition"[1] and that the supplemental petition be personally served on the opposing party. The Steering Committee recommends that this proposed rule be changed to provide that: (a) modification of such injunctions be initiated by motion rather than by supplemental petition, and (b) service of the motion be that which is

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[1] The Steering Committee recognizes that the current Court-approved form submitted by the Steering Committee refers to the document as a "supplemental petition." *See* Florida Family Law Form 12.980(k). If this Court adopts the Steering Committee's proposal on this issue, then the form and its instructions should be changed to refer to the document as a motion.

reasonably calculated to apprise the non-moving party of the pendency of the proceeding.[2]

A. Title of the Initiating Document

The Steering Committee suggests that modification of a domestic violence or repeat violence injunction should be made by a motion called "Motion to Modify or Vacate Injunction" rather than by a supplemental petition. Under existing statutory and case law, domestic violence and repeat violence injunctions, unlike final judgments of dissolution of marriage, may be modified without a showing of substantial and material change of circumstances. *See* section 741.30(6)(b) (1997)("....Either party may move at any time to modify or dissolve the injunction. *No specific allegations are required.*")(emphasis supplied). *See also Spiegel v. Haas*, 697 So.2d 222 (Fla. 3d DCA 1997)(in determining whether to modify a domestic violence injunction by extending its duration, a trial court may consider the circumstances which initially led to the issuance of the injunction when determining whether the petitioner's continuing fear of future violence is reasonable; implicitly holding that changed circumstances are not required). The statute's admonition that no specific allegations are required for modification or vacation of domestic violence injunctions is consistent with the unique nature of such injunctions and the immediacy of the safety concerns which often spur requests for modifications of the injunctions.

The title of a document does not determine the standard which a trial court must apply in deciding whether to grant or deny the relief sought by the document; however, the Steering Committee is concerned that if the initiating document which seeks a modification or vacation of a domestic violence or repeat violence injunction is called a "supplemental petition," trial courts

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[2] This language is drawn from similar language contained in the Court's proposed Family Law Rule of Procedure 12.615 concerning notices of contempt hearings.

and family law attorneys may understandably be misled into believing that modification or vacation may only occur if the petitioner proves that a material and substantial change of circumstance has occurred since entry of the injunction.

Further, denominating the initiating document a "supplemental petition" would erroneously suggest to counsel and the courts that the non-petitioning party should be afforded a twenty-day period within which to respond in writing to the petition. This, of course, would be wholly inconsistent with existing practice, with the urgency of concerns for the safety of the Petitioner and any children, and with the intent of the Legislature that issues concerning the issuance, denial or modification of domestic violence and repeat violence injunctions be heard and resolved expeditiously.

For these reasons, the Steering Committee respectfully suggests that the initiating document seeking modification or vacation of an existing domestic violence or repeat violence injunction be called a "Motion to Modify or Vacate Injunction" rather than a "Supplemental Petition to Modify or Vacate Injunction."

B. Notice of the Modification Proceeding

The proposed rule would require personal service of the document which seeks modification of a domestic violence or repeat violence injunction. The Steering Committee proposes instead that the service required be that which is reasonably calculated to apprise the non-moving party of the pendency of the proceedings. Under this standard, personal service would not be required in every instance. For example, where the petitioner seeks a modification which would be *favorable* to the respondent, *e.g.*, an elimination of the "no contact" provision in the existing injunction, personal service should not be required.

C. Standard for Granting Modification

As noted above, statutory and case law indicates that, at least with regard to certain types of modifications of domestic violence and repeat violence injunctions, the petitioner or movant is not required to prove the occurrence of a material and substantial change of circumstances since entry of the original injunction. The appellate courts of this state have not yet addressed the issue of the appropriate standard for determining whether to modify the custody, support and visitation provisions of a domestic violence or repeat violence injunction. The Steering Committee suggests that the determination of the appropriate standards for granting or denying the various types of modifications be left to developing statutory and case law rather than be addressed by rule.

D. Suggested Changes to Subsections of Proposed Modification Rule

For the reasons outlined above, the Steering Committee suggests that proposed Rule 12.610(b)(2)(C) be amended to read:

> **Additional Documents.** Service of pleadings in cases of domestic or repeat violence other than the petitions and orders granting injunctions shall be governed by rule ~~rules 12.070 and~~ 12.080. Service of a motion to modify or vacate an injunction should be that notice which is reasonably calculated to apprise the non-moving party of the pendency of the proceedings.

It further suggests that proposed Rule 12.610(c)(6) be amended to read:

> **Motion to Modify or Vacate Injunction.** The petitioner or respondent may make ~~a motion to~~ move the court to modify or vacate an injunction at any time. ~~Motions to modify or vacate an injunction shall be governed by the Florida Rules of Civil Procedure.~~ Service of a motion to modify or vacate an injunction shall be governed by subsection 12.610(b)(2) of this rule.

II. RULE 12.615: CIVIL CONTEMPT

Proposed Rule 12.615 outlines procedures to be followed in civil contempt proceedings. The Steering Committee agrees that clear delineation of such procedures is necessary to assure that due process is afforded to those affected. To that end, the Steering Committee suggests several refinements to the proposed rule.

A. The Proposed Rule Should Require that the Notice of Hearing Apprise the Alleged Contemnor of the Consequences of a Failure to Appear at the Contempt Hearing.

The proposed rule provides that a writ of bodily attachment will be issued if the alleged contemnor fails to appear at the contempt hearing but does not require that the notice of hearing include a warning to the alleged contemnor that failure to appear at the hearing will result in the issuance of such a writ. The notice of the contempt hearing should clearly advise the alleged contemnor of that immediate consequence of failure to comply with the Court's direction to appear.[3] A plainly-worded warning on the notice of hearing will increase the likelihood that the alleged contemnor will appear, thereby: (a) minimizing delay and the need for subsequent hearings, and (b) providing the Court more complete information on which to base its contempt decision.

B. The Proposed Rule Should Require that the Alleged Contemnor Be Brought Before the Court Within a Specified Period of Time Rather Than "Immediately."

Paragraphs (c)(2)(ii) and (e) of the proposed rule require that the alleged contemnor, after arrest, be "immediately" brought before the court for a hearing. "Immediate" is not defined and

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[3] If the Court adopts this recommendation, the commentary to the rule will need to be changed because it refers to a contempt notice (Form 1.982, Florida Rules of Civil Procedure) which does not include this provision.

may be subject to varying interpretations. Further, requiring an "immediate" appearance may have the unintended consequence in support cases of denying to the moving party who is entitled to support (obligee) meaningful notice of the contempt hearing and any reasonable opportunity to appear and be heard at that hearing. Although the Steering Committee is sensitive to the due process concerns underlying the proposed rule's immediacy requirement, it believes that the due process concerns of the obligee, as well as those of the obligor, must be considered and balanced in determining the period of time within which the contempt hearing must occur.

In contempt actions founded upon the non-payment of child support obligations (the most common type of contempt hearing in family cases), the obligor parent is alleged to have wilfully failed to pay the support owed. At the contempt hearing, he or she may assert that payments were, in fact, made or may assert a past inability to pay the support when due. The obligee parent, to whom support for the child is owed, has a keen interest in appearing and offering testimony to rebut what might otherwise be the unrebutted testimony of the obligor parent.

The Steering Committee suggests that the need for a prompt hearing to minimize unnecessary (and perhaps ultimately unwarranted) detention of the obligor parent may be balanced against the right of the obligee parent to be notified of the contempt proceeding and to have a meaningful opportunity to appear and be heard by requiring that the hearing after detention occur "as soon as practical but in no event not later than three business days" after such detention. Where the obligee parent can be swiftly located and notified and can promptly come to court to offer testimony, the contempt hearing will still occur "immediately" after detention. Where, however, location and notification of the obligee parent requires, for example, twenty-four or forty-eight hours, the court will not be required to choose between conducting the hearing

in the absence of any testimony from the obligee parent, or releasing from jail the obligor parent who may owe substantial sums of back support and who may have been difficult to locate and detain.

In situations where the obligor parent is detained in a circuit other than the circuit where the contempt hearing will be held, the three-day time limitation will permit the obligor parent to be transferred from one circuit to the other.

C. The Proposed Rule Should Permit the Court to Exercise Discretion Whether to Issue a Writ of Bodily Attachment When the Alleged Contemnor Fails to Appear.

The proposed rule requires the trial court to issue a writ of bodily attachment if the alleged contemnor fails to appear at the contempt hearing. In some cases, however, even where the alleged contemnor fails to appear, the court may be presented with sufficient evidence from which it may adjudge the individual in contempt. If the court, after adjudication, imposes a coercive sanction other than incarceration, *e.g.*, a coercive fine, it should not be required to issue a writ of bodily attachment.

D. The Proposed Rule Should Permit Deferral of Incarceration for a Limited Period of Time Without Triggering the Need for a Second Hearing on the Contemnor's Present Ability to Pay the Purge.

The proposed rule requires that, if a contemnor's civil incarceration is deferred for any period of time, no matter how brief, the court must conduct a second hearing to assure that the contemnor still retains the present ability to pay the purge set by the court. This circumstance often arises when the contemnor, after adjudication, requests a brief period of time (often twenty-four or forty-eight hours) within which to marshal his or her assets in order to avoid incarceration. A court which grants this request would be compelled under the proposed rule to

set a second hearing twenty-four or forty-eight hours after the first hearing to assure that the contemnor's financial circumstances have not so materially changed that he or she is now unable to pay the purge amount set one or two days ago. Such a drastic change of financial condition in so short a period of time is highly unlikely; however, assuming that it occurred, *e.g.*, a hurricane destroyed all of the contemnor's assets, the contemnor could still request a second hearing, alleging the occurrence of such an untoward event. From an administrative perspective, mandating a second hearing without regard to the length of time for which incarceration is deferred will likely result either in numerous, and generally unnecessary, additional hearings or in a decrease in the number of contempt adjudications which permit any deferral of incarceration. The Steering Committee therefore suggests that the proposed rule permit up to a two-day deferral of incarceration without mandating a second hearing on continuing ability to pay the established purge.

E. The Proposed Rule or a Comment to It Should Emphasize that the Court Must Establish a Purge Amount Whenever an Individual is Adjudged in Civil Contempt.

The proposed rule requires that the court establish a purge "if [it] orders incarceration, a coercive fine, or any other coercive sanction for failure to comply with a prior support order." The Steering Committee recommends that the rule itself or a comment to the rule emphasize that a court which adjudges an individual in civil contempt must always afford the contemnor the opportunity to purge himself or herself of contempt. Although the present wording of the rule may be sufficient to convey this, it may be preferable to insert the word "coercive" before the

word "incarceration" to better distinguish between the coercive incarceration (civil contempt) for which a purge is required and the punitive incarceration (criminal contempt) for which no purge is required or permitted.

F. The Proposed Rule Should Better Delineate between Wilful Past Failure to Pay and Present Ability to Pay a Purge Amount.

The proposed rule provides in paragraph (c)(2)(ii) that the court, before determining whether the failure to pay court-ordered support was wilful, must determine whether the alleged contemnor "no longer has the present ability to pay support." The Steering Committee suggests that the rule more clearly distinguish the finding necessary to support an adjudication of civil contempt, *i.e.*, that the obligor, *at the time support payments became due*, had the ability to pay that support but wilfully failed to do so, from the finding necessary to support establishment of the purge amount, *i.e.*, that the obligor *presently* has the ability to pay the stated purge amount. For example, an obligor who was ordered to pay $200.00 per month may be adjudged in contempt because, when the support payments came due, he or she had the ability to pay that support but wilfully failed to do so. After the court adjudges the obligor in contempt, it will impose a sanction, *e.g.*, coercive incarceration, and set an appropriate purge amount. If the obligor's financial condition has deteriorated, he or she may now only have the present ability to pay a purge of $50.00. The finding of past wilfulness, however, is separate and distinct from the finding of present ability to pay a purge amount.

G. Proposed Changes to Subsections of Contempt Rule.

For the reasons outlined above, the Steering Committee suggests that Rule 12.615 be amended as follows:

(i) The following sentence should be inserted at the end of the existing paragraph (b): The Notice must state that if the alleged contemnor fails to appear, a writ of bodily attachment may issue to compel the alleged contemnor to be brought before the court.

(ii) Paragraph (c)(2)(ii) should be amended to read: "...the alleged contemnor be ~~immediately~~ brought before the court as soon as practical but in no event not later than three business days after detention or arrest for a hearing....[4]

(iii) Paragraph (c)(2)(ii) should be modified to substitute the word "may" for the word "shall" so that it reads "if the alleged contemnor fails to appear, may issue a writ of bodily attachment...."

(iv) Paragraph (c)(2)(i) should be modified to add the word "shall" so that it reads "if the alleged contemnor is present, shall...."

(v) Paragraph (e) should be modified to read: "If the court orders incarceration but defers incarceration for more than two business days to allow the contemnor a reasonable time to comply with the purge conditions, and the contemnor fails to comply within the time provided, then upon incarceration...."

(vi) Paragraph (c)(2)(i) should be amended to read: "...if the alleged contemnor is present, ~~determine whether the alleged contemnor has established that the alleged contemnor no longer has the present ability to pay support. If the court finds that the alleged contemnor has the present ability to pay support, the court is to~~ determine whether the failure to pay such support ~~is~~ was willful, after providing the alleged contemnor the opportunity dispel the presumption of ability to pay. The alleged contemnor may dispel the presumption by demonstrating that, due to circumstances beyond his or her control which intervened since the time the order directing payments was entered, the alleged contemnor did not have the ability to pay the support ordered.[5]

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[4] A similar change should also be made to paragraph (e) of the proposed rule.

[5] A conforming change should also be made to paragraph (d)(1) of the proposed rule.

III. CONCLUSION

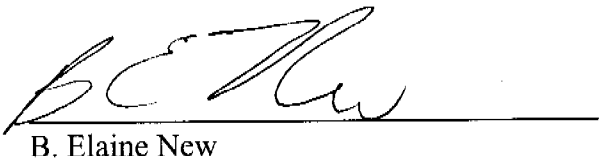
For the reasons stated above, the Family Court Steering Committee respectfully requests that this Court adopt the proposed Florida Family Law Rules of Procedure 12.610 and 12.615 attached as Appendix A.

Respectfully submitted,

Karen K. Cole
Chair, Family Court Steering Committee
Duval County Courthouse
330 East Bay Street
Suite 200
Jacksonville, Florida 32202
Telephone: (904) 630-2591
Facsimile: (904) 630-2979

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing RESPONSE OF THE FAMILY COURT STEERING COMMITTEE TO THE COURT'S ORDER OF OCTOBER 29, 1998 was provided by U.S. Mail to Mr. John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399 and to The Honorable George Reynolds, Chair, Family Law Rules Committee of The Florida Bar, Leon County Courthouse, Room 365-K, Tallahassee, Florida, this 15th day of December, 1998.



B. Elaine New
Senior Attorney
Florida Bar No. 354651

Department of Legal Affairs and Education
Office of the State Courts Administrator
500 South Duval Street
Tallahassee, Florida 32399
Phone: 850/414-8389
Fax: 850/414-1505

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