

MINUTES OF THE DECEMBER 6, 2008 FLS MEETING

Council Members Present:

Amy Yu
Barb Kelly
Carlo Martina
Carol Breitmeyer
Kent Weichmann
Dick Halloran
Bob Treat
John Hammond
Erika Salerno
Todd Selin
Connie Thacker
Donna Mobilia
Liisa Speaker
Philip Navarre
Lorne Gold
Judith O'Donnell
Kristen Robinson
Rebecca Schiemke
Anne Argiroff
Traci Rink
Ross Stancati

Guests Present:

Shel Stark
Toni Raheem
Lana Panagoulia
Bill Kandler

Ex-Officio

Katherine Barnhart
Karen Sendelbach

I. Administrative matters

- A. Meeting called to order at: 9:35 a.m. Introductions. Not sure if we will have local bar association members come today.

Chairperson's Report- First order, election of new council member for Carlo's (actually, Karen Sendelbach's) open seat. Judith O'Donnell nominated Kristen

Robinson. Kristen only practices family law and has written articles. Vice-chair of Family Court Committee in Oakland. No opposition. Welcome aboard Kristen. Carlo interested in topic Kristen wrote about- solicitation of clients in new divorce cases. Issue will be on agenda for April Representative Assembly meeting. On November 14th, the Board approved our By-law changes. Must send a revised electronic word document, Barb Kelly has done this.

- B. Recording Secretary's Report: Ask for approval of meeting minutes. Minutes approved. Carlo indicates cost of disseminating packet where there is little except agenda is not cost effective. Gets most things for submission too late. Wants committee reports if possible 2 weeks, at the latest 10 days so packet can be put together and sent in time. Asks that reports be sent directly to Heather Anderson.
- C. Treasurer's Report. Amy disseminated balance sheets for 2008. She and Carlo participated in Section Treasurers' meeting. This is finalized budget. Motion to accept accounting. Without opposition.

II. STANDING COMMITTEE REPORTS

Adoption – no report

ADR- Shel Stark says not enough for ADR training and it has to be cancelled. 8 were signed up. To break even, we need 16 registered. We're not going to get 16, so seminar cancelled. There will be about \$3000 in marketing expenses, which will be split between ICLE and Council. Neither Woody Mosten nor Barb Johanssen will charge cancellation fee and there will be no cancellation fee for St. John's either. Carlo asks ADR committee to consider having Zena Zumeta to do an alternate weekend ADR training. Toni says SCAO is putting together a list of mediators and making the list state wide since the requirements for mediation are state wide. She is talking to Doug Van Epps about making the list more informative and comprehensive. This would include specialties of the names on the list. Toni wants everyone on ADR committee to talk to the SCAO committee about what they want the new revised SCAO mediator list to look like.

Alternative Families- Connie attended LGBT seminar sponsored by ACLU and State Bar– interesting things we could plug in our committee including reintroduction of second parent adoption legislation and equitable parentage. Discussed case regarding second parent adoption and custody pending in the Michigan Courts. We were not asked to weigh in on this. There was a second parent adoption in Illinois where it is allowed. Some judges are recognizing out of state second parent adoptions. This issue will be on the front burner. This can help our committee set our agenda. Karen adds that Court of Appeals Judges at ICLE seminar admitted they didn't have a lot of family court experience. Connie hopes that there can be some coordination between various groups working on this issue. Connie mentions that anyone practicing family law in Kent county get some help because they are employing alternative dispute resolution and will be using new forms for all cases involving kids. Rebecca says Jay Kaplan (ACLU) will be doing the same training again. The recent Michigan constitutional amendment is creeping into

many court cases as a basis for not honoring various agreements including contractual and parenting agreements. Karen said we may get some traction when we push an agenda talking about seeing these families from the perspective of the children involved. Equitable/psychological parent- different concepts.

Amicus- Anne Argiroff says we filed Cooper Request for an Amicus. Liisa Speaker said Court was very engaged when she witnessed oral arguments. Court had many questions for Grievance Commission. Is hoping there is ultimately a good result for the attorneys of Michigan. Carlo adds that is was discussed earlier and not acted on three years ago.

Hunter- Sec 25 of the child custody act. Believes it can be read consistently with existing case law with regard to third party custody- harm or unfitness. Consistent with Troxel and In Re Clausen. Asks Council to support amicus that sec 25 of child custody act can be read to be consistent with existing case law and consistent with the Hunter case. 19 in favor and one abstention.

Annual Meeting - There will be one.

CLE/ICLE- Shel has good news. Brought statistics about Family Law Institute. 499 registrations (411 last year, 389 year before). We are at capacity. Used every table and chair in the building. 45 Judges attended. Section membership 72% of participants. First time participants, 36%. Evaluations almost tabulated. 6.2 (rating overall on a 7 point scale). Shel brought results of some of the audience responses. Passed out some results from the survey. Carlo thought it interesting that the Court of Appeals wanted to know what cases to publish. Karen said the Court of Appeals judges said we should be careful what we ask for because they are not specialists and we may not like the results. Karen said we can file motion to ask cases be published. Traci mentioned that Court of Appeals Judge told her that they were interested in knowing which issues we want them to address. Carlo has had positive experience with Judges actually asking for help on issues they don't specialize in and having an interest in applying the law. Richard Halloran agreed that we should be careful about asking for publication when they are not specialists. John Hammond said attorneys have to make sure they have made their case on the record to preserve the record for a good appellate decision.

Rebecca Schiemke thanked Council for the scholarship for legal aid attorneys to attend the Family Law Institute.

Carlo praised Shel and the fabulous two-day Family Law Institute. A great success.

Court Rules- Carol Breitmeyer on behalf of Jim Herrington continuing discussion on amending MRE 703. Committee is recommending we amend current rule to include phrase that 'this rule does not include domestic relations matters'. Different language was discussed. MRE 1101 (9) committee recommends FOC report not admissible into evidence unless the parties stipulated to their admission. Motion made to adopt committee's position on 703 that MRE 703 not apply to domestic relations cases. Carlo testified when the rule was made. The concession was made at the time that 1101 (B) (9)

corrected this problem, but we would prefer that 703 simply not apply to domestic relations cases. Richard Halloran said it wasn't unintentional that Judge Giovan did also intend the 'dueling experts' problem to apply to family cases. Passed 18-0. Kent said that 1101 (B) (9) has been construed to imply that everything the FOC touches in making their recommendation is 'in', which is not intention. Committee position is that it not be evidence unless the parties stipulated to it. 1101(B)(9) was not intended to let everything in, but the best we could do at the time. Richard Halloran said this was part of the process to make it hard to get expert testimony in. 1101 (B)(9) allowed the Judge to let the FOC report in. They can talk to people that he cannot. He can put the burden on those objecting to dispute the information in the report. Kent pointed out that the FOC report can be 'considered' but not if 703 (requiring facts be in evidence) but report itself isn't evidence, where does that leave the decision maker and the record for appeal? John Hammond said that he would use the report to help form the questioning during the hearing. Karen says if it is to be evidence it must be able to be cross examined. Rebecca suggests that the report writer then would have to be available for cross examination. Judge Halloran has problems with language in proposed change to 1101 (B)(9) that the report is not admissible. Carlo and Kent made points about peripheral witnesses who may appear in the report of the FOC but may or may not be crucial to the case. Todd said that the quality varies greatly as to the writers of the reports so blanket admissibility would be problematic. Lorne said this all boils down to basic due process. There is nothing that unique or different about the FOC report that means it shouldn't be treated like any other potential evidence. Barb requests friendly amendment that the language states that the court may consider the report but that it is not evidence unless it is stipulated to by the parties. Passed 17-0

Carol says that there are ongoing discussions about electronic discovery. The committee likes the proposed court rule which is geared to new electronic world. A question about inadvertently discovered evidence- privileged information that was accidentally transmitted with permissible evidence. This should be included in any court rule change. Not to include it would be inconsistent with existing Michigan case law. Committee recommended that the Supreme Court add language in subsection 7 that the receiving party notify the sending party of the receipt of the information. John Hammond says this is an area ripe for abuse. There is a high probability of regular abuse. He is concerned about cost of abusive of discovery. Carol says as the committee discussed, it became clear to them that it wasn't that big a deal- deletion does not kill the discovery and doesn't keep this from being applied fairly. Kent says these rules really mirror the rules for paper records. Rules shouldn't be different because they are kept in electronic form rather than paper. If as an attorney you receive something you shouldn't, you are covered with your client that you have to return the inadvertently received item rather than taking advantage of its receipt. Motion to adopt committee's recommendation as to subsection 7 of MCR 2.302 passed 14-0.

Domestic violence. Rebecca says Committee continues to meet and is working with ICLE to do webcast in the spring

Family Court Forum- no report

Journal- no report

Family support- no report. Encourages member of the Council and bar bring problems to the attention of Kent or Carol with regard to the new guidelines.

Journal advertising- no report

Legislation- end of session nothing new introduced. Bob Treat's bill about removing social security numbers from QDRO's and EDROS' still moving. FOCA package addressed most of our concerns. Alimony-only cases not enforced through FOC after 4/1/09 unless judge orders enforcement. They want a 50% cap and the surcharge changes. Overall package is pretty good. Most of our concerns addressed. Domestic Relations Arbitration Act Bill will die and the Uniform Parental Kidnapping Act will also die.

Membership/Mentor – Todd will get the names of local bar association leaders. Just got authority to get names.

Mid-Winter Seminar- who doesn't want to go today!!!

Mid-Summer Seminar- Reviewing proposal for July 30 to August 2 for Homestead. Lorne and Traci are working out some glitches.

PAC- see above

QDRO- Bob Treat recognizes Bill Kandler effort to get HB6189 passed. Bill hopes the legislature gives it time before the end of the session..

Tech- no report.

Ad Hoc Committees:

Resource Utilization- Barb says we will have final report of recommendation in April. We will work within the strategic plan adopted two years ago.

Law school for legislators- Kent and Karen . They will meet with Bill Kandler and try to figure out how to address their misperceptions they have going into the Senate/House about the state of family law. Bill suggests we look at concepts we want to forward. This will be late winter/early spring Council members are encouraged to submit ideas.

Parenting Coordinator Committee for Uniform Order. They are clearer about who committee members are and will be working on it. SCAO appears to be allowing other groups lead this endeavor. Issues include authority, effect of stipulation. Bill asks how this relates to CASA legislation- understand that legislators may see them as related.

III. New Business

Training on January 15 on how to deal with the media. Some Executive Committee members will go. Let him know if anyone wants to participate.

Ross refreshed the Council's understanding of the parliamentary procedures with regard to motion procedure. See Robert's Rules of Order. Widely available.

Next Meeting January 17, 2009 in Novi.

March 7th Grand Rapids. New Schedule

Meeting adjourned: 11:20 a.m.