



March 31, 2019

Michigan Supreme Court Clerk  
P.O. Box 30052  
Lansing, MI 48909  
[ADMcomment@courts.mi.gov](mailto:ADMcomment@courts.mi.gov)

Re: ADM File 2018-13

Dear Clerk:

On behalf of the Michigan Poverty Law Program (MPLP), I write to share concerns with the rule proposing the Friend of the Court alternative dispute plan. MPLP provides support, training and advocacy to legal services programs that are federally funded to provide free legal assistance to low income individuals in a variety of substantive areas, including family law.

The proposed new rule sets out procedures that a court must follow if it offers alternative dispute resolution services (ADR) to assist parties with child custody disputes through the Friend of the Court. The rule includes many processes that improve current practice across the state, which can vary widely between counties. In particular, the rule recognizes that domestic violence can impact and impede the fair resolution of disputes regarding children and as such, requires that any ADR process may not begin until “a reasonable inquiry has been made as to whether either party has a history of domestic violence with the other party.” This is a important and necessary protection that must be required.

However, there is one section in particular that raises concerns. Subsection (F) of the proposed rule creates a new Friend of Court ADR process called “facilitative and informational gathering conference,” defined as “a process in which a facilitator assists the parties in reaching an agreement” on disputed issues, including child custody. MCR 3.22X(B)(3). If the parties are unable to resolve the issues the facilitator submits a report and the rule provides three options that a court may choose. Under the first option, MCR 3.22X(F)(2)(a)(i), the facilitator – who is not required to be an attorney – prepares a recommended order that is forwarded to the court who may enter the order immediately.

This section is contrary to law and raises due process concerns. It will permit the court to give immediate effect to a custody order based on a recommendation by a non-attorney who is not making any findings of facts as to the child's best interests and which is not supported by any record evidence or sworn testimony. MCL 552.507 grants referees, who must be attorneys, the

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authority to submit proposed orders for immediate effect, but such orders are based on evidence elicited through a hearing and findings of facts by the referee that the order is in the child's best interests by application of the facts to the best interest factors in MCL 722.23. In contrast, non-attorney FOC staff are authorized "to investigate all relevant facts, and to make a written report and recommendation" regarding custody, parenting time or child support, but those recommendations are not given immediate effect. MCL 552.505(1)(g) and (h). The proposed provision gives non-attorneys the authority of referees but without due process protections to litigants that the custody order entered by the court is based on findings of fact that it is in the child's best interests. Before issuing a custody order, the court must consider each of the statutory factors in MCL 722.23 and make specific findings on the record. *Overall v Overall*, 203 Mich App 450 (1994). See also *Harvey v Harvey* 407 Mich 186 (2004) (parties agreement on custody does not relieve the court of its statutory responsibility to insure custody order is based on the child's best interests).

In addition, the facilitative and informational gathering conference described in the proposed rule muddles roles of FOC staff, which MCL 552.515 clarifies: "An employee of the office who provides domestic relations mediation in a friend of the court case involving a particular party shall not perform referee functions, investigation and recommendation functions, or enforcement functions as to any domestic relations matter involving that party."

In order to ensure that FOC ADR processes are consistent with law and to preserve the many helpful sections in the proposed rule, either subsection ??? should be eliminated as an option or be permitted only if the facilitation conference is conducted by a referee in accordance with the referee hearing rules.

Thank you for the opportunity to comment on this provision.

Sincerely,

Rebecca Shiemke