

MINUTES – FAMILY LAW COUNCIL, FAMILY LAW SECTION

**Saturday, March 5, 2011
Meijer Garden, Grand Rapids, MI**

Attendance:

- **Council Members Present (18):** Anne Argiroff, Elizabeth Bransdorfer, Carol Breitmeyer, Neil Colman, James Harrington III, Donna Mobilia, Philip Navarre, Antoinette Raheem, Traci Rink, Kristen Robinson, Erika Salerno, Rebecca Shiemke, Liisa Speaker, Connie Thacker, Gail Towne, Kent Weichmann, Stacy Van Dyken, Amy Yu
- **Ex Officio & past Council Members:** Jon Ferrier, Barbara Kelly, Carlo Martina, David Sarnacki, Joe Cunningham
- **Guests:** Randy Velzen, Jeff Murphy, John Potter, Bill Kandler, Bill Berlin, Debra Colletti

I. Administrative Matters

- A. **Call to Order:** The meeting was called to order at 9:30 a.m.
- B. **Proposed Amendment of Default Judgment Court Rule.** Hon. Katherine Feeney joined Council by phone to describe the rationale and intended results of the proposed amendment. Subsequent discussion noted that there are reasons to amend the default rule in family law cases where trial courts are responsible for determining the best interests of children and equitably dividing property. However, there were concerns raised about the proposed rule's sanctioning the use of inadmissible evidence and due process concerns. Judge Feeney noted the concerns, but felt there was a need to give judges this ability, particularly given the increase in pro se litigants, most of whom don't clearly understand the process. Judge Feeney noted that there is no set time table for the proposal, but the Michigan Judges Association would like to work with Council and submit a proposal to the SCAO by the end of the summer. It was agreed to send the proposal back to the Court Rules Committee, which would work with MJA to draft a proposal for Council's review at or before its June meeting.
- C. **Chairperson's Report – Amy Yu:**
 - 1. The chair reminded everyone that she handed out each council member's legislative representative and had asked everyone to contact their representative. When polled, only the chair and Erika Salerno had done so and both had positive experiences. The chair asks everyone else to make contact by the next meeting.
 - 2. Nominations for the Lifetime Achievement Award are closed and will be announced at the next meeting.
 - 3. Chair Appointments. Toni Raheem has been appointed by the chair as a Council representative to review the mediation standards at the request of SCAO. Amy Yu and Kent Weichmann were appointed to serve as Council representatives on the SCAO child support review committee. Jim Harrington was appointed to the State Bar unauthorized practice of law committee.

- D. **Recording Secretary Report** – Minutes from the January 29, 2011 meeting were unanimously adopted.
- E. **Treasurer's Report** – The Treasurer's report was unanimously adopted.

II. **Standing Committee Reports:**

- A. **Adoption.** No report.
- B. **Alternative Dispute Resolution.** A written report was submitted describing some of the topics the committee hopes to address.
- C. **Alternative Family.** Carol B. submitted the letter to Governor Snyder asking for his support for the second parent adoption bill, but has had no response.
- D. **Amicus.** No report.
- E. **Annual Meeting.** Council dinner will be Sept 14, 2011 in Dearborn.
- F. **CLE/ICLE.** No report.
- G. **Court Rules.**
 - 1. Council voted 18-0 to support the proposed amendment of MCR 2.507(G), which deletes the language “subsequently denied by either party” and continues the language that an agreement respecting the proceeding must be made in open court or in writing. The deleted language is not necessary and the requirement that an agreement be on the record or in writing is consistent with existing law. (See S Ct. Adm File 2008-11).
 - 2. Council voted 18-0 to support the proposed amendment of MCR 2.203, which would require the issuance of a summons under MCR 2.102 for new parties and that unless the court orders otherwise, the summons is valid for 21 days. There was concern that 21 days may not be sufficient time, however, the rule allows the court to provide a different time period and it satisfies notice requirements. (See S Ct. Adm File 2008-32).
- H. **Domestic Violence.** Rebecca Shiemke reported that the committee has provided two power points to be posted on the Section web page in the member's only section. One is an ICLE presentation from last summer on domestic violence and custody and the second was developed by the committee and includes more general information about domestic violence.
- I. **Family Court Forum.** No report.
- J. **Family Law Journal.** Toni Raheem reported that she and Carol Chiamp will alternate the article for the mediation column.
- K. **Family Support.** Council voted to approved the Committee's recommendations to SCAO regarding revisions to the 2008 child support formula manual as follows:
 - 1. Modify 1.04(E)(17) to read: “A parent provides a substantial amount of a child's daytime care ~~and~~ or directly contributes toward a significantly greater share of the child's costs than those reflected by the overnights used to calculate the offset for parental time.”
 - 2. Add the following additional language in bold to 2.01(A): “The term “net income” means all income minus the deductions and adjustments permitted by this Manual. A parent's “net income” used to calculate support will not be the same as that person's take home pay, net taxable

income, or similar terms that describe income for other purposes. **For a W-2 employee, a determination of gross income should start with the use of the Medicare wages and tips figure found on the employee's W-2.**

3. Removed subparagraph (8) from 2.01(C), which reads: "Employer contributions to pensions or other retirement plans, or individual contributions to qualified private retirement plans that exceed 5.5% of the parent's gross income (excluding FICA and Medicare taxes)." In lieu revise 2.07 Allowable Deductions From Income, subparagraph (E) to read as follows: "Deduct Employer **And Employee Contributions** to private qualified pension plans, but only up to 5.5% of the employee's gross income."
4. Modify 2.01(D) to include a second subparagraph, which read: "Income also includes the market value of prerequisites (perks) received as goods, services, or other non cash benefit for which the parent did not pay, if they reduce personal expenses, and have significant value, or are received regularly.
(1) Common forms of prerequisites (perks) or goods and services received in kind include, but are not limited to: housing, meals, or room and board, personal use of a company business vehicle or mileage reimbursement, including use between home and primary work site, and other goods or services.
(2) **If there are health insurance benefits not being included in the Medicare wages and tips portion of the W-2, don't consider them as a perk, nor apportion them under 3.05(C).**"
5. Replace the current provisions of 2.01(E) with the previous Manual's sections regarding business income, as follows:

2.01(E) There are special difficulties in determining the income of certain individuals. This is due to at least four related causes. First, self-employed persons, business owners, and others often have types of income and expenses not frequently encountered in determining the income of most people. Second, the tax rules and tax forms associated with self-employment income are not only quite different from those associated with ordinary income from employment, but are designed with many additional purposes unrelated to child support determination and may therefore be difficult to translate into child support terms. Third, business balance sheets and other records also have purposes unrelated to child support determination, and are similarly difficult to translate into child support terms. Finally, there are potential difficulties because persons who have significant control over the form and manner of their own compensation may be able to arrange that compensation so as to be able to minimize the amount visible to friends of the court and others. To a somewhat lesser extent, all these considerations also apply to business executives who may have little or no ownership interest in the business.

2.01(F) The objective of determining income for purposes of this formula is to estimate as accurately as possible the monies available for support of children. Because tax rules and forms, and business balance sheets, as noted above, have quite different purposes, it is necessary to examine such documents carefully, with an emphasis on what is not available from those documents and what needs translation into child support terms.

2.01(G) These considerations apply to all forms of self-employment and business ownership, regardless of whether the business is organized as a corporation, a partnership, a sole proprietorship, or is a completely informal operation (of course, the form of organization will make a major difference in the sort of tax documents and

business records available). As noted, many of these considerations will also apply to business executives, again without regard to the form of legal organization of the business.

2.11 (H) Special attention should be given to the following factors:

(1) Unusual forms of income. Income may come in many forms other than wages and salaries. These might include distributed profits of the business (including under a profit-sharing plan), officers' fees and other compensation, management or consulting fees, commissions, and bonuses.

(2) In-kind income. Income might be received in a form other than cash. Among the most common forms of such income are use of a company car, free admission to entertainment provided by the business to its clients, and purchases of stock or other goods and services. All such in-kind income should be priced at its market value (the price that a person not affiliated with the business would have had to pay); the amount (if any) that was paid by the individual for the goods or services out of his or her pocket should be subtracted; and the remaining amount counted as income (note that part or all of the items added to income in this section may be allowable as deductions under Subsection (7)).

(3) Re-directed income. In some cases, income to the owner or executive might be treated by the company as if it were something else. One example would be personal loans to the owner or executive which will not be paid back. These can later be "forgiven" by the company, or otherwise converted into income to the individual, once the time of child support determination is past. Although it should be presumed that such loans are in fact income, the presumption may be overcome if there is a history of such past loans being made and being repaid in a timely manner with market interest rates, and the current loan is at market interest rates and is fully paid up in accordance with a commercially reasonable time schedule. The amount by which a commercially reasonable repayment amount exceeds the amount actually repaid should be treated as income.

(4) Other forms of redirected income are payments by the business (in the form of wages, salaries, or payments for services) made to friends or relatives of the individual. If the individual cannot demonstrate that there is a history of such payments preceding the separation (or motion for redetermination of child support) by several months or that the payments are a fair market value payment for services actually performed, then the payments shall be treated as income to the individual.

(5) Deferred income. It is possible for business owners and executives to reduce their income for the period of a child support determination by temporarily lowering their own salaries, fees, distributed profits, etc. Past practices should be examined with care to determine whether the most recent information on such incomes is in line with historical patterns. For example, if it has been normal for a business to distribute a certain percentage of profits to owners, but the most recent year's distribution was substantially below that percentage, income for child support determination should be based on the historical average. Recent reductions in salary, bonuses, management fees, etc., as a percentage of gross income of the business should be treated the same manner.

(6) Fringe Benefits. Certain fringe benefits paid by the business should be counted as income to the individual for child support determination purposes, even though such payments are not considered income for tax purposes. These include contributions to pension or other retirement plans, except for the employer share of Social Security and Medicare (FICA) taxes and contributions to qualified private retirement plans of up to 5.5 percent of the individual's gross income. Contributions in excess of these exceptions are to be counted as income.

(7) Deductions. For a wide variety of historical and policy reasons, there are a considerable number of deductions allowed for taxation of business and individuals that are irrelevant to, and therefore not allowed as deductions from income for purposes of, child support determination, unless the expenses are consistent with the

nature of the business. These include the following:

- (a) Rent paid by the business to the individual (unless the rent is otherwise counted as income to the individual);
- (b) Certain depreciation allowances. (Depreciation is an allowance for the presumed declining market value of assets used by the business. For tax purposes, depreciation allowances serve the function of spreading the deduction that would be associated with the expense of a purchase over several tax years; because the depreciation periods typically understate the useful life of many assets, depreciation allowances also provide some incentive to purchase new assets.)

The only depreciation allowances that are permitted to be used as deductions from income for child support purposes are those that:

- 1) involve the property of the individual (not a corporation or partnership); and
- 2) involve tangible personal property (thus not financial assets or realty other than automobiles or home offices; and
- 3) are based on straight- line (and not accelerated) tax depreciation. (Straight-line depreciation is when equal dollar amounts are claimed as depreciation allowances on a given asset in each of several tax years. Individuals who used accelerated depreciation on their tax returns can claim a deduction for the straight-line amount, provided the deduction meets the other criteria, if they can prove through an affidavit from an independent CPA what the straight-line amounts would have been).
- (c) Home office expenses, including rent, hazard insurance, utilities, repairs, and maintenance;
- (d) Business entertainment expenses spent on the parent (expenses on customers are allowable as deductions);
- (e) Travel expenses, except where such expenses are inherent in the nature of the business or occupation (e.g., a traveling salesperson), and in no case in excess of rates allowed by the state of Michigan for travel by its employees (such as automobile mileage rates, airplane coach rates, etc.); and
- (f) Automobile repair and maintenance expenses.

Note: Some items listed above appear in more than one section. This is because the items may appear on both individual and employer tax returns, in somewhat different guises.

- 6. Add to 2.01(G) Potential Income: **“2.01(G)(5) Potential income should not be imputed where a parent’s source of income is a means tested benefit, such as temporary assistance to needy families (TANF), food assistance (FAP), the Federal Earned Income Tax Credit, and supplement security income (SSI).**

It was also suggested that former manual’s case cites from 2.10(H), including *Ghidotti*, be re-inserted.

- 7. Modify 2.05(B): “Income may include the value of gifts or gratuities such as money, food, shelter, transportation or other goods or services that a parent receives from relatives (**OTHER THAN A NEW SPOUSE**), friends, or others, to the extent it:
 - 1. Is significant and regularly reduces personal expenses, or
 - 2. Replaces or supplements employment income.
- 8. Strike 3.01(C) Minimum Order Amounts, in its entirety. The provision reads as follows: “Unless the court decides to deviate from the formula, a parent’s total child support obligation must be at least \$25.00 per month.”
- 9. Amend 3.06(E), which currently reads: “Since childcare support obligations accrue based on the assume continuation of the net expenses used to set the currently effective order, custodians and parents need to notify each other of

changes in costs, and must notify the friend of the court when they stop incurring child care expenses for a child.” Add new language to follow:

(1) Child care support obligations accrue based upon the assumed continuation of the net expenses used to set the currently effective child support order. As it relates to child care support expenses, custodians and parents must do the following:

A Notify each other in writing of significant changes in child care costs or that child care costs have stopped, and

B Concurrent with (A) above, notify the friend of the court in writing when there has been a significant change in child care costs, or child care has stopped.

(2) Significant change exists when the practical result of correcting the erroneous contribution to child care expenses meets a minimum threshold of 10% of the currently ordered support payment or \$50 per month, whichever is greater.

(3) The aforesaid provision regarding significant changes in child care expenses, shall not apply if the child care support obligation currently existent, is based on an approximate average of these child care expenses.

(4) If a party has failed to notify the other party, in accordance with paragraph 1A above, and a significant change in child care costs have occurred, then the child care costs portion of the existing child support order shall be modified, effective the date of the significant change in child care costs.

10. Amend 4.04(A) to add the bold language, as follows: **“For Friend of the Court review purposes, the “minimum threshold for modification” is 10% of the currently ordered support payment, or \$50.00 per month, whichever is greater.”**

11. Add the following new provision: **“4.06 Incarceration. During periods of incarceration, child support shall be set at zero dollars, subject to the right of the other party to object and establish that the payer has income or assets from which support can be paid.**

Council approved a friendly amendment to add in language to provide that unless the incarcerated party contacts the Friend of the Court within a certain number of days, the prior support order would be reinstated.

12. Include a provision that would adjust child care costs consistent with the low income transition equation found in 3.02(D).

L. **Journal Advertising.** No report.

M. **Legislation.**

1. Council voted 17-0 to support **HB 4249**, which would amend the adoption statute to permit two unmarried persons to petition to adopt a child under the adoption code. This position is consistent with Council’s position in the past as the bill would widen the scope of families available to adopt children, including families comprised of same-sex parents.

- N. **Membership/Mentor Roundtables.** A written report was submitted describing the work of the committee.
- O. **Midwinter/Midsummer Seminars.** Tracy Rink reported that the midwinter seminar in Antigua was fabulous. Next year's seminar will be in St. Martin. Council unanimously supported a motion to authorized Judith O'Donnell to execute a contract with the resort. Reminder that the midsummer seminar is July 28-31 at Mission Pointe in Mackinac Island.
- P. **Political Action Committee.** N. Colman reminds everyone to contribute.
- Q. **QDRO/Taxation.** Joe Cunningham described the committee's efforts to fix the EDRO statute, which doesn't permit entry of an EDRO after retirement, to provide a 60-day window for approval of an order if it was submitted before the participant retired. Through the State Bar pro bono program, committee members drafted 86 QDROs for 7 legal aid programs in 2010. Good work.
- R. **Technology.** No report.

III. Ad Hoc Committees

- A. **Resource Allocation Committee.** No report.
- B. **Parenting Coordination.** The proposed statute was made available to Council at the last meeting. It was moved and seconded that Council support the proposed parent coordination statute. Discussion involved concerns regarding whether the statute could be an unconstitutional delegation of the court's authority. The duty to insure child's best interest is statutorily vested in the court. It was noted that the parties must consent to appointment of a coordinator. In response, the statute does permit the parties to agree to be bound by the coordinator's recommendations, which would in effect be creating an order. It was agreed that a party who failed to follow the binding recommendation could be held in contempt. Before additional discussion could proceed, it was moved and seconded to call the question. The motion to call the questions was approved on a voice vote. The motion to support the proposed parent coordination statute passed by a vote of 14-3.

Meeting adjourned at 11:45 a.m.

Next Meeting: Saturday, April 2, 2011 at Doubletree Hotel, Novi, Michigan. Breakfast is available at 9:00 a.m. and meeting starts at 9:30 a.m.