

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENT TO THE
FLORIDA FAMILY LAW RULES
OF PROCEDURE,**

CASE NO. SC02-1574

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**SUPPLEMENTAL COMMENT ON THE FAMILY COURT
STEERING COMMITTEE’S AMENDED PETITION TO AMEND
RULE 12.610, FLORIDA FAMILY RULES OF PROCEDURE**

The Family Court Steering Committee (“FCSC”) has filed an Amended Petition to Amend Rule 12.610, Florida Family Law Rules of Procedure, pursuant to the emergency procedures of Florida Rule of Judicial Administration 2.130(a). Under the proposed amendment, the trial court must first conduct a hearing in all domestic violence injunction cases and make a finding of whether domestic violence has occurred or whether imminent danger of domestic violence exists. The trial court is then *required* to rule on all “safety-related issues,” including, *inter alia*, contact between the parties, use of the parties’ residence, temporary custody and visitation, and temporary child and/or spousal support. Only then, with the consent of both parties, may the trial court refer the parties to mediation to resolve other details on these safety-related issues.

While no doubt well intentioned, the proposed rule has the effect of eliminating the highly successful voluntary facilitation program currently utilized in the Twelfth Circuit as an aid in resolving domestic violence injunction cases. Participants have overwhelmingly supported this program, with ninety-six percent of all petitioners rating the facilitator as helpful or very helpful in

resolving issues.

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The Twelfth Circuit has previously filed an Objection to this proposed rule amendment. This Supplemental Comment is filed in response to the Notice appearing in the October 15, 2002, edition of The Florida Bar News and is intended to augment the prior Objection by presenting additional arguments in opposition to the proposed amendment.

1. The proposed rule amendment arbitrarily creates an unequal system of resolving domestic violence injunction cases.

In proposing the rule amendment, the FCSC has relied heavily on the findings contained in a report authored by the Chair of the Domestic Violence Subcommittee. (“DVS Report”) (A1-16)² There are, however, some marked discrepancies between the rule language and the purported intent of the rule drafters. For example, the rule amendment to 12.610(c)(1)(B) requires a hearing to be held in every case. Nonetheless, the DVS Report provides:

[N]othing in the proposed rule would prevent the parties and their attorneys from having a hearing at which they presented evidence of an agreement. There is no intention to interfere with the parties’ ability to reach an agreement through their attorneys or on their own, *even though contact without an attorney may violate a temporary injunction*. Courts have not interpreted the requirement for a “full hearing” to restrict the parties from reaching agreements. The rule, as proposed, is designed to define the court’s role when people come to court without an agreement and is not intended to interfere with the parties’ and their attorneys’ ability to negotiate prior to a hearing on the petition.

(A9) (emphasis added).

The proposed rule amendment appears to contemplate non-adversarial “hearings” where the only activity is the presentation of an agreed resolution for the court’s approval. Notably, however, in light of the DV Subcommittee’s professed concern for victim safety, the DVS Report openly condones parties reaching an agreement, even if contact between the parties violates a temporary injunction meant to protect the victim. On the other hand, if the

¹ Comments by participants in the program were attached to this Circuit’s previously filed Objection at Appendix pages 1 through 3.

² References to the Appendix accompanying this Supplemental Comment are designated by the symbol “A” followed by the appropriate page number.

parties were participating in a voluntary facilitation program, such as the Twelfth Circuit's, an agreement would be reached without any contact between the parties that would violate the terms of a temporary injunction. Under the Twelfth Circuit's program, both domestic violence victims and respondents discuss their concerns and the resolution of ancillary issues outside the presence of the other party.

Perhaps more egregious, however, is the Commentary to the 2002 proposed rule amendment, which clearly contemplates agreed-upon resolutions in final injunction cases, but only for those parties who can afford to retain counsel:

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 to one or more issues, but does not preclude the parties, *through their attorneys* from presenting agreements to the court.

(emphasis supplied). The combined impact of the DVS Report and the Commentary is clear – if the parties can afford to hire attorneys, they are not precluded from reaching an agreed disposition on the final injunction. If, however, the parties are *pro se*, they can either run the risk of violating the temporary injunction to reach an agreement between themselves or forego an agreed upon resolution because they cannot afford to hire attorneys and the proposed rule amendment has removed any alternative resolution procedure.

The net effect of the proposed rule amendment, therefore, is to arbitrarily deny *pro se* litigants the same opportunities that are available to represented parties to reach a settlement and present the court with an agreement. The removal of an alternative resolution process essentially guarantees that *pro se* victims must endure the emotional trauma of an adversarial hearing in order to obtain a final injunction. It undermines the authority of the chief judge of this Circuit who has authorized this system of handling domestic violence injunctions under Florida Rule of Judicial Administration 2.050 and creates a concomitant negative impact on the efficient administration of justice in the Twelfth Circuit.

2. The proposed rule amendment conflicts with relevant sections of the Florida Statutes.

The proposed rule requires that if the trial court finds that an injunction should issue, “the court shall also rule on the following,” *e.g.*, contact between the parties, use of the parties’ residence, temporary custody and visitation, temporary child and/or spousal support, etc. Section 741.30(6)(a), Florida Statutes, presently provides: “Upon notice and hearing, the court may grant such relief as the court deems proper, including an injunction” addressing these ancillary issues. The proposed amendment to section 741.30(6)(a), effective January 1, 2003, does *not* remove the trial court’s discretion to rule on these ancillary issues. Likewise, section 741.2902, Florida Statutes (“Domestic violence; legislative intent with respect to judiciary’s role.”) requires only that the court shall “consider temporary child support when the pleadings raise the issue *and in the absence of other support orders,*” and “consider supervised visitation, withholding visitation, or other arrangements for visitation that will best protect the child and petitioner from harm.” *See* § 741.2902(2)(d), (e), Fla. Stat. (2002) (emphasis supplied).

These conflicts are important in light of Section 25.371, Florida Statutes, which provides that when the Supreme Court adopts a rule concerning practice and procedure, and the rule conflicts with a statute, the rule supersedes the statutory provision. *See* § 25.371, Fla. Stat. (2002). Thus, given the obvious conflicts, if adopted, the amended rule provision would control over the above-cited statutes.

The DVS Report states that the Subcommittee “did not intend the rule to require that judges enter orders providing ancillary relief,” and “it is contemplated that the court could very well decline to enter an order granting ancillary relief as may be before the court.” (A9) The problem, however, is that the unambiguous language of the proposed rule amendment clearly requires such orders, thereby rendering moot the Subcommittee’s intentions.

The Florida Supreme Court is empowered to promulgate rules of procedure, but only the Florida Legislature can enact substantive changes to the law. *See Office of the Public Defender v. State*, 714 So. 2d 1083 (Fla. 3d DCA 1998). The proposed rule amendment implicates substantive law because it interferes with the discretion delegated to the judiciary by

the legislature to address various issues in entering a final injunction. In other words, the proposed amendment usurps the considered judgment of the legislature that trial judges should have the discretion whether or not to address these ancillary issues in the context of a final injunction hearing. As such, the rule amendment, as currently proposed, cannot be adopted.

3. The Twelfth Circuit has revised its voluntary facilitation program to comport with legislative changes in Section 741.30.

Effective on January 1, 2003, section 741.30(6)(a) provides:

Upon notice and hearing, when it appears to the court that the petitioner is either the victim of domestic violence as defined by s. 741.28 or has reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence, the court may grant such relief as the court deems proper, including an injunction: [granting various relief within the trial court's discretion].

...

See § 13, ch. 2002-55, Laws of Florida, eff. Jan. 1, 2003 (codified at § 741.30(6)(a), Fla. Stat.) (emphasis supplied). The underlined language was not part of the original bill; it was proposed by amendment by Representative Littlefield on March 13, 2002. See Amendment I.D.# 403277 to S.B. 716 (available on Online Sunshine). The language is not discussed in the legislative committee reports accompanying S.B. 716, nor is it discussed in the legislative committee reports accompanying H.B. 299, from which the language was derived.³ Thus, there is no guidance on the legislative intent of the new wording.

Nevertheless, in anticipation of this substantive change in the law, the Twelfth Circuit has changed its voluntary facilitation procedure to eliminate the option allowing a respondent to stipulate to the entry of an injunction with no finding of fact regarding domestic violence. This key change in the Twelfth Circuit's program eliminates a major criticism levied against the program in the DVS Report, *i.e.*, the purported lack of jurisdiction to enter a final injunction without a finding of fact and the issue of whether an injunction would be enforceable in the absence of a finding of fact.

4. No emergency exists to allow the proposed rule amendment to be approved via the

³ Representative Littlefield was the 2002 sponsor of HB 299, which added the language highlighted in the main text above, redefined the term domestic violence to include parties engaged in a dating relationship, and eliminated the filing fee for petitioners seeking a domestic violence injunction.

emergency procedures in Florida Rule of Judicial Administration 2.130(a).

Finally, it is worth noting again that the FCSC has failed to demonstrate any emergency requiring expedited approval of the proposed rule amendment. The FCSC alleges in its Amended Petition that expedited consideration is necessary “to ensure safety and due process for victims, abusers and their children by providing clear, statewide standards for conducting domestic violence injunctions.” But, the FCSC provides no basis upon which to conclude that any participant’s safety and due process rights are being compromised. No member of the DV Subcommittee or the FCSC observed the Twelfth Circuit’s voluntary facilitation program. In fact, it was not until September 11, 2002, that a Senior Court Analyst from OSCA viewed the operation of the program firsthand in Sarasota. (A17-18)

Nonetheless, the FCSC asserts it has filed under Rule 2.130(a) because of directions to the FCSC in *In re: Family Court Steering Committee*, No. AOSC00-18, and *In re: Report of the Family Court Steering Committee*, 794 So. 2d 518 (Fla. 2001). Presumably, the FCSC refers to the Supreme Court’s direction that it “conduct an assessment of how courts are handling domestic violence cases and develop recommendations for model practices for handling these cases in a manner that helps ensure the safety of victims and children.” *See* AOSC00-18 at Task #4; *Report*, 794 So. 2d at 525. Nothing in these directives, however, suggests that the FCSC may propose rule changes by circumventing the general procedures under Florida Rule of Judicial Administration 2.130(b) and, as a result, the input of the Family Law Rules Committee of The Florida Bar (“Rules Committee”). Finally, the changes to the rule have been proposed without the benefit of OSCA’s Report on the statewide assessment of how courts are handling domestic violence and repeat violence cases and its recommendations for model court practices, which is not due until December 31, 2002.

The FCSC’s manner of proceeding in this case has effectively bypassed any input from the Rules Committee. This is especially troubling because the primary role of the Rules Committee is to consider proposals for amending the family law rules. This role evolved from the Florida Supreme Court’s previous observations in 1998 of the “many procedural problems

inherent” in having both the FCSC and the Rules Committee working on revisions to the Family Law Rules and Forms. *See In re: Amendments to the Florida Family Rules of Procedure*, 724 So. 2d 1159 (Fla. 1998) (citing *In re: Amendments to the Florida Family Law Rules*, 713 So. 2d 1 (Fla. 1998)).

As a result, the Court directed both committees to address specifically the role each committee should play in amending the family law rules and forms. *Id.* at 1160. In response, both committees recommended the following division of responsibilities between the committees:

[T]he focus of the rules committee should be to consider rule proposals for family law rules and the focus of the steering committee should be to support and assist the courts in developing and implementing the Family Courts Initiative and to fulfill the steering committee’s duties and responsibilities as defined by the Chief Justice’s administrative orders. The duties of the steering committee include: (a) making recommendations regarding family law litigation, model family courts (including self-help centers), and administrative policy and rules to advance recommended goals; (b) improving communication between the courts and other agencies; (c) addressing pro se litigant issues; and (d) funding recommendations.

Id. The Court approved this division of responsibilities between the committees. Yet, nothing in this case suggests that the FCSC’s proposal has been referred to the Rules Committee.

Compare In re: Amendments to Florida Family Law Forms, 759 So. 2d 583 (Fla. 1999) (adopting amendments to family law forms necessitated by new legislation because “there exists insufficient time to conduct the general procedures that normally accompany such amendments”). Nor has the FCSC suggested that time constraints have necessitated a bypass of the general procedures for proposed rule amendment in this case. This Court should, therefore, deny the FCSC’s Amended Petition and refer the proposal to the Rules Committee.

Conclusion

The FCSC has taken the position that its solution is the only solution rather than examining whether a voluntary facilitation program, operating within approved parameters, can provide a viable alternative for *pro se* litigants. The success of the Twelfth Circuit's voluntary facilitation program suggests that it is a viable alternative.

A rule, similar to Rule 12.750 ("Family Self-Help Programs"), could be utilized to establish the parameters of a domestic violence voluntary facilitation program. Included in the Appendix of this Supplemental Comment is a capsule summary containing several provisions that would be included in a rule allowing the establishment of such a program. (A19-20) Although not intended as a rule proposal, it may serve to open further debate on the future of voluntary facilitation programs should this Court decline to grant the Amended Petition of the FCSC.

Respectfully submitted,

Thomas M. Gallen
Chief Judge, Twelfth Judicial Circuit
Florida Bar No. 27440
Manatee County Courthouse
P.O. Box 1000
Bradenton, Florida 34205
Telephone: (941) 742-5963
Fax No.: (941) 742-5958

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing objection has been provided by regular U.S. mail on this _____ day of November 2002 to the following:

The Honorable Raymond T. McNeal
Chair, Family Court Steering Committee
110 N.W. First Avenue, Room 3058
Ocala, Florida 34475

Mr. John F. Harkness
Executive Director, The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399

Mr. Michael Walsh
Chair, Family Law Rules Committee
501 S. Flagler Drive, Suite 306
West Palm Beach, Florida 33401-5911

The Honorable Peter D. Webster
Chair, Rules of Judicial Administration Committee
First District Court of Appeal
301 S. Martin Luther King, Jr., Blvd.
Tallahassee, Florida 32399-1850

Ms. Caroline K. Black
Chair, Family Law Section of The Florida Bar
307 S. Magnolia Avenue
Tampa, Florida 33606

Deborah A. Lacombe
Legal Affairs and Education
Office of the State Court Administrator
500 South Duval Street
Tallahassee, Florida 32399

By: _____
Thomas M. Gallen, Chief Judge
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I hereby certify that this document was printed in Times New Roman 14-point font.

By: _____
Thomas M. Gallen, Chief Judge