IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA FAMILY LAW RULES **CASE NO. 08-09**

FLORIDA DEPARTMENT OF REVENUE'S COMMENTS IN RESPONSE TO THE THREE-YEAR CYCLE REPORT OF THE FAMILY LAW RULES COMMITTEE

The Florida Department of Revenue respectfully submits these comments in response to the Three-year Cycle Report of the Family Law Rules Committee that were noticed for comments in the March 1, 2008 Florida Bar News.

Rule 12.040, Attorneys. The Department respectfully disagrees with the committee's conclusion that there is an attorney/client relationship between the IV-D[1] attorney and the recipient of IV-D services. The committee asserts that the IV-D attorney provides legal services for the recipient of services because the attorney files a lawsuit on behalf of the recipient and signs the complaint, reasoning that in any other lawsuit the court would find that the attorney has made a general appearance for the person seeking support.

While IV-D cases may be filed on behalf of the recipient (or the child), the Department of Revenue is the petitioner and the IV-D attorney signs the petition as the attorney for the Department. While the recipient and child may benefit, the fact remains the action is commenced and prosecuted by the state to further the state's interests in child support

[1] "IV-D" refers to Title IV, Part D of the Social Security Act, 42 U.S.C. §§ 651-669b, the federally funded, state administered child support enforcement program. The Department of Revenue is the state's Title IV-D agency. §409.2557(1), Fla. Stat.

enforcement generally. The actions are filed and prosecuted by attorneys for the state who are paid by the state and who have contractual obligations to the state. The recipient does not pay for IV-D services or retain the IV-D attorney as a private attorney. §409.2567(1), Fla. Stat. Clearly the role of the IV-D attorney in a IV-D case is different than the role of an attorney in a private lawsuit.

The committee significantly overstates the level of interaction between the IV-D attorney and the recipient of IV-D services. The committee states that after filing the action, "The attorney consults with the person seeking support, speaks for the person in court, advises the person about the law and his or her legal rights, helps the person establish objectives for the representation such as whether to waive retroactive support…" In fact the IV-D attorney typically has no contact with the recipient of services until the day of the court hearing. It is the Department as the IV-D agency that manages the IV-D case, obtains necessary information from the recipient and provides it to the IV-D attorney. Likewise it is the Department in consultation with the IV-D attorney that establishes the objectives of the litigation in accordance with its statutory mission and responsibility under federal law. The Department and the IV-D attorney direct the course of the litigation not the recipient. In welfare cases the recipient's support rights are assigned to the state by operation of law. §409.2561(2)(a), Fla. Stat. In such cases the recipient may not even appear at the court hearing. Nor is it the role of the IV-D attorney to advise the recipient of his or her legal rights. Under sections 409.2564(5) and 409.2567(2), Florida Statutes, the IV-D attorney is required to notify the recipient of services in IV-D cases that the attorney represents the Department only and not the recipient.

In a January 28, 1999 legal opinion provided to the State Attorney for the Eleventh Judicial Circuit, which administers the state's IV-D program in Miami-Dade County, private attorneys Richard McFarlain and Robert McNeely[2] agreed with the Department's position that there is no attorney/client relationship between the IV-D attorney and the recipient of IV-D services. (*see* Appendix A) The McFarlain opinion provides a detailed analysis of relevant Florida Bar ethics opinions, including Opinion 92-2.

The McFarlain opinion takes strong exception to the Bar's central premise that recipients of IV-D services may have a reasonable belief that there is an attorney/client relationship between the IV-D attorney and the recipient of services. McFarlain describes the Bar's premise as "fundamentally flawed," "illogical," and "circular." McFarlain describes a typical scenario of how a recipient of IV-D services pays [at that time] a nominal fee, interacts primarily with county or state workers, and has limited contact with the IV-D attorney. McFarlain concludes that, "Given these facts, it is not logical to suggest that the mother could have a 'reasonable belief' that the attorney was representing her personally. The moment the mother walked into a government office building, as opposed to a private law office, she could reasonably be expected to know she was receiving government services, not individual legal representation."

We know of no Florida case law that addresses the question of the attorney/client relationship in IV-D cases. There is case law from other jurisdictions, however, including state courts of last resort, that hold there is no attorney/client relationship between a IV-D attorney and a recipient of IV-D

[2] Richard C. McFarlain was formerly chief legal counsel of the Florida Bar and chair of the Judicial Qualifications Commission. Robert A. McNeely practices family law in Florida and is a member of the Family Law Section of the Florida Bar.

services. *See State of Arkansas, Office of Child Support Enforcement, Pulaski County v. Terry*, 985 S.W. 2d 711, 715-718 (Ark. 1999); *Haney v. State of Oklahoma*, 850 P.2d 1087, 1090-1092 (Okla. 1993); *Gibson v. Johnson et al*, 582 P.2d 452, 455-456 (Ore. App. 1978); *Baldwin v. Baldwin and Missouri DSS*, 174 S.W.3d 685, 688-689 (Mo. Ct. App. 2005); *Kibodeaux v. Kibodeaux*, 635 So.2d 530, 532 (La. Ct. App. 1994); *Blankenship v. Blankenship*, 1992 Ohio App. Lexis 6279; *In the Interest of M.C.R.*, 55 S.W.3d 104, 108 (Tex. App. 2001); *McLaurin v. Cox*, 1993 Conn. Super. Lexis 2506. (*see* Appendix B)

Several bar opinions from other states reach the same result. *See* Oregon State Bar Board of Governors, Legal Ethics Opinion No. 527 (June 1989); The Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Opinion No. 90-10 (June 15, 1990); Nebraska State Bar Association, Advisory Opinion 92-1 (March 5, 1992); Virginia State Bar Standing Committee On Legal Ethics, Legal Ethics Opinion No. 964 (March 1, 1988); Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Ethics Opinion 90-F-123 (September 14, 1990). (*see* Appendix C)

The court should clarify that there is no attorney-client relationship between the IV-D attorney and the recipient of IV-D services. The language suggested by the Department in its July 26, 2007 comments to the committee address this and accurately describes the scope of IV-D services based on state and federal law. In addition, the Department believes that incorporating the notice of limited appearance into a pleading that is served on the parties is reasonable notice to the parties and the court. The Department amends its proposed language as follows to reflect the

committee's concern that notice be directed not only to the recipient but also to the other parties to the case:

> An attorney for the State's Title IV-D child support enforcement agency who appears in a family law matter governed by these rules shall file a notice informing the recipient of Title IV-D services and other parties to the case that the IV-D attorney represents only the Title IV-D agency and not the recipient of IV-D services. The notice must state that the IV-D attorney may only address issues concerning determination of paternity, and establishment, modification, and enforcement of support obligations. The notice may be incorporated into a pleading, motion, or other paper filed with the court when the attorney first appears.

We believe this provides meaningful notice to the recipient of IV-D services, other parties to the case, and the court as to the limited role of the IV-D attorney. The committee's modified proposed rule does not specify the IV-D services provided, which are fundamental and statutorily defined, and introduces a new issue, whether the recipient of IV-D services is a party to the action, while providing no clear guidance in the rule on that point.

Form 12.900(h), Notice of Related Cases The petitioner should only be required to file the related case form if there are related cases. Florida Rule of Judicial Administration 2.545(d) does not require the petitioner to file the form if there are no related cases. *See In re Amendments to the Rules of Judicial Administration*, 915 So. 2d 157 at 160 (Fla. 2005) ("Consistent with this recommendation, the new subdivision creates a procedure for the filing of notice of related cases by a petitioner in a family case *if* related cases are known or reasonably ascertainable.") (emphasis added)

Administrative orders from the circuit courts should not impose additional requirements that go beyond the rule approved by the court. It is evident that the drafters of the rule only intended that a related case form be filed if there are related cases. Had the drafters and the court intended that the form be filed in every case even if there are no related cases, the rule would have said that but it does not. (*see* Appendix D, April 19, 2006 email reply from Circuit Judge Scott Bernstein to Thomas Mato)

Adding requirements to file forms is costly. Forms must be programmed into the state's IV-D automated system, completed, generated and mailed in thousands of cases filed by the Department of Revenue each year. Variations in local practice add further programming costs, cause delays, require more training, result in more manual processing by the Department and create problems for individual filers who are unaware of local requirements.

Filing a form that says there are no related cases is of little value. The rule obligates the attorney to file the form *if* there are related cases and paragraph (d)(5) of the rule imposes a continuing duty on the attorney to inform the court of any proceeding in this state or any other state that could affect the proceeding. Presently, some clerks of court refuse to accept petitions filed by the Department based on administrative orders of the circuit court, and return the petitions to the Department if the circuit's related case form is not filed, even if there are no related cases. (*see* Appendix E, Second Judicial Circuit, Administrative Order 2004-01, Section V-A) Such local requirements are contrary to the plain meaning of the rule, the opinion of the court, and Rule of Judicial Administration 2.120(b) and (c), which provide that local court rules and administrative orders may not conflict or be inconsistent with a rule of statewide application. The court

should amend the related case form and instructions accordingly, clarifying that a party only need file the form if there are related cases.

Respectfully submitted this 1st day of April, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing comments was furnished by U.S. Mail to: Raymond T. McNeal, Chair, Family Law Rules Committee, 2640 S.E. 45th Street, Ocala, FL 34480-5784 this 1ST day of April, 2008.

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Thomas J. Mato