IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1454

IN RE: AMENDMENT TO FLORIDA FAMILY LAW RULES OF PROCEDURE AND FLORIDA RULES OF CIVIL PROCEDURE AND PROPOSED NEW RULES GOVERNING PARENTING COORDINATORS AND ESTABLISHING STANDARDS FOR PARENTING COORDINATORS AND ADR NEUTRALS OTHER THAN MEDIATORS, ARBITRATORS AND PARENTING COORDINATORS

RESPONSE TO COMMENTS OF THE SIXTH CIRCUIT, THE FAMILY LAW RULES COMMITTEE AND RAYMOND T. MCNEAL

This response by the Supreme Court Committee on ADR Rules and Policy (Committee) will address two areas contained in its above referenced Petition: first, the recommendation to revise Florida Rule of Family Procedure 12.740(f) to eliminate a 10-day period for attorneys of record to review their clients' mediated settlement agreements after a mediation at which the attorney was not in attendance (commonly referred to as the "10-Day Rule"); and second, matters concerning parenting coordination.

FLORIDA RULE OF FAMILY PROCEDURE 12.740(f)

Comments in opposition to the Committee's recommendation to eliminate the 10-Day Rule were received from the Sixth Judicial Circuit, Honorable Chief Judge J. Thomas McGrady and the Florida Bar Family Law Rules Committee, Ashley J. McCorvey Myers, Chair. The objections center

on the contention that a benefit exists in a family case by allowing consultation with one's attorney, who was absent from the mediation, before an agreement is finalized. In the Family, Juvenile and Civil arenas, the only mediation rule currently containing this 10-day provision is 12.740(f).

The Committee maintains that the benefit of attorney review is not eliminated by deletion of the 10-day rule. A party to mediation may still request attorney review before signature or incorporate a review provision into a signed agreement. The recommended amendment to the Family Law Rules of Procedure merely does away with an automatic review which can cause unnecessary delay in the proceeding if a party does not need or desire such review.

By eliminating the automatic 10-day review period, the Committee believes two important values are supported. First, the right of self-determination of parties to a mediation, a value central to the mediation process, is preserved and consistency in court procedural rules is achieved between the Family Law Rules of Procedure and the Rules of Juvenile Procedure (consistent with the Court's stated unified family court concept) as well as with Florida Rule of Civil Procedure 1.730 governing agreements in civil cases. The origin of the instant Petition was a request to address this

specific inconsistency by the Family and Children in the Court Steering Committee in their "End of Term Report 2008-2010".

The Committee, therefore, continues to support its proposed rule change in order to maintain consistency as well as to eliminate unnecessary delays.

PARENTING COORDINATION

Comments concerning parenting coordination were filed by retired judge Raymond T. McNeal. McNeal expresses concerns regarding Rule 12.742(b) and (l) and new proposed Rules 15.005, 15.220, and 15.030.

With regard to Proposed Rule 12.742 (b), which merely requires each circuit to establish a process for determining that parenting coordinators are qualified to serve, McNeal raises concerns about statewide consistency and limited circuit resources. Since the Dispute Resolution Center does not have the resources to administer parenting coordination on a statewide basis (which McNeil recognizes), the Committee believes that the circuit approach set forth in the rule is the most practical way to address the issue.

Proposed Rule 15.005 is drafted to apply statewide standards to parenting coordinators. McNeal expresses concerns about applying statewide standards to parenting coordinators who have been approved by

diverse circuits. The Committee believes that statewide standards are appropriate and will promote the quality of parenting coordination.

Proposed Rule 15.030 generally provides that a parenting coordinator shall not engage in any dispute resolution process other than one agreed to by the parties or ordered by the court. McNeal agrees with the concept of the rule, but asserts that the rule is unnecessary and may imply that the parties could agree or the court could order the use of some other process under the rule and that parties could agree to parenting coordination without court order. The Committee does not believe that the rule is unnecessary or that these implications flow from the rule as written.

Proposed Rule 12.742(l) raises concerns for McNeal regarding: (1) the appropriate method for communicating with the trial court; (2) procedural due process and opportunity to be heard; and (3) invasion of judicial discretion and party autonomy. While, as the McNeal notes, the issues may be interrelated, this response will address the issues separately as they were discussed in the comments.

McNeal raises concerns about methods of communicating with the court. He notes that the current practice is for parenting coordinators to communicate with the court informally via letters or telephone calls. In an attempt to improve upon the current common practice and attain a level of

statewide uniformity, the Committee has proposed the new form 12.XXX, *Parenting Coordinator's Request for Status Conference*, which addresses safeguards related to communication with the court in way similar to the safeguards involving communication to the court by expert witnesses.

Florida Family Law Rule of Procedure 12.365(b) provides:

> *(b)* ***Communication****. No expert may communicate with the court without prior notice to the parties and their attorneys, who shall be afforded the opportunity to be present and heard during the communication between the expert and the court. A request for communication (emphasis added) with the court may be conveyed informally by letter or telephone. Further communication with the court, which may be conducted informally, shall be done only with notice to all parties.*

The end result of the expert's "request" is a hearing with notice and an opportunity for the parties to be heard. The ability for a non-party, court appointed expert to "request" communication with the court is, as McNeal notes, not a new concept. However, rule 12.365(b) does not apply to parenting coordinators. Therefore, the safeguards regarding notice and an opportunity to be heard that are provided in 12.365(b) do not apply to parenting coordinators and the parties they serve.

Accordingly, the Committee proposes a unified form parenting coordinators across the state could use for purposes of communicating with the court. The proposed Instructions attached to the proposed Rule 12.XXX specifically require notice to the parties and their counsel, if any.

While the statute requires parenting coordinators to report various circumstances to the court, parenting coordinators, many of whom are non-lawyers, are without guidance as to what they can say and the appropriate format for conveying the information to the court. Further, the relief provided by the form was specifically requested by a number of parenting coordinators during the initial process of developing both the rule and the statute on parenting coordination. By adopting this form, parenting coordinators, like expert witnesses, would now have the ability to request further communication with the court in order to adequately perform the duties in accordance with the court's direction.

We agree with McNeal's concerns that the parenting coordinator not be placed in the position of advocate for the parties. The form does not do so and is not intended to allow the parenting coordinator to serve as one or both of the parties' legal counsel.

McNeal submits that any written communication between the parenting coordinator and the trial court should be labeled "report". Neither §61.125 or Rule 12.742 require such a label for written communications between a parenting coordinator and the trial court. On the contrary, as an example, the current Rule 12.742(d) requires a parenting coordinator to

respond to the appointment by filing Form 12.984 "*Response by Parenting Coordinator*".

Form 12.XXX, *Parenting Coordinator's Request for Status Conference,* provides a uniform means for parenting coordinators to have written communication with the trial court to report specific circumstances without violating §61.125.

McNeal also raises due process concerns, asserting that the proposed form does not require any supporting information to inform the parents of what the parenting coordinator will be presenting to the judge. It is the Committee's position that it is the parenting coordinator's responsibility to elucidate the circumstance and would be no different if the document was labeled "report". The form, as drafted, leaves blank lines to be filled in by the parenting coordinator as to the specifics of why the request is being made.

The request for a status conference is a way for the parenting coordinator to provide a written report to the court of a circumstance which may require the court's intervention, without moving for a specific action. At the status hearing, the court could determine if an evidentiary hearing is warranted.

McNeal also asserts that proposed Rule 12. 742(l) takes away judicial

discretion and party autonomy. The language of Rule 12.742(l) states, "….and the court shall set a timely status hearing." The requirement for the court to schedule a hearing based upon the occurrence of a specific event exists in many areas of the law, including the context of domestic violence, juvenile proceedings, and specifically under current Florida Family Law Rule 12.742 (i)(2), which requires that the court schedule a return hearing if an ex parte emergency order is entered. In the proposed language of 12.742(l), the court is free to set a hearing as it deems it "timely" depending on the urgency of the circumstance being reported. . It is still within the court's discretion as to what constitutes "timely."

McNeal's suggested changes would eliminate the requirement of a timely status hearing. Myriad circumstances exist where the parenting coordinator may need to request that the court address a situation. By having the rule require a status conference be scheduled, the court is on notice that a conference is needed and will be able to determine its urgency and when it will be held.

Conclusion

In conclusion, the Committee submits the following:

The elimination of the 10-Day Rule is appropriate to ensure party self-determination, eliminate unnecessary delays and ensure uniformity in the mediation rules of procedure regarding attorney review of mediated agreements.

Circuit qualification of parenting coordinators is appropriate, but statewide standards should be applied to them.

Proposed Rule 15 does not imply that it can be used for processes other than parenting coordination or that parenting coordination can be done without court order.

A request for a status conference is an appropriate method of communication between a parenting coordinator and the trial court. Proposed Rule 12.742(l) does not take away judicial discretion or party autonomy. On the contrary, proposed Rule 12.742(l) and Form 12. XXX provide a uniform method of written communication with the court, informs the parties of circumstances being reported, and improves the parenting

coordination process.

Respectfully submitted this ___ day of _____ 2012.

_____
Judge William D. Palmer
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Chair of the Committee on Alternative Dispute Resolution Rules and Policy
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Comments has been forwarded by U.S. Mail on this ____ day of _____ 2012 to Hon. J. Thomas McGrady, Chief Judge of the Sixth Judicial Circuit, 14250 49th Street North, Clearwater, Fl 33762; Hon. Raymond T. McNeal, 2640 SE 45th Street, Ocala, Fl 34480; Ashley J. McCorvey Myers, Chair, Family Law Rules Committee, 1912 Hamilton Street, Ste. 204 Jacksonville, Fl 32210-2078; John F. Harkness, Jr., Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee Fl 32399-2300; Kevin D. Johnson, Chair, Civil Procedure Rules Committee, 201 N. Franklin Street, Tampa, Fl 33602; Joel M. Silvershein, Chair, Juvenile Court Rules Committee, 201 S.E. 6th Street, Ste, 660, Ft. Lauderdale, Fl 33301; Dana Dowling, Staff Liaison, Families and Children in the Court Steering Committee, 500 S. Duval Street, Tallahassee, Fl 32399; Elena Rodriguez, 10420 SE 140 Road, Miami, Fl 33168.

CEERTIFICATE OF TYPEFACE COMPLIANCE

I further certify this petition has been prepared in MS Word using Times New Roman 14-point font, which complies with the font

Requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

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