Faulk, Camilla

From: Linda Roubik [lroubik@wechslerbecker.com]
Sent: Thursday, June 03, 2010 4:01 PM
To: Faulk, Camilla
Subject: Comments re proposed FLCR

Thanks for the suspension of the 4/30/10 deadline -- allowing me to still submit these comments about the proposed new FLCR.

(First, I want to mention that these very important proposed changes to family law have gotten NO play in the family law community, at least in Seattle. I only found out about the suggested new rules because they were posted to the KCBA Family Law Section website, just before the May meeting. But this had not been a topic at any prior meeting, and no member at that meeting except me seemed to have even read the lengthy 17-page proposal. I don't know how I missed any other announcements of this proposal; I usually pay attention to such things. There has been zero publicity about these issues. The statewide WSBA Family Law Executive Committee is still preparing its comments. My point is: the family law bar has thus far been asleep about this. Don't interpret the paucity of comments to date as an indication of agreement!)

I am a former chair of the KCBA Family Law Section, and a partner at Wechsler Becker. I have practiced family law for almost 25 years.

Interestingly, thanks to the posting of these comments on your webpage (which I did not know about, either, until now) I see that Jerry Kimball has already made the point that the automatic restraining orders are simply illegal for dissolutions etc., and inappropriate for other actions. I agree -- but my comments are less technical, and rather focused on the concepts.

We should not want any such automatic orders.

Family law is not cookie-cutter. I have consistently fought against the urges of various bureaucracies to make it so. One thing I have learned through handling a large number of these cases is that they are all different. Any blanket rule will have unintended and unnecessary consequences. And these are people's lives we're playing with . . ..

A restraint on changing the residence of the children? That's a trap, that will soon be figured out by those who will abuse such sudden power. It will prevent the (most often female) primary caretaker of the children from leaving the household.

To illustrate, I was recently on the other side of just such a situation. My client, the husband, knew that his wife was going to move out. They were both very involved with the children; in fact now that she has moved out (and is representing herself pro-se), they are informally following a 50/50 parenting plan, under no court orders. If this rule had been in place, I could have advised the husband that all we had to do was file a Petition -- and then if she moved out, the kids would have to stay with him, unless she got a lawyer and went to court.

The better situation is the present one, where a time-honored phrase we have told clients hundreds of times is "the Petition just gets the case started".

The same goes for financial restraints. Some cases need that, and those cases should go to court. But the vast majority of divorce cases never get temporary orders. Most do not need them. Do not make a blanket rule based on the relatively small subset of cases that involve misuse or hiding of funds.

In an even more general sense, we should not be imposing orders on people who did not ask for them, do not understand them, do not need them, probably do not want them. Talk about restrictions of rights, with no due process!

Remember, too, that most divorces have been plotted for a long time by one spouse, and the Petition often hits the other spouse as a complete surprise. Do not give a tool to a spouse who may have already sequestered his or her own desired funds, who will now with just the filing of a Petition be able to restrain the other spouse from accessing property. Do not give a tool to a spouse who will time the filing of the Petition, with its automatic restraints, to hurt the other spouse who may be in the midst of a business transaction. (In our present system, it takes quite a bit more effort to get such restraints -- motion papers, an Ex Parte emergency order, service of that order, and a full hearing in 2 weeks.)

If the idea is that such automatic orders will reduce the amount of work for the courts: no, this may have the opposite effect. Once parties have to come to court -- to get appropriate parenting situations, or opt out of certain financial bans -- they will litigate the whole array of temporary order issues. No sense hiring the lawyer and going to court for a parenting order, without dealing with child support and other financial issues at the same time. Today, the same case might rather work out all such issues by agreement.

Most people cannot afford lawyers, and are not inclined to come to court pro-se. They may rather just ignore such automatic orders. Do we really want a large increase in the number of people violating court orders?

Automatic discovery for all cases also is not needed. I just submitted a mediation proposal for a case of a doctor and a professor, where because of the circumstances, they don't need a property chart, or documents showing proof of values. They will each just keep property in their own possession or in their own name; the only issue is a future sale of the house.

This is an emotional and scary time for people. Interaction with their spouse is not pleasant. If a case does not need a high level of activity, don't turn it into more of an event than it needs to be. Don't increase attorneys' work (and fees) unnecessarily. For cases that need the documentation, there is a whole body of well-developed procedure called discovery to deal with those needs.

Get back to basics. No social engineering. You just don't know what is right for most cases. Let those cases which need the court's help for temporary orders seek that assistance. Leave the others alone.

Less is more. That was supposed to be the philosophy behind these rule changes, in the first place.

Here are a few other comments:

The list of required documents to be exchanged 2 weeks before a settlement conference is a good way to kill the impulse to do early, "blue sky" settlement conferences. Yet such conferences can sometimes resolve cases with less time, work and cost.

And if someone does not provide a summary of tracing of separate property -- what's the enforcement? Exclude any testimony about this at trial?!

The restraint language about transferring or disposing property has for many years gone along with a phrase (which is vague, but that can be a good thing) which is part of the mandatory form for temporary orders: "except in the usual course of business or for the necessities of life and requiring each party to notify the other of any extraordinary expenditures made after the order is issued." That's missing here.

I repeat: family law is not cookie-cutter. Do not try to make it so.

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