IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1454

IN RE: AMENDMENTS TO FLA. RULES OF CIVIL PROCEDURE; AMENDMENTS TO THE FLA. FAMILY LAW RULES OF PROCEDURE; NEW FLA. RULES FOR QUALIFIED AND COURT–APPOINTED PARENTING COORDINATORS; NEW FLA. RULES FOR OTHER COURT–APPOINTED ALTERNATIVE DISPUTE RESOLUTION NEUTRALS.

AMENDED COMMENTS ON PROPOSALS OF THE SUPREME COURT COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION RULES AND POLICY

Raymond T. McNeal, a member of The Florida Bar, files the following comments to the proposals of the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy Proposals as allowed by the Notice published in The Florida Bar News on November 15, 2011. I request the Court to consider my concerns before deciding whether the rules should be approved as proposed.

First, I would like to express my appreciation for the outstanding work of the Alternative Dispute Resolution Rules and Policy Committee (hereinafter referred to as "Committee") in drafting comprehensive rules for ADR processes and especially the standards governing the practice of parenting coordination. This is an excellent product. The thought and hard work of the Committee and the Systems Subcommittee are apparent in the proposals. I have a few concerns, but only a few.

Proposed Rule 12.742(b). This rule requires each judicial circuit to "establish a process for determining that a parenting coordinator is qualified in accordance with the requirements established in section 61.125(4), Florida Statutes." The Supreme Court should reject this proposal.

At first glance the proposal seems innocuous, but later in Rule 15.005 it is clear that the real intention is to extend the rules and standards to all persons who are "qualified parenting coordinators" under section 61.125, Florida Statutes and who have been "approved by the court to serve as a qualified parenting coordinator or to be on a qualified parenting coordination panel for any circuit." Proposed Rule 15.005.

Approval of Rule 12.742(b) and portions of Rule 15 extending the standards to all qualified parenting coordinators will mean that each circuit and in multi-county circuits, each county, will need a procedure for soliciting applicants, verifying qualifications which will include evaluating training programs, maintaining a list, and updating it periodically. Also, proposed Rule 15.220 will require the circuits to establish procedures for processing complaints and enforcing the standards of conduct.

This is a bad idea for many reasons. Lack of statewide consistency and uniformity are the most obvious. Furthermore, the Supreme Court should not ask

the circuits to do this without additional resources.

In truth, the Dispute Resolution Center should be responsible for certifying parenting coordinators, training programs, and processing complaints the way it does for mediation. However, the Supreme Court's resources are stretched too thin to do this right now. Until this can happen, the best solution is to rely on current Rule 12.742(c), proposed Rule 12.742(d), which requires the trial court to appoint a parenting coordinator "qualified by law" when the parties do not agree.

Proposed Rule 15.005. This rule seeks to apply the standards for parenting coordinators to all qualified parenting coordinators even if they have never been appointed to a case. Until the Supreme Court establishes a certification process similar to mediation, the court should not extend the standards to all parenting coordinators who have been approved using different requirements in 20 different circuits. All of the standards except marketing apply to the process of parenting coordination and the parenting coordinator's role in that process, not to general ethical concerns for those who have not been appointed.

Proposed Rule 15.030. This rule provides that "a parenting coordinator shall not engage in a dispute resolution process other than the process to which the parties have either *agreed* or been ordered." (*emphasis added*). This rule does not appear to serve any purpose in the context of Rule 15 which applies only to parenting

coordination. Once the court orders or the parties select the process of parenting coordination, the appointed parenting coordinator may not engage in any other process with this family, even if the parties agree. It is generally agreed that parenting coordinators should not establish more than one professional relationship with the parties and the child. Therefore, the parenting coordinator cannot serve as a counselor, custody evaluator, mediator, guardian ad litem, or parenting time supervisor for the parents or child. *See Final Report of the FLAFCC Parenting Coordination Task Force, Proposed Ethical Guidelines for Parenting Coordinators in Florida*, 4, available at http://www.flafcc.org/documents/PC_Coord_Final.pdf (last visited Dec. 15, 2011). The language of this rule implies that the parents may agree to or the court may order the parenting coordinator to engage in some process other than parenting coordination under proposed Rule 15. That is not appropriate. The Court should reject this rule.

Professionals who are conducting some kind of hybrid service, separate and apart from parenting coordination, are covered by proposed Rule 16.020 which uses similar language. In that context the language is meaningful and appropriate.

Rule 12.710(a)(4) allows the court to order or the parties to agree to a combination of ADR processes. For example, the court may order parenting

coordination, mediation, and counseling. However, a single professional could not provide all of these services. It would create a conflict of interest which is usually addressed in standards preventing dual professional relationships.

I am also concerned that proposed Rule 15.030 implies that the parties can agree to parenting coordination without a court order. Parenting coordination does not exist without an order of referral defining the parenting coordinator's role. A parenting coordinator has two potential responsibilities: development of a parenting plan or implementation of a parenting plan. If the parenting coordinator is performing either one of these services without a court order, the parenting coordinator is acting as a mediator, facilitator, or in some other role, but not that of a parenting coordinator.

This is not true of mediation. A mediator may conduct a mediation with people who have never filed a case or who have a closed case. A person who is certified by the Florida Supreme Court to be a mediator is bound by the ethical standards for certified and court-appointed mediators even if the mediation is not court ordered.

I suggest that proposed Rule 15.030 is unnecessary and confusing. The court should reject it.

Proposed Rule 12.742(l). The proposed changes to this rule and the "Parenting

Coordinator Request for a Status Conference" raise three concerns: 1) the appropriate method of communicating with the trial court; 2) procedural due process–informed notice and opportunity to be heard; and 3) invasion of judicial discretion and party autonomy. Although these problems are interrelated, I will attempt to deal with them separately.

Methods of Communicating with the Trial Court. At the present time, it is customary for parenting coordinators to communicate with the trial court with letters or telephone calls. The practice has some support in the Florida Family Law Rules of Procedure. Rule 12.365(b) allows an expert to request communication with the court by "letter or telephone." Rule 12.365 does not apply to parenting coordinators. Rule 12.740(j) allows a parenting coordinator to submit a "written communication regarding any nonconfidential matter to the court." This language would include letters and perhaps, e-mails and text messages. I submit that any written communication between the parenting coordinator and the trial court should be by written report.

Section 61.125, Florida Statutes favors the use of a report. *See* Section 61.125(5)(b), Florida Statutes ("immediately report"); Section 61.125(7)(d), Florida Statutes ("reports"); Section 61.125(7)(e), Florida Statutes ("reporting"); Section 61.125(8)(a), (8)(b), Florida Statutes ("affidavit or verified report" of an

emergency).

The Committee has proposed a form, “Parenting Coordinator Request for a Status Conference.” The instructions advise parenting coordinators to use this form “when the parenting coordinator is unable to adequately perform the duties in accordance with the court’s direction.” The reasons for a status conference in proposed Form 12.xxx are:

1. ____ To request direction from the court concerning __________.
2. ____ To request resolution by the court regarding ____________.
3. ____ To report, . . . noncompliance . . .
4. ____ To report that the case is no longer appropriate for parenting coordination.
5. ____ To report that the undersigned parenting coordinator is not qualified . . .
6. ____ The undersigned parenting coordinator is unable or unwilling to continue to serve and a successor parenting coordinator should be appointed.

All of these reasons are more appropriately addressed in a report to the court. Reasons 3–6 are all reports to the court. Reason 6 could be reworded so that it is consistent with reasons 3–5. It would read, “To report that the undersigned parenting coordinator is unable or unwilling to continue to serve and a successor parenting coordinator should be appointed.”

Reasons 1 and 2 undermine mediator neutrality by placing the parenting coordinator in the role of a litigator, moving for relief, instead of a neutral furnishing information to the parties and the court. It is not the parenting

coordinator's responsibility to see that the circumstances are resolved. It is the responsibility of the court and the parties. There is no difference in a "motion" and a "request" that is filed with the trial court. Motions are filed by parties, not court appointed professionals. If the parties do not resolve the problem within a reasonable time, the parenting coordinator can report that the case is no longer appropriate for the parenting coordination process.

The difference between the role of a neutral parenting coordinator and a party can be illustrated with the following example. In the process of parenting coordination, the parties agree to modify their parenting plan. The parenting coordinator's responsibility is to file a report informing the court that the parents have reached an agreement and attach a copy of the signed agreement. It is up to the parties to follow through with the legal process of obtaining court approval of the parenting plan. Therefore, it would be inappropriate for the parenting coordinator to request a status conference for the purpose of obtaining approval of the parenting plan.

Section 61.125, Florida Statutes was intended to keep parenting coordinators neutral. Proposed rule 12.742(l) does not help with that effort.

Due Process Notice and Opportunity to be Heard. If the parenting coordinator is allowed to file a request for a status conference, the parties should

have sufficient information to prepare for the conference. The proposed form does not require any supporting information to inform the parents of what the parenting coordinator will be presenting to the judge. Consider the following real examples. Example 1. The parenting coordinator files a request for a status conference, alleging that "the behavior of one or both parents is reasonably likely to cause harm to the child." This is not sufficient information to inform the parents of what issues will be discussed or what relief is requested. Example 2. The allegations in support of the status conference are "one or both parents are in need of clarification from the court on the terms of the parenting plan and, what, if any, consequences exist for failure to cooperate fully with the court order." This allegation does not provide informed notice and an opportunity to be heard. Example 3. The allegation is "at the present time I am unable to adequately perform the duties in accordance with the court's direction." Once again, the request does not inform the parents of what will be discussed. Also, the parenting coordinator is both the movant and the witness in each situation.

Requiring a more complete explanation may undermine the parenting coordinator's neutrality and ability to work with both parents. That is why it is best to let the parenting coordinator report to the court that there is a problem and then, let the court and parties decide what to do with the information.

Mandatory Hearing Invades Judicial Discretion and Party Autonomy. Proposed Rule 12.742(l) provides in part, "If the parenting coordinator is unable to adequately perform the duties in accordance with the court's direction, the parenting coordinator shall file a written request for a status conference and *the court shall set a timely status hearing*." (*emphasis added*). The requirement of a mandatory hearing invades judicial discretion and the autonomy of the parties. If the Supreme Court approves the rule as written a parenting coordinator can force the court to hold and the parties to attend a status conference by filing a request for a status conference based on bare allegations like the examples above. This is not the way the legal process should work. Usually, the judge or the parties decide whether a witness should present testimony or other evidence to the court. Adherence to this customary procedure is especially important to the process of parenting coordination. The parenting coordinator may not be a witness except in limited circumstances. Florida Family Law Rule of Procedure 12.740(k). Therefore, proposed Rule 12.740(l) should maintain litigant and judicial control over whether a hearing is scheduled. If one party is undermining the process, the other party can request a hearing and explain it to the judge. If both parties are at fault, the case may not be appropriate for parenting coordination. This can be communicated to the court in a report and if the court or parties want a hearing, it

can be scheduled. This allows the parenting coordinator to remain neutral.

Changing Proposed Rule 12.742(l). I suggest that the Supreme Court change proposed Rule 12.742(l) to eliminate the request for a status conference and mandatory status hearing and to require the parenting coordinator to file a report with the court and serve a copy on each party. The new proposed rule would be:

> **(l)~~(j)~~ Written Communication with Court.** The parenting coordinator may submit a written report ~~or other written communication~~ regarding any nonconfidential matter to the court. Parenting coordinators are required pursuant to section 61.125, Florida Statutes to report certain emergencies to the court without giving notice to the parties. The parenting coordinator shall use a form in substantial compliance with Florida Family Law Rules of Procedure Form 12.YYY when reporting any emergency to the court, whether or not notice to the parties is required by law. If the parenting coordinator is unable to adequately perform the duties in accordance with the court's direction, the parenting coordinator shall file a written ~~request for a status conference and the court shall set a timely status hearing~~ report with the court and serve a copy on each party. The parenting coordinator shall use a form in substantial compliance with Florida Family Law Rules of Procedure Form 12.XXX to ~~request a status conference~~ make a report to the court. When notice to the parties is required, t~~T~~ he parenting coordinator must contemporaneously serve each party with a copy of the written communication.

Doing this and adopting an appropriate form will answer the question of how a parenting coordinator communicates with the trial court and make the practice uniform across the State.

Changing the Proposed Form. The proposed form and instructions would

need to be revised so that it could be used for all reports to the court. The nature and timing of reports will depend on the court order referring the parties to parenting coordination and any agreements between the parties allowing the parenting coordinator to report to the court.

Respectfully submitted on December 15, 2011.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this comment was provided by U. S. mail on December 14, 2011 to Honorable William D. Palmer, Chair, Committee on Alternative Dispute Resolution Rules and Policy, Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, FL 32114, Joel M. Silvershein, Chair Juvenile Court Rules Committee 201 S.E. 6th St., Ste. 660 Ft. Lauderdale, FL 33301, Kevin D. Johnson, Chair, Civil Procedure Rules Committee, 201 N. Franklin St., Tampa, FL 33602, Ashley J. McCorvey Myers, Chair, Family Law Rules Committee, 1912 Hamilton Street, Suite 204, Jacksonville, FL 32210-2078, Dana Dowling, Staff Liaison, Families and Children in the Court Steering Committee, 500 South Duval Street, Tallahassee, FL 32399, and to Elena Rodriguez, 10420 SE 140 Road\, Miami, FL 33168.

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