IN THE SUPREME COURT OF FLORIDA

IN RE: FLORIDA FAMILY LAW RULES OF PROCEDURE **CASE NO. SC02-1574**

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RESPONSE OF THE FAMILY COURT STEERING COMMITTEE

The Honorable Raymond T. McNeal, Chair of the 2000-2002 Family Court Steering Committee, ("FCSC") files the following response to the issues raised in the comments submitted by interested parties in the above styled case.

I. The Court should adopt the amendments to Rule 12.610 out of the cycle prescribed for the Florida Bar.

Several commenters argue that the FCSC failed to demonstrate an emergency to justify expedited consideration of the proposed amendment. Although the FCSC believes that Administrative Order AOSC00-18 authorized the Committee to petition the Supreme Court without complying with Rule 2.130, Florida Rules of Judicial Administration, the Committee suggests that there are valid reasons for the Court to consider the proposed amendments under the emergency provisions of Rule 2.130(a), Florida Rules of Judicial Administration.

During the 2000 legislative session, a bill was filed prohibiting all forms of alternative dispute resolution in domestic violence cases. Because this question falls under the rule making authority of the Florida Supreme Court, the Office of State Courts Administrator asked the sponsors to wait until this matter could be addressed

by the Family Court Steering Committee. They agreed and the Chair of the 2000-2002 FCSC affirmed the agreement.

The Legislature and the Governor's Task Force on Domestic Violence were concerned with the process of "facilitation" being used by a few courts in domestic violence cases. The programs blended elements of case management and mediation. While there are variations in practice, all programs incorporated the following three characteristics:

- At the time of the scheduled return hearing, a court employee, called a domestic violence "investigator" or "facilitator" meets separately with the parties to identify and resolve the issues between the parties by "facilitating" agreements between the parties on all relevant issues. The "facilitator" also provides information on court procedures and explains the injunction forms.
- If the parties reach an agreement on the issuance and terms of the injunction for protection, the "facilitator" prepares a final injunction for protection and submits it to the judge for signature. The parties are allowed to strike the finding that petitioner was the victim of domestic violence or that imminent danger of domestic violence exists, language included in the form required by Rule 12.610(c)(2)(A), Florida Family

Law Rules of Procedure. By striking the finding of domestic violence, the parties are also able to stipulate to strike the firearms provisions in the final injunction.

- If an agreement is reached, the parties are allowed to leave without seeing the judge or in many cases receiving their final judgment. The stipulated judgment is mailed to the parties. (This was not true of the sixteenth circuit) If the parties do not reach an agreement, they appear for an evidentiary hearing. Most cases are "facilitated."

Although the FCSC did not visit each "facilitation" program, the FCSC did observe the "facilitation" process in Lee County, located in the Twentieth Circuit and the mediation process of Eighth Circuit. Also, the Sixteenth Circuit presented their program to the Domestic Violence Subcommittee. The results of the site visits confirmed this description of "facilitation" and the essential differences in the two programs.

By the time the Domestic Violence Subcommittee studied the process, "facilitation" of domestic violence cases had expanded to other circuits without any guidelines or regulation. This expansion is likely to continue, so the judiciary, the bar, and the public need clear direction from the Court on what issues, if any, are appropriate for mediation and what qualifications court staff should have before they

are allowed to help the parties negotiate agreements in domestic violence cases. More importantly, the judiciary needs clear guidance on their oversight role in this process.

In December of 2001, the FCSC circulated a draft of its proposed rule to interested stakeholders.[1] The Committee received and considered forty comments. Most of the comments came from the Twelfth, Sixteenth, and Twentieth Circuits. The source of these comments was noted in Appendix B of the Domestic Violence Subcommittee Report, but the comments were not provided with the copy of the report and Committee Request for Action form that was filed with the Chief Justice. Those letters and the FCSC chair's replies to them are available for the Court to review. These letters detailed some of the functions being performed by court staff, including:

- assisting the parties to negotiate an agreement
- speaking to the court outside the presence of counsel

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[1] The proposal was sent to all Chief Judges, Family Court Administrative Judges, Family Court Steering Committee Members, Trial Court Administrators, the Academy of Matrimonial Lawyers, the Association of Professional Family Mediators, the Commission on Responsible Fatherhood, the Department of Children and Families Domestic Violence Unit, the Family Mediation Program Coordinators, the Florida Bar Family Law Rules Committee, the Florida Bar Family Law Section, the President of the Florida Chapter of the AFCC, the Florida Coalition Against Domestic Violence, Florida Legal Services, the Florida Sheriffs' Association, the Supreme Court Committee on ADR Policy and the Supreme Court Committee on ADR Rules.

- assisting the court in obtaining information about the alleged victim's honesty and demeanor
- preparing stipulated orders for the judge's signature
- providing an effective resolution to issues between the parties
- eliminating the finding of fact for domestic violence to encourage the respondent to agree to the issuance of the injunction.

From the comments it is clear that domestic violence "facilitation" programs use court staff to perform a variety of functions, including investigation, fact finding, case management, and mediation. In some circuits all of these functions may be performed by the same staff member. It is not clear whether court staff has the authority to perform some of these functions because they may violate Canon 3 B.(7) of the Code of Judicial Conduct, constitute the practice of law, or are contrary to statute.

Current comments from the circuits indicate that some of these practices are no longer condoned. However, at some point in the past, some or all of these practices were central features of "facilitation." The changes have occurred as a direct result of the work of the Domestic Violence Subcommittee and the development of the proposed amendments. These voluntary changes do not eliminate the need for guidance from the Supreme Court.

Some commenters have suggested that the Court should wait on a final report from the domestic violence assessment. The Office of State Courts Administrator conducted a domestic violence assessment to examine the movement and handling of domestic violence cases, assess the ways that court services are managed and delivered, and determine the extent that parties are concurrently involved in civil and criminal domestic violence cases. The assessment will not generate data regarding the use of alternative dispute resolution in domestic violence cases. Consequently, the FCSC does not expect the report to yield any information that would help the Court decide this issue.

Finally, the FCSC points out that neither The Florida Bar, nor any of The Florida Bar committees have opposed the proposed amendments or suggested that the Court should refer this issue to a Bar committee for further study. The proposed rule was published in The Florida Bar News, October 15, 2002. Additionally, each of the Chairs of the Family Law Rules Committee and the Chairs of the Family Law Section of the Florida Bar were members of the 2000-2002 FCSC. The current Chair of the Family Law Section represented the Family Law Section on the FCSC. There is nothing that the Court would gain by requiring strict compliance with Rule 2.130(b), Florida Rules of Judicial Administration.

II. A hearing is required in domestic violence cases.

One criticism of the proposed amendments is that they require a hearing in all cases. The FCSC concurs with the hearing requirement in the rule, concluding that to do otherwise would be contrary to current law. Although the FCSC believes that the current law is clear, the comments suggest that there is much disagreement among trial judges over the meaning of the "full evidentiary hearing" requirement of Rule 12.610(c)(1)(B), Florida Family Law Rules of Procedure, and the legislative intent with respect to the judiciary's role in §741.2902, Florida Statutes (2002).

The role of the judge is critical in domestic violence cases.[2] Trial judges are charged with the difficult tasks of protecting the victim and children and holding the abuser accountable for the violence. However, the judge's primary responsibility is to ensure the integrity of the process for both parties, their children, and society. When the parties reach an agreement, and they are not both represented by attorneys, the judge should decide that the agreement was entered into freely and voluntarily. When a party wants to dismiss an injunction, the judge should ensure that the decision is voluntary and informed. If the parties are referred to alternative dispute resolution processes to resolve the amount of child support or details of parenting

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[2]*See generally* James Ptacek, Battered Women in the Courtroom: The Power of Judicial Responses (1999).

time, it should be the judge who makes the referral after determining that a history of domestic violence will not compromise the process. When an injunction is entered, it is the force and authority of the court conveyed through the judge that transforms the written document into an instrument of safety and stability that can result in long-term improvement of the entire family.

Today, all "facilitation" programs require the parties to see the judge at some point in the process. That was not the case when the amendments were first proposed.[3]

III. Judges should resolve issues related to family safety.

Adoption of the proposed amendments will ensure that a judge will resolve all issues related to safety that are properly pled in the petition or properly brought before the court. The FCSC does not suggest that the judge must rule on issues that are not properly before the court. That is a decision the judge must make in every case, not just domestic violence cases. See *Ryan v. Ryan*, 784 So. 2d 1215,1218 (Fla. 2d DCA 2001) (court could not grant petitioner custody in a domestic violence

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[3]However, Judge William Blackwell's comment at page 4 states, "If . . . both parties consent to entry of the injunction during the facilitation, and do not wish to have a hearing, then a hearing before the judge on the specifics of the violence and other ancillary issues is not required." It may be that the actual process varies from judge to judge and among counties within a circuit.

case because the petitioner did not check the box on the petition indicating that he was seeking custody).

The judge, not court staff, should decide the threshold issue of whether the petitioner is the victim of domestic violence or in imminent danger of becoming the victim of domestic violence. That finding is jurisdictional and the foundation for ancillary relief. §741.30(1), Florida Statutes (2002). Also, the domestic violence or abuse should never be subject to negotiation. It implies that the victim should compromise the finding of abuse to obtain relief that he or she would be entitled to for safety reasons. It also allows the abuser to avoid taking responsibility for the abuse.

If the judge decides to enter an injunction, the judge, not court staff or a mediator, must decide the following issues:

- contact between the petitioner and respondent;
- use of the parties' shared residence;
- temporary custody of minor children;
- temporary visitation; and
- temporary child and/or spousal support.

The FCSC makes this recommendation because the issues are directly related to victim safety and the effectiveness of the injunction for protection. An injunction

that leaves these issues undecided creates a variety of problems for the family and reinforces factors that cause victims to remain in abusive relationships–a place to live, children, and finances. Allowing an abuser to use any of these safety related matters as bargaining chips can compromise the victim's safety.

Also, the proposed rule clarifies the role of the judge, so that these distinct issues may not be deferred to court staff or other parties. This result is consistent with Rule 12.490(c), Florida Family Law Rules of Procedure, that prohibits referral of issues in domestic and repeat violence cases to a general master. It does not make sense that referral to a general master is inappropriate but referral of these same issues to court staff who may not be attorneys or certified mediators is appropriate.

The FCSC continues to support the right of all parties to a wide variety of dispute resolution programs to resolve their legal and nonlegal problems, but domestic violence cases require careful consideration by the judge before parties are referred to any alternative dispute resolution process. Although every case is different, the FCSC points out that the proposed rule concerns cases where the petitioner has alleged that he or she is the victim of domestic violence or is in imminent danger of becoming a victim and a judge has determined that the allegations are sufficient to enter a temporary injunction or schedule a hearing. These are serious

allegations and both parties deserve to see the judge before being asked to negotiate the merits of their respective positions.

IV. If the judge determines that alternative dispute resolution is appropriate, it should be conducted by a certified family mediator.

"Facilitation" is a form of alternative dispute resolution. Although there is a national debate on when alternative dispute resolution should be used in cases of domestic violence, most authorities agree that it is generally inappropriate to resolve a petition for injunction for protection against domestic violence.[4] The National Council of Juvenile and Family Court Judges, Model State Code on Domestic and Family Violence, Chapt. 3, Section 311 (1994) provides, "A court shall not order parties into mediation for resolution of the issues in a petition for an order of protection." Supporters of "facilitation" contend that it is not mediation while arguing that it results in negotiated settlements. Accordingly, facilitation is a form of alternative dispute resolution even if it does not technically meet the definition of mediation. Alternative dispute resolution is generally inappropriate because domestic

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[4]Carrie-Anne Tondo, Rinarisa Coronel, and Bethany Drucker, *Mediation Trends: A Survey of the States*, Family Court Review, Vol. 39, No. 4, (October 2001); Jessica Pearson, *Mediating When Domestic Violence is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, Mediation Quarterly, Vol. 14, No. 4, (Summer 1997), Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 Fla. St. U.L. Rev. 43 (Summer, 1995).

abuse creates a profound imbalance of power between the parties involved in the negotiations.

The effect of domestic violence cannot be measured by one act of physical violence. Violence, including threats, force and intimidation, undermines the victims' perception of reality and ability to participate freely in ordinary life decisions. As a result, the victim may not have a realistic ability to leave the abusive situation because of the abuse and lack of economic independence.

Proponents of alternative dispute resolution in domestic violence cases argue that not all domestic violence cases involve issues of power and control and that parties can be protected by using caucuses instead of direct negotiation. Although the proponents point out other advantages commonly associated with resolution of issues in domestic relations cases, the court must be extremely careful because the overall goals of a unified family court may not be appropriate in some cases because of the history of domestic violence. The primary goal of the legal process in civil domestic violence cases is safety. [5]

The FCSC tried to strike a balance between these two schools of thought by defining the judge's oversight responsibility for the process and clarifying the qualifications of personnel who assist the parties in negotiating a settlement of the

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[5] *See* Billie Lee Dunford-Jackson, Loretta Frederick, Barbara Hart, and Meredith Hofford, *Unified Family Courts: How Will They Serve Victims of Domestic Violence?*, Family Law Quarterly, Vol. 32, No. 1, Spring, 1995 for an excellent discussion of these competing considerations.

petition. This allows room for experimentation and innovation while ensuring family safety and due process of law, our primary concerns in domestic violence cases.

In striking this balance, the FCSC strongly believes that the judge should decide whether the domestic violence occurred and whether it will compromise the mediation process. The FCSC consulted with the Supreme Court Committee on ADR Policy and Committee on ADR Rules and agreed with their recommendation that only certified family mediators should be appointed to such cases. The FCSC concurs in this recommendation because:

- certified family mediators receive a basic 40 hour mediation training that includes specific learning objectives related to domestic violence;
- certified family mediators must complete at least four hours of domestic violence education during each two year renewal cycle as part of the continuing mediator education requirements;
- certified family mediators are trained to calculate child support and other Chapter 61 issues that are present in many domestic violence cases.

Although certified dependency mediators receive training in domestic violence, they are not trained to calculate child support and in other Chapter 61 issues. Other certified mediators do not receive training in domestic violence.

The FCSC acknowledges that certified family mediators are not readily available everywhere in Florida, but this is not an "unfunded mandate." The proposed rule is not intended to require or even encourage mediation of any issues in domestic violence cases, but to give guidance to those circuits that want to experiment with the process.

For example, the Eighth Circuit has a successful program that complies with the proposed rule. If the judge decides that it is appropriate and efficient, parties may agree to meet with a certified family mediator to resolve visitation logistics, the amount, timing and payment of support, temporary division of personal property, and how family debts will be paid. This is done before they leave the courthouse and the additional provisions are attached as an addendum to the final injunction. These details are the most time consuming part of the process and a tremendous help to the court.

The Eighth Circuit program might not work in other circuits because of the volume of cases. Using mediation might require a bifurcated proceeding that could not be concluded on the same day. Whenever possible, it is important to decide all of the issues at the first hearing that must be held within fifteen days after the petition is filed. Deferring these issues for a separate hearing or proceeding has a negative impact on victim safety and family stability.

V. The proposed amendments do not prohibit case management by court staff.

One of the principal objections made in comments from circuits that utilize facilitation programs is that their processes will be prohibited. Some circuits will have to modify their programs to limit court staff to administrative and managerial functions, but the programs do not have to end.

Court staff can still perform valuable case management services in domestic violence cases. For example, a case manager may interview each party and review the pleadings to outline the disputed issues for the judge, educate the parties about the process, inform the parties of voluntary services and services that can be mandated by court order, and determine if the family has other pending or closed litigation that may affect the judge's decision. *In re: Report of the Family Court Steering Committee,* 794 So. 2d 518, 529 (Fla. 2001) A case manager may ask respondent if he or she objects to entry of the injunction or other demands in the petition. If a petitioner wants to dismiss the injunction, case managers may arrange for him or her to have a voluntary conference with a domestic violence advocate, so the judge can be assured that the petitioner's decision is a free, voluntary and informed decision. Case management staff may obtain a financial affidavit or other evidence of income and calculate child support for the judge's consideration. They

may also prepare the final injunction pursuant to the judge's rulings and instructions. All of these activities are legitimate case management functions that help the judge expedite a domestic violence hearing. The rule does not affect these activities.

For further instruction on permissible activities for court staff we can look to Rule 12.750, Florida Family Law Rules of Procedure, where the Court explicitly enumerated the activities that are and are not appropriate for family law self-help personnel in the court system. Under this rule, court staff may provide both parties with general information about court processes, practice and procedures, and forms. Staff may not deny a litigant's access to the court, encourage or discourage litigation, or engage in oral communications other than those reasonably necessary to elicit factual information to complete approved forms. *See In re: Amendments to the Florida Family Law Rules of Procedure (Self-Help)*, 725 So. 2d 365 (Fla. 1998). The amendments do not affect self-help activities that are consistent with this rule.

VI. The proposed amendments do not prohibit represented parties from entering into agreements.

Several commenters expressed concern that the proposed rule would prevent represented parties from resolving their dispute out of court. That fear is misplaced. There is nothing in the current rule or the proposed amendments that interfere with parties' ability to reach an agreement through their attorneys. When the attorneys

announce to the judge that they have an agreement and the court approves the agreement, the parties have had a "full evidentiary hearing." If the Court finds that clarification is necessary, the FCSC does not object to language proposed by the Sixth Circuit.

The FCSC recognizes that prohibiting court staff from facilitating agreements between parties means that self-represented parties do not have the same opportunity to negotiate a settlement as parties who have attorneys. This is appropriate because of the highly complex nature of domestic violence. A judge has already determined that the allegations of domestic violence are sufficient to enter a temporary injunction or to set a hearing. If the judge finds that the allegations are true, the judge should not expect or require the victim to negotiate an agreement with the abuser under any circumstances.

Civil injunction proceedings are the type of case where self-represented litigants need to come before the judge to ensure their due process rights. *See, e.g.,* Rule 12.105, Florida Family Law Rules of Procedure, requiring self-represented parties to appear before the court in a simplified dissolution of marriage. The hearing required by Rule 12.105 may not be waived by the parties. *Varrieur v. Varrieur*, 775 So. 2d 361 (Fla. 3d DCA 2000). The rights involved in domestic violence cases are just as important as those in simplified dissolutions of marriage.

VII. Conclusion

Most of the comments and objections from the circuits concern the possible effects of the proposed amendments on their particular program. The FCSC suggests that it is inappropriate to use this analysis to determine what is best for the citizens of Florida and the legal system. The Court should resolve first the question of what is right for the public, our customers, and the integrity of the legal system and then measure whether the adjustments required by the circuit programs are unacceptable. The Court should do this in three stages.

First, the Court should define the role of a trial judge in cases where petitioner has asked for an injunction for protection against domestic violence and the trial court has granted a hearing. This explanation should include the proper administrative functions of court staff in performing case management, abdication of judicial authority, and staff compliance with the Code of Judicial Conduct. The explanation of the judge's role may include an explanation or qualification of the "full evidentiary hearing" requirement in Rule 12.610, Florida Family Law Rules of Procedure.

Next, the Court should decide whether any issues in a petition for injunction for protection against domestic violence case may be referred to alternative dispute resolution processes by the trial judge or court staff. Alternative dispute resolution

includes mediation, arbitration, facilitation, negotiation or any other process where court staff or a third-party neutral assists the parties to negotiate an agreement.

Finally, if the Court decides that some issues are appropriate for alternative dispute resolution, the Court should list these issues, state whether the referral must come from the judge, state whether court staff may offer the program as a voluntary service, and designate the qualifications of third-party neutrals who will assist the parties to negotiate their agreement. In answering this question and the previous question, the Court may want to clearly distinguish between the case management function of court staff and the function of serving as a third-party neutral in negotiations.

The FCSC analysis of these questions led to the proposal before the Court and the FCSC is confident that the Court's own analysis will lead the Court to approve it as drafted, or some version of the proposal. More importantly, the Court through answers to these questions will establish uniform standards for court-based domestic violence programs across the state.

Respectfully submitted January 6, 2003.

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I certify that this document complies with the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure.

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