IN THE SUPREME COURT OF FLORIDA

Case No. SC02-1574

IN RE: FLORIDA FAMILY LAW RULES OF PROCEDURE

COMMENTS OF INTERESTED PARTY
DAVID A. DEMERS
CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Family Court Steering Committee proposed an amendment to Florida Family Law Rule of Procedure 12.610. The proposed rule was published for comment. David A. Demers is the chief judge of the Sixth Judicial Circuit and files this comment on behalf of the family law judges in this circuit.

The proposed rule provides restrictions on the use of mediation in domestic violence injunctions issued pursuant to section 741.30, Florida Statutes. The

relevant part of the proposed rule provides as follows:

(c) **Orders of Injunction.**

(1) **Consideration by Court.**

(A) **Temporary Injunction.** For the injunction for protection to be issued ex parte, it must appear to the court that an immediate and present danger of domestic or repeat violence exists. In an ex parte hearing for the purpose of obtaining an ex parte temporary injunction, the court may limit the evidence to the verified pleadings or affidavits for a determination of whether there is an imminent danger that the petitioner will become a victim of domestic or repeat violence. If the respondent appears at the hearing or has received reasonable notice of the hearing, the court may hold a hearing on the petition. If a verified petition and affidavit are amended, the court shall consider the amendments as if originally filed.

(B) **Final Judgment of Injunction for Protection Against Repeat Violence**. ~~Permanent Injunction~~. A ~~full evidentiary~~ hearing shall be conducted.

(C) **Final Judgment of Injunction for Protection Against Domestic Violence.** The court shall conduct a hearing and make a finding of whether domestic violence occurred or whether imminent danger of domestic violence exists. If the court determines that an injunction will be issued, the court shall also rule on the following:

(i) whether the respondent may have any contact with the petitioner, and if so, under what conditions;

(ii) exclusive use of the parties' shared residence;

(iii) temporary custody of minor children;

(iv) whether temporary visitation will occur and whether it will be supervised;

(v) whether temporary child support will be ordered;

(vi) whether temporary spousal support will be ordered; and

(vii) such other relief as the court deems necessary for the protection of the petitioner.

The court, with the consent of the parties, may refer the parties to mediation by a certified family mediator to attempt to resolve the details as to the above rulings. This mediation shall be the only alternative dispute resolution process offered by the court. Any agreement reached by the parties through mediation shall be reviewed by the court and, if approved, incorporated into the final judgment. If no agreement is reached the matters referred shall be returned to the court for appropriate rulings. Regardless of whether all issues are resolved in mediation, an injunction for protection against domestic violence shall be entered or extended the same day as the hearing on the petition commences.

New commentary would provide:

Commentary 2002 Amendment. This rule was amended to emphasize the importance of judicial involvement in resolving injunction for protection against domestic violence cases and to establish protections if mediation is used. The first sentence of (c)(l)(C) contemplates that an injunction will not be entered unless there is a finding that domestic violence occurred or that there is imminent danger of domestic violence. Subdivision (c)(1)(C) also enumerates certain rulings that a judge must make after deciding to issue an injunction and before referring parties to mediation. This is intended to ensure that issues involving safety are decided by the judge and not left to the parties to resolve. The list is not meant to be exhaustive, as indicated by subdivision (c)(1)(C)(vii), which provides for "other relief," such as retrieval of personal property and referrals to batterers' intervention programs. The prohibition against use of any "alternative dispute resolution" other than mediation is intended to preclude any court-based process that encourages or facilitates, through mediation or negotiation, agreement as to one or more issues, but does not preclude the parties through their attorneys from presenting agreements to the court. All agreements must be consistent with this rule regarding findings. Prior to ordering the parties to mediate, the court should consider risk factors in the case and the suitability of the case for mediation. The court should not refer the case to mediation if there has been a high degree of past violence, a potential for future lethality exists, or there are other factors which would compromise the mediation process.

SUMMARY OF ARGUMENT

The proposed rule provides for judicial involvement in domestic violence proceedings. However, the proposed rule may have unintended consequences. It will stifle development of appropriate mediation in domestic violence cases. For example, even where represented parties appear before the court and request mediation, the court will be unable to refer the parties to mediation without first conducting a hearing. The development of appropriate mediation programs will be stifled if the Court prematurely adopts this rule.

Further, the rule is not clear whether represented parties can present a stipulated agreement to the court for a modification of a domestic violence injunction. The commentary to the proposed rule notes that the rule does not preclude parties through their attorneys from presenting agreements to the court. This should apply to both the initial issuance of a domestic violence injunction and to modification of the injunction. Scarce judicial resources should not be used to conduct an evidentiary hearing when represented parties present an agreement to the court, whether for an initial injunction or modification of the injunction.

ARGUMENT

I. The Court should not adopt the proposed rule because it would completely prohibit the court from ordering represented parties who appear at a return hearing to mediation.

Some domestic violence injunction cases may be appropriate for referral to mediation.[1] Consider the following situation. Two married parties appear before the court. They do not have any children. There is no history of violence between them; the allegation in the petition is an isolated incident of violence arising from a dissolution of the marriage. Both of the parties ask to have the issue of the injunction resolved in a mediation setting. Both parties are represented by counsel.

Under the proposed rule, the court would be precluded from referring these represented parties to mediation without first having an evidentiary hearing to determine whether the injunction will be issued, whether there can be any contact between the parties, who will have exclusive use of the residence, and whether temporary spousal support will be ordered. Only then can the parties be referred to mediation.

Another situation where it may be appropriate to refer a case to mediation is the following. The petitioner is seeking a domestic violence injunction from her former husband. The parties were divorced 10 years earlier. A single incidence of violence is alleged. Both parties are represented by counsel. Again, under the proposed rule the court would be unable to refer these parties to mediation.

It is possible to establish a mediation program that has appropriate security measures, considers balance of power issues between the petitioner and respondent, and uses certified family law mediators who are trained in domestic violence issues. This proposed rule would stifle the development of such initiatives.

The current statutory prohibitions on mediation are not as limiting as this proposed rule. Mediation is only prohibited in situations where a history of domestic violence would compromise the mediation process. See section 44.102, Fla. Stat. Mediation has evolved and is used in a variety of situations. In dependency cases, when parents are faced with the loss of their children, mediation is not only used but encouraged. See, section 39.4075, Fla. Stat. In other situations where the parties are likely to have an ongoing relationship, mediation is a preferred method of resolving disputes. See e.g., *Mediation, A Preferred Method of Dispute Resolution,* 16 Pepperdine L. Rev 5 (Spring 1989).

The Court should not prematurely adopt a rule that would prevent the development of positive initiatives in this area.[1] The Court should refer the proposal back to the

new Steering Committee on Family and Children in the Court for further review.

[1] The Sixth Judicial Circuit does not take a position on the current procedures in the 12th, 16th and 20th judicial circuits, rather, simply notes that even formal mediation with certified family law mediators involving represented parties would be prohibited under this proposal until the court conducts a hearing.

II. The Court should modify the proposed rule so that represented parties are able to present agreements to the court, for both initial injunctions and for modification of injunctions, without the court conducting an evidentiary hearing.

If the Court does not reject the proposed rule, then the rule should be modified to clarify its application to stipulated agreements.

Proposed rule 12.610(c)(1)(C) provides, inter alia:

> The court shall conduct a hearing and make a finding of whether domestic violence occurred or whether imminent danger of domestic violence exists.

The commentary notes that the rule "does not preclude the parties through their attorneys from presenting agreements to the court. All agreements must be consistent with this rule regarding findings." The proposal allows represented parties to present agreements to the court and the court can issue an initial injunction without conducting an evidentiary hearing on the agreement. This concept should be expanded to address modification of the injunction.

This is consistent with the general rule that courts favor stipulations. *Doyle v. Department of Business Regulation*, 794 So. 2d 686 (Fla. 1st DCA 2001) (Florida courts look favorably upon stipulations because they shorten litigation time and lower litigation costs). The Court has favored stipulations designed to simplify, shorten, or settle litigation and save costs to parties. The Court has held that such stipulations should be enforced if entered into with good faith and not obtained by fraud, misrepresentation, or mistake, and not against public policy. *Cunningham v. Standard Guar. Ins. Co*., 630 So.2d 179, 182 (Fla. 1994) citing *Gunn Plumbing, Inc. v. Dania Bank,* 252 So.2d 1 (Fla.1971); *Steele v. A.D.H. Bldg. Contractors, Inc.,* 174 So.2d 16 (Fla.1965); *Welch v. Gray Moss Bondholders Corp.,* 128 Fla. 722, 175 So. 529 (1937); *Esch v. Forster,* 123 Fla. 905, 168 So. 229 (1936); *Smith v. Smith,* 90 Fla. 824, 107 So. 257 (1925). This Court recently reaffirmed that position as it relates to family law matters when it adopted the guiding principles for a model family court, including the guiding principle that parties should resolve their own disputes. *In re Report of Family Court Steering Committee*, 794 So.2d 518 (Fla. 2001).

Here, the proposed amendments to Rule 12.610 should support the principle that settlement by the parties are favored. Where represented parties either in an initial proceeding or a modification proceeding present the court with a stipulated injunction, the court should not be required to expend limited judicial resources to conduct a full evidentiary hearing.

In order to address the above concerns, the following changes to the

commentary are proposed.[2]

> Commentary 2002 Amendment. This rule was amended to emphasize the importance of judicial involvement in resolving injunction for protection against domestic violence cases and to establish protections if mediation is used. The first sentence of (c)(l)(C) contemplates that an injunction will not be entered unless there is a finding that domestic violence occurred or that there is imminent danger of domestic violence. Subdivision (c)(1)(C) also enumerates certain rulings that a judge must make after deciding to issue an injunction and before referring parties to mediation. This is intended to ensure that issues involving safety are decided by the judge and not left to the parties to resolve. The list is not meant to be exhaustive, as indicated by subdivision (c)(1)(C)(vii), which provides for "other relief," such as retrieval of personal property and referrals to batterers' intervention programs. The prohibition against use of any "alternative dispute resolution" other than mediation is intended to preclude any court-based process that encourages or facilitates, through mediation or negotiation, agreement as to one or more issues. ~~but~~ This rule does not preclude the parties through their attorneys from presenting agreements to the court, including agreements to modify an injunction. All agreements must be consistent with this rule regarding findings. Prior to ordering the parties to mediate, the court should consider risk factors in the case and the suitability of the case for mediation. The court should not refer the case to mediation if there has been a high degree of past violence, a potential for future lethality exists, or there are other factors which would compromise the mediation process.

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[2] The proposed rule is presented without underlining in order to identify suggested changes to the proposed rule in strike through and underline format.

CONCLUSION

For the above stated reasons, this Court should return the proposal to the Steering Committee on Family and Children in the Court. Alternatively, the Court should amend the commentary to provide that stipulations for a modification of an injunction should be treated in the same manner as stipulations relating to the initial injunction.

Respectfully submitted this _____day of November 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of COMMENTS OF INTERESTED PARTY DAVID A. DEMERS CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT has been furnished to The Honorable Raymond T. McNeal, Chair, Family Court Steering Comm., 110 N.W. 1st Avenue, Room 3058, Ocala, FL 34475; John F. Harkness, Exec. Dir., The Florida Bar, 650 Apalachee Pkwy., Tallahassee, Fl 32399; Michael Walsh, Chair, Family Law Rules Comm., 501 S. Flagler Dr., Suite 306, West Palm Beach, FL 33401-5911; The Honorable Peter D. Webster, Chair, Rules of Judicial Admin. Comm., First District Court of Appeal, 301 S. Martin Luther King, Jr. Blvd., Tallahassee, FL 32399-1850; Ms. Caroline K. Black, Chair, Family Law Section of The Florida Bar, 307 S. Magnolia Ave., Tampa, FL 33606; The Honorable Thomas M. Gallen, Chief Judge, Twelfth Judicial Circuit, Manatee County Courthouse, P.O. Box 1000, Bradenton, FL 34205; Deborah A. Lacombe, Legal Affairs and Education, Office of the State Courts Administrator, 500 S. Duval Street, Tallahassee, FL 32399 by U.S. Mail this 21st day of November 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Times New Roman 14 point font, and complies with the requirements set forth in Rule of Appellate Procedure 9.210(a)(2).

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B. Elaine New

[1] The Sixth Judicial Circuit does not usually refer parties at a return hearing to mediation. This proposed rule, however, would prevent the development of such alternatives in the future.