

Minutes
Legislation Committee
Family Law Section Midyear Meeting – January 27, 2011

MEMBERS IN ATTENDANCE:

Thomas Duggar, Co-Chair	Barbara Beilly
Maria Gonzalez, Co-Chair	Luis Insignares
Heather Apicella, Co-Vice Chair	Shannon Novey
Ronald Bornstein, Co-Vice Chair	Rob Boyd
Susan Savard, Co-Secretary	Robin Scher
Benjamin T. Hodas, Co-Secretary	Sarah Sullivan
Elisha Roy, Exec. Committee Liaison	Robert Merlin
Deborah Day, Psy.D., Sp. Advisor to Chair	Steve Berzner
Diane Kirigin – Section Chair	Belinda Lezzara
Patricia Alexander	Jeff Weissman
Amy Hamlin	C. Debra Welch
Patricia Kuendig	Adam Zborowski
Robert Kohlman	Michael Gilden
Matthew Capstraw	David Hirschberg
Lawrence Datz	Monica Pigna
Elizabeth Adams	Caryn Green
Sam Jubran	Norberto Katz
Ashley Myers	Sheena Benjamin-Wise
Douglas Greenbaum	Laura Davis-Smith
Robyn Vines	Rana Holz
Frank Zilaitis	Amy Hickman
Stephen Pennypacker	Abigail Beebe
Chris Rumbold	David Manz
David Riggs	Ray McNeal
Julia Wyda	Jodi Seitlin

GUESTS IN ATTENDANCE:

Alyson Hughes	Nicole Goetz
Evan Marks	Ron Koffman
Tim Voit	Susan Keith
Amy Van Velsler	Lee Schriver
Ronda Goodman	Sara Arvarian
Craig Fabricanth	Frank Lopez
Judy Hoder	Lexie _____
Jean Weston	Michelle Klinger
Kathy Lively	Gina Toner
Cindy Vogel	Maggie Mooney
Steven Binder	Chris Bruce
Christy Gray	Rachel Hill

Eva Velchol
Jessica Ootz
Cecilia _____
Kelly Marie
John Foster
Kathy Beamer
Aimee Gross
Barbara Kelly

Kim Nutter
Nicole Hobble
Tammy Wilson
Natalie Martin
Deborah Trecht
Teresa Parnel
Caroline Black

Stephen Pennypacker has to leave early – excused

Thomas Duggar’s birthday – Wife and kids arrive to celebrate at the beginning of the meeting

Welcome and Call to Order – 3:30 p.m.

Introduction of Guests

Introduction of Section and Committee Officers

Review/Approval of minutes

September 22, 2010 – Amy Hamlin – Timely sent e-mail that she could not attend – Motion to excuse 2nd by Matt. Motion by Norberto – minutes amendment approved.

January 7, 2011 – Jodi Seitlin excused absence from this meeting is not reflected on the original minutes. – Jodi asks that the minutes be amended – Norberto moves to approve – July 2nd – unanimous approval. Abigail Beebe is also excused from January 7, 2011 meeting.

Standing positions

4 new standing positions approved by BOG

Committee/Subcommittee/ad hoc committee reports

Elisha Roy– Exhibit 4 – proposed legislation Chapter 61 amendments – bill asked to review not filed yet- there are a few other states with similar bills – this one is from NJ - if you kill spouse you can’t get ED and alimony – small subcommittee that reviewed it. Everyone had different opinion. Two members thought it should not be supported and not fixable to be supportable – Two members thought it was OK – small subcommittee not best to vet issue. It’s a short bill. Concerns from subcommittee: May want to work with legislator to make it more palatable – has been passed in NJ.

Concerns from Legislation (discussion):

Alimony provisions and child support – alimony – we have case law that says adultery cannot be considered notwithstanding statutory language to the contrary – it can’t unless money spent – judges say it is not fault state – can’t be a reason to deny alimony (unless you murder someone). Line of consanguinity is long as well.

Chris Rumbold– “convicted” is a concern- court may withhold adjudication – probation for 10 years – not as all encompassing as it should be – should be reworded if we are going to consider the statute.

David Riggs: as he reads ED portion – party cannot receive ED following offense. Does intended victim receive all of the assets? There is enough anti-marriage language in the statute. Does this mean that if you don’t kill but try to, all assets go to other? Why not just kill them? Absurd results – What about if appeal on conviction overturned and all of the money is gone. There is enough in the equitable distribution statute to take it into consideration w/o statutory amendment.

Chris Rumbold: Has problems with “substantial similar” D-1 lines 41 and 44-45 and 43. Curious in which court are the determinations made – not criminal court – if conviction in certain of the offenses – no finding of substantial risk – Does family judge make this determination? Very different evidentiary standard than criminal. Sign-up for subcommittee to expand its membership.

Norberto Katz: Also involves estate issue – is RPPTL also looking at it?

Elisha Roy: We are casually looking at it. RPPTL comments just came in today.

Thomas Dugger: New expanded subcommittee to continue looking at the issue – to have telephonic meeting within the next week or so.

Domestic Violence – Amy Constantino – reported by Robin Scher. Only thing looking at was whether senate study would be acted upon. No further report.

Thomas Dugger: IN DV committee – proposed draft of bill has been filed to remove stalking from the statute – not filed yet – we have not seen proposed language yet. Forming subcommittee with Norberto Katz as chair and Ray McNeal and Luis Insignares as subcommittee members – second sheet sent around for subcommittee to vet proposed language.

Jodi Seitlin: point of clarification – DV subcommittee not proposing this. Brought to attention by Judge Delpino – bringing the issue tomorrow.

Thomas Dugger: the subcommittee with Judge Kelly and Judge Delpino – filed just to keep spot open – bills must be presented to bill drafting in a timely manner. They filed “shell” bill just to hold spot. There is no guarantee that a bill will be generated. It is our job to monitor and report on bills which may affect this section. Nothing may happen with the bill – report back as to the content and what our position should be if any.

Norberto Katz: alimony rapid response – meet and greet meeting – we will meet when there is something to discuss.

David Hirschberg: reminder – DV committee had put together bill “gehan’s laws – firearms bill.” Discussed potential problems with bill and revisions; committee has put together a revised bill – redlined bill – must vote on changes. Some committee members

have made additional contributions to the changes. Completed proposal will be presented at June meetings. Will be setting up series of telephone conferences to finalize the proposal. Will discuss and vote on changes. Open to all – not just subcommittee members.

Kim Nutter – GAL Hearsay – proposed amendment to statute – Two changes: 1) Replace “20 days” with “30 days” before final hearing; 2) Waiver of hearsay has been issue for quite some time; procedurally, to make a new rule or exception was not the way to approach. Section 5 at end “GAL’s report may be considered by the trial court in its discretion – admissibility of report and GAL testimony shall not be excluded by strict rules of evidence.”

Judges are becoming frustrated – 60 hours of work – someone will not like the recommendations and attorney’s (who are just doing their job) will raise hearsay objection. As a GAL, she is getting a lot of attorneys who will enter into agreed order to waive hearsay. People are trying to get around statute. Proposed language does not waive current evidentiary rules. §61.403 amendment

Jeff Weissman: 2nd amendment less controversial – bifurcate so that there are 2 votes

Issue 1 – change from 20 to 30 day rule. No discussion.

All in favor – no opposition – MOTION CARRIES

2nd portion of the bill

Thomas Sasser: objects vehemently - breaches rules of evidence without doing it the right way. We can’t simply escape rules of evidence. Hearsay is hearsay and it must be tested properly to be in evidence. Proposal is intellectually dishonest. Change rules of evidence instead of trying to sneak it by. Urges that we do not pass this – change rules of evidence if we think that is right thing to do. This is not the right way.

Robert Kohlman – agrees with Thomas Sasser – do it under Florida Statute § 90 and not here.

Robert Merlin – This is not a new procedure – he brought this issue to legislation 10 years ago – §61.20 exact same language exists with home studies – court may consider information on study and technical rules of evidence don’t apply – this is not a slippery slope – it already exists. GAL is to gather information. Judge can appoint someone to do home study; should be able to use GAL report – GAL statute makes reference under appropriate circumstances to obtain opinion of child- what is purpose if it is hearsay and can’t be submitted to the court? In order to make GAL functional in Florida, we have to enable the information to come in and not be excluded due to technical rules of evidence. Attorneys have the ability to bring in other witnesses to rebut what GAL says. He supports motion and urges passage.

Thomas Sasser: Disagrees with Robert Merlin – just because this has been done the wrong way somewhere else, it should not happen here. GAL report can be written without hearsay – should be done right.

Kim Nutter: §61.20 looked at when language drafted. She understands this is a divisive issue – but they used same language. She is not trying to step on toes. GAL's appointed in high conflict, difficult cases. Shutting down the ability to relay perception of kids to court is wrong. This does not prevent attorneys from doing their job. They can still subpoena witnesses, experts, etc. System does not currently work as it is now. Committee was trying to find the road of least resistance. Consider the purpose of the GAL and why and the purpose of the proposed statute.

Jeff Weissman: We need to focus on the purpose of the hearsay rule to begin with. How much does this undercut the role of the GAL without consideration of hearsay at its core? Hearsay is based upon reliability of statement - Is what is being reported reliable? Enumerated exceptions – §61.20 – reiteration of expert witness rule – it is treated differently than §61.403. GAL's are not necessarily expert witnesses – they can be lay witnesses – Sciringe v. Harrick – created difficulty and differentiated between reliability of social investigation v. reliability of lay GAL under §61.403. Under §61.403, since criteria and training is far less than expert witness under §61.20, differentiation was made in this case. Do GAL's carry equivalent pedigree as expert and are they reliable enough to compare to expert witnesses? There are many great GAL's and would stand up to this; but some are yahoos. This is why the distinction has been made between lay person and expert witness.

Maria Gonzalez: Supports the statutory amendment – the judiciary is frustrated with the system the way it is. Too many times the report does not come in as an exhibit; the decision will be made as to the best interests will be made by judge after considering report. GAL's are of sufficient training that they should be given expert status re: hearsay exception.

Steve Berzner: Does not believe judges will go against GAL report – some GALs are good and some are not so good. If opinions are well founded, the attorneys probably will not raise hearsay. If GAL has not done good job, hearsay exception may be utilized. Attorneys should be able to object when necessary.

The language has existed for a long time – GAL shall file written report which may contain wishes of the child. Why is this in the statute if it can't be used in the GAL report? If GAL is not good, it is up to the attorneys to attack the GAL. Don't exclude the ability to meet the purpose of providing information to the Court. This is why the home study is done as well.

Michael Gilden: Children vs. 3rd parties. GAL will probably not be manipulated by child as opposed to 3rd party.

Kim Nutter: Understands issue of expertise. Her other ad hoc committee is GAL training program. If all goes well, training program and DVD will be released in May, 2011. She is trying to do something about quality GAL's.

Lawrence Datz: This is a potential "floodgate" on hearsay. Here it is hearsay of any kind whatsoever.

Norberto Katz: Moves to call vote – Thomas Sasser with 2nd;

2nd portion – hearsay portion of the GAL statute – 6 in favor –34 opposed.

MOTION DENIED.

Equitable Distribution – John Foster – There are 2 proposed changes to CH. 61. – mortgage paydown – what portion of passive appreciation is marital when mortgage paid down by marital funds. The second proposed change related to a deferred payment – when an equitable distribution payment is paid out over time – proposed change is that the court is required to provide for security and interest unless good cause. Tom Sasser brought up good points today when discussing status of proposal. Should be studied further and vetted further.

Thomas Sasser: Key issue is security provision. If there is a delayed payout there should be interest – that is not an issue. The real concern he has is with the security issue. Statute drafted makes it mandatory, except for good cause shown. This means it will apply in almost every case. In the biggest of cases this makes sense. However, think about the average doctor or lawyer divorce, etc. This will be tremendously expensive to litigate. There are at least 3 forms of security, and testimony and evidence is required to show which is more appropriate method. Once the method is determined, security instruments must be drawn/negotiated by secured transaction lawyers. This statute sets up a judge having to decide line by line the security documents. There will need to be testimony on all of this in every case. Right now it is discretionary. It is a great idea, but all implications may not have been vetted. Judges will dislike this. While the concept is great – don't put it before the legislature until it is fully vetted.

Thomas Duggar – there is a hand out on the senate version of our Equitable Distribution bill. This portion has been vetted by legislation committee and EC and is in the hands of lobbyists'. It has come out of senate bill drafting. We are close to having senate sponsorship for this bill; currently we have no house sponsorship.

Jeff Weissman: agrees with the work of the subcommittee. Thinks Tom brings up some good points. Since current law is that it is discretionary – can we fix the draft by changing "shall" to "may" in the statutory revision?

Maria Gonzalez: The person receiving the payout should receive the interest – security may not have been fully vetted in the first discussion of the proposed statute. Interest is

probably the more important issue. We should attempt to salvage the proposal. Line 94 – change “and” to “or” in addition to on 93 “shall” to “may”

Thomas Sasser: We need to be careful. By adding “or,” we may be placing the court in the position of one or the other, but not both. The security issues can be done in settlements, but not usually seen in rulings. I endorse the “may” change. The Committee is going back to examine whether it should be “shall” or “may.” And “or” should be very carefully looked at so that it does not limit the court.

John Foster: Even if “may” is used, it will give courts opportunity to utilize the issues.

Nicole Goetz: This came about approximately 3 years ago and was originally due to the district courts imposing statutory interest rather than reasonable interest rate.

John Foster: Keep mortgage paydown language; the committee did not discuss other. Strike language and have further vetting was what the committee requested.

Committee accepts friendly amendment – At Line 93, the very last word is being changed from “shall” to “may.” .

Jeff Weissman: Proposes “shall” to “may”.

Thomas Sasser: The other point addressed at the ED subcommittee meeting regarding security is that there was a suggestion that only statutory interest applied – profit margin for party receiving statutory interest. The proposal says “reasonable rate of interest” and the court may default to statutory interest. There must be a prohibition that it is not statutory interest. However, now expert testimony will be required to determine a reasonable rate of interest – could this default right back to the thing we don’t want?

Matt Capstraw: Agrees with Tom, but the issue is the committee’s language.

Frank Zilaitis: Moves to postpone indefinitely the issue.

Thomas Duggar: We can’t postpone – it has come out of senate bill drafting and is moving forward. We need to make a decision today.

Diane Kirigin: We can’t give a sponsor a bill that is imperfect.

Nicole Goetz: The 2nd District thinks that it is compelled to do statutory interest – others consider other rates. This is now 3 years out from when originally drafted – it was at 6% rate then.

Evan Marks: You might want to consider on security issue that it does not say “to be secured with marital assets.” The statute says you can’t distribute to spouse any non-marital property.

Thomas Duggar: We do not want to go back to our lobbyists to say bill is not right. We should go back to further vetting.

John Foster: These are issues we have discussed many times – this is a way to allow the courts to do something other than statutory interest.

Tom Duggar: The motion is to change “shall” to “may.”

Short recess taken: Tom Duggar – John Foster and the subcommittee are going to submit what was originally submitted with deletions – committee voted on this. John Foster cannot accept a friendly amendment from legislation. Question is to approve submission by the committee to strike lines 93 – 100 and portions of lines 12-15 as on handout. Anyone on the floor can make a motion following this.

In Favor – 11

Opposed – 6

Abstentions – 16

MOTION DOES NOT CARRY

Jeff Weissman: reiterates everything he said previously – keep language – convert “shall” to “may” in lines 93 – 100 – Weissman requests Sasser assistance in re-writing

Thomas Duggar: Updates on bills

Equitable Distribution – out of bill drafting – almost has sponsor in senate and looking for sponsor in house.

Paternity – keeping children safe – house and senate sponsors. Has been filed. Diaz is the house sponsor.

UIFSA – in drafting – some concern over language – Elisha working with senate bill drafting – we will probably end up with house & senate sponsor – have not yet elected to file it.

Collaborative law – in senate drafting – meeting telephonically next week to discuss concerns looking for sponsors in house & senate.

All “little” bills – GAL, fees for fees, magistrates, etc...these will be tacked on to other bills; however, none of these have been amended on to any draft bills as yet.

Session is coming up. We will be monitoring bills coming up by others. We have a rapid response team headed by Norberto Katz, Rob Boyd, Ronald Bornstein, Heather Apicella and Robert Coleman.

Blast e-mail as to when weekly meetings will start – probably will start in March. Will be every Friday 12 pm – 1pm – same call in # and same code. Some will be long and some short.

Tim Voit: Potentially new legislation on QDRO's with handouts and presentation.

QDRO subcommittee to be established – sheets being passed around for sign-up for this subcommittee.

Back to the Equitable Distribution Bill

Proposed language:

Line 12 – Replace “requiring” with “permitting.”

Lines 93-98 – Now reads, “If installment payment are ordered, the court may require security and a reasonable rate of interest, or otherwise recognize the time value of money in determining the amount of the installments. If security or interest is required, the court shall make written findings of fact relating to any deferred payments, the security required, and the amount of any interest.”

Evan Marks: Add security “from marital assets” – friendly amendment rejected by Jeff Weissman.

VOTE: Changes read out loud by secretary

In favor – 36

Opposed – 0

MOTION CARRIES

Meeting adjourned 5:32 pm