

Family Law Section
by Cynthia Stump Swanson

Last month, I reported on several tips from Judge Smith and Judge Davis for family law practitioners. This month, I'd like to pass on some additional items from Judge Moseley and Judge Glant, as well as some additional information from Judge Smith and Judge Davis. Before getting into the substance, I wanted to thank these judges, once again, on behalf of all family lawyers, for their generous and helpful comments. The family law judges have been making a special effort to attend FLAG meetings and Family Law Section meetings, and their attendance is really appreciated. Their willingness to provide guidance and insight to lawyers is something each of us should take advantage of. Also, it's possible that we can provide some information to them that will be helpful to them (see my comments below regarding child support guideline calculations).

So, on to specifics. These notes are from discussions had at the April Family Law Section meeting and the April FLAG meeting.

Judge Moseley asks us to please re-read the 8th Circuit Administrative Order 5.1120(E). This specifically provides that a parent must attend the Parent Education and Family Stabilization Course in person, unless the parent resides out of state, or in a Florida county in which such course is not offered in person, or if the parent receives permission from the Judge. We are being put on notice that the judges will review the parents' certificates to see that they have attended in person. If not, be prepared to show that the parent meets the criteria to attend a court online.

Beverly Graper mentioned that many parties for whom she has mediated have provided positive comments about attending the course before they attend mediation. This provides parents with information on things they should be thinking about regarding parenting issues that come up in mediation. She urges us to get our clients to attend the parenting course before mediation.

Based upon a question posed at the Family Law Section meeting, the judges responded to concerns about judges rotating in and out of divisions and how that can be difficult for parties whose cases are started with one judge and completed with another. Judge Glant pointed out that for every party who was upset because their first judge transferred out, there is another one who is really happy. The main piece of advice is for lawyers to "protect the record." This means to get substantial findings of fact into every order. When a second judge can read a temporary support order and see the facts upon which the order is based, it is less likely that the second judge would change the first judge's order, unless the facts have actually changed. Good recitations of facts result in more consistent orders, no matter who is the judge at the second (or third or fourth) hearing on that issue.

This point prompts me to remind you of one of Judge Smith's comments which I passed on last month: GIGO. Garbage in, garbage out. If we lawyers don't get in the evidence that a judge needs in order to make findings of fact, then it's pretty hard for the judge to do much to make findings. Similarly, if we don't put some work into proposed orders (writing them and reviewing them), then we have only ourselves to blame for orders which skimp on findings of fact.

Next, we discussed parenting plans and child support guideline calculations. Lawyers are urged to prepare a detailed parenting plan to be provided with their pretrial compliance statements. Specifically, to provide as detailed a plan as you want the court to adopt. Note that the Florida Supreme Court has adopted a proposed parenting plan form which is not mandatory. Form 12.995. The Court is still accepting comments on this form, so if you have some bright ideas, let them know. The American Academy of Matrimonial Lawyers also has a proposed plan, which you can get on a CD and then fill in on your own computer. The Supreme Court form can be downloaded from the Court's website.

The judges are very happy to accept a parenting plan with more or less detail, depending upon the parties' needs. If the parties are in agreement, not as much detail may be needed. Where there is a lot of conflict, however, a very detailed plan would probably be best.

Dr. Myrna Neims said that she had worked with some parties to help them fill out a parenting plans, and was surprised by how strongly some parties fought over only a day or two or time, and wondered why this would be. I brought up my personal pet peeve that the child support guidelines create this problem, and pointed out that one day can make a huge difference in the amount of child support paid. At some income levels, 40% instead of 39% contact can mean a couple hundred dollars difference in support paid and received. At other levels, it can make a \$1,000 difference. Most rational people would not argue tooth and nail over one night per year. Over the course of a childhood, this still only adds up to 10 or 15 nights.

But \$1,000 per month over ten years adds up to \$120,000. Over 15 years, it's \$180,000. THAT'S why the big fight. In my humble opinion. Judge Moseley mentioned later that he had not realized the monetary difference could be so significant. That's what I mean by us providing information that might be useful to judges in these give-and-take meetings.

The question of children and teenagers testifying in court was also considered. Generally, the judges do not like to talk to kids, but they all have done it at various times. Remember that Rule 12.407 governs this and no minor may be deposed or may testify or even be brought to a deposition or to court without prior order of the court based on good cause shown. The judges generally agreed that it is almost always a bad idea to talk with a minor, for several reasons. The usual concern about the child's maturity level is not just a concern about the ability to distinguish between the truth and a lie, but also for the child to understand the possible consequences to the child (emotionally) of such testimony. There are also concern about whether a child may be more aligned with one parent than the other, and whether the child perceives that he or she has inappropriate "power" in giving testimony; as well as whether the judge is the best trained person to even be able to discern this.

On the other hand, the judges pointed out that a vast majority of the time, the child or teenager simply says something along the lines of, "I just want to be with both my parents." And often something like, "I don't want to be in the middle of this." Judge Moseley pointed out that if you haven't been able to convince him that it's best for the child to be with a particular parent with the other evidence you have presented, what the child says will not tip the scales to that parent. Judge Moseley said he would rather hear from friends, neighbors, teachers, and so on than from

children.

All the judges said that if they were going to talk with children or teenagers, it would be just that - talking with them. Not having the minor testify in open court. When judges have talked with children, they do it in their chambers, with just a judicial assistant or a bailiff or both present. No attorneys; no parents. Both parents would have to have agreed to this in camera procedure; otherwise, the child would have to testify in open court. My feeling was that it would be an exceedingly rare case in which a judge would grant a motion to have a child testify in open court.

Finally we had a discussion about evidence. We are reminded that the first rule of evidence is that it must be relevant. No need to even consider if it's an authentic record, hearsay, or an excited utterance . . . if it's not relevant, it should not come in. If it is relevant, then it should come in unless it is clearly excluded by some other rule. The judges recognized that the cost of doing the "perfect" dissolution of marriage trial has become very high and is simply overwhelming to most people. Thus, there is a perceived need for the rules of evidence to be somewhat relaxed in family law matters. Not abandoned, but somewhat relaxed sometimes in some situations. The probative value of any particular piece of evidence (its "weight") is always up to the judge in a family law matter. Thus, if a piece of evidence is on the cusp of being objectionable, the trial judge may let it in, but still not consider it to be particularly probative.