

Greg's COPY D.A. 5-800

077

FILED
DEBBIE CAUSSEAU

MAR 15 2000

CLERK, SUPREME COURT
BY _____

IN THE SUPREME COURT OF FLORIDA

CASE NO: 1999-162

IN RE:

AMENDMENT TO THE FLORIDA RULES
OF JUDICIAL ADMINISTRATION

COMMENTS OF THE FAMILY/JUVENILE WORKGROUP
OF FLORIDA LEGAL SERVICES, INC. REGARDING
THE PROPOSED AMENDMENTS TO FLORIDA RULES OF
JUDICIAL ADMINISTRATION 2.050, 2.160 AND 2.075

DEBORAH A. SCHROTH
FLORIDA LEGAL SERVICES, INC.
126 West Adams Street, Ste. 502
Jacksonville, Florida 32202
Telephone: 904-355-5200
Facsimile: 904-355-5223
e-mail: deborah@floridalegal.org
FLORIDA BAR NO: 290629

STATEMENT OF INTEREST

Deborah A. Schroth, member of the Family/Juvenile Workgroup of Florida Legal Services, Inc., files these Comments to the proposed rule amendments suggested in the Interim Report of the Ad Hoc Committee on the Implementation of the Kayla McKean Act dated December 30, 1999.

Florida Legal Services, Inc. (FLS) is the statewide support office of the legal services and legal aid offices serving Florida's poor. Begun in 1973 by Florida Bar leaders, the overall mission of FLS is to serve as a leader in the delivery of high quality legal services to the poor and to organize and provide coordination, training, case consultation and technical assistance to the thirty-six legal assistance providers throughout the state of Florida.

FLS sponsors the Family/Juvenile Workgroup which is comprised of approximately twenty-three Legal Services and Legal Aid attorneys who practice primarily family law and dependency law. Workgroup members have represented parents and children in the juvenile dependency system, as well as domestic violence victims and their children in Florida. Workgroup members have represented Florida's low-income children and families with a variety of legal problems in Florida's trial and appellate courts, as well as lobbying for important legislative changes. A central feature of the Workgroup is to identify problems in the

area of juvenile dependency law and practice, which problems have a statewide impact on the poor, and to coordinate strategies addressing these issues.

As representatives of poor and low income individuals, the Family/Juvenile Workgroup has a vital interest on behalf of our clients in the interpretation and implementation of the Kayla McKean Act of 1999.

COMMENTS

The Family/Juvenile Workgroup (the Workgroup) shares the concerns expressed by the Rules of Judicial Administration Committee of The Florida Bar (RJA Committee), and respectfully suggests this Court adopt the suggestions proposed by the RJA Committee. In the event this Court chooses to adopt rules implementing the Kayla McKean Act, the Workgroup requests this Court adopt those Rules suggested by the RJA Committee.

The Workgroup expresses its overriding concern with the . proposed additions to Rule 2.075, regarding a court receiving a written summary of an investigation by the Department of Children and Families. This investigative report is non-evidentiary hearsay, and its receipt would constitute an ex parte communication with the court. A court's receipt of an investigative report therefore threatens traditional notions of judicial impartiality and independence. It would potentially

provide grounds for **recusal** of a party to any underlying action¹ in which the presiding judge learned of the facts which led to his or her reporting the allegations to the Department.

When a judge sends **a** report of alleged or suspected child abuse, abandonment or neglect to the Department, the judge has fully complied with his or her ethical and moral duties. Thereafter, the reporting judge should not seek to involve the Department in any way in the existing case which occasioned the report. Nor should the judge involve himself or herself in the conduct of the Department's investigation and disposition of the report.

The Department is the executive agency statutorily charged with the protection of the child who is the subject of the court's report. The Department, after conducting its investigation into the truth or falsity² of the allegations, is provided many options for dealing with the reported family and

¹ In all likelihood, it is the judges of the Family Law Divisions and judges presiding over actions for injunctions to prevent domestic violence, who are most likely to be affected by a reporting requirement.

² While this author does not have statistics as to the number of false or fraudulent allegations reported to the Department, it is clear that an allegation is only that and not necessarily the truth of the matter. The Department is charged with investigating the allegations which it receives. See Part III, Chapter 39, Fla. Stat. and, in particular § 39.301, Fla. Stat. It is also clear that some allegations are patently false. See §§ 39.205, 39.206, Fla. Stat. regarding penalties, administrative fines and civil damages for false reports.

child. The Department may close the report as being unfounded³. The Department may determine that some level of protection is necessary for the child, and offer services to the family, including "protective supervision" of the child without court intervention.⁴ The Department may determine that the child requires the protection and supervision of the court, in which case the investigator will file a petition for dependency. § 39.301(8) (c), Fla. Stat.

The scheme of Chapter 39, Florida Statutes, provides for the assessment of risk to a child and the protection of the child when some level of risk is present. Chapter 39, Florida Statutes, specifically provides for court intervention in appropriate cases. Generally, these cases are assigned to the Juvenile Division of the Circuit Court. There is no need, and no statutory authority, for any other judge to voluntarily become involved in the Department's protection of a child, other than by filing a report with the Department.

Such voluntary involvement by a judge in his or her official capacity would disrupt the orderly administration of this statutory scheme of child protection. More importantly, non-dependency judicial involvement will interfere in the family's

³ See 65C-10.003(17) (b), F.A.C., regarding the allegation matrix which "Guides protective investigators to be able to determine whether abuse, neglect or abandonment has occurred."

⁴ See 65C-10.003(15), F.A.C.

constitutionally protected right to be free of governmental intrusion except where necessary to protect the child. This Court has recognized the parents' liberty interest in "preserving the family unit and raising one's children", and has delineated the inquiry which a court must conduct in determining whether to appoint legal counsel for a parent involved in a dependency proceeding. *In Interest of D.B.*, 385 So.2d 83 (Fla. 1980). See also, *Xenenbaum v. Williams*, 193 F. 3d 581, 593, (2d Cir. 1999) citing United States Supreme Court cases describing this protected liberty interest.

The Workgroup submits that this protected liberty interest is violated when a judge invokes the "awesome power of the state" in a determination of child custody or visitation outside the Chapter 39, Fla. Stat. scheme of child protection.' If the Department fails to meet its obligation to protect a child, the response should not be to involve the judiciary in assisting the Department in its investigations. This Court should neither encourage nor permit the judiciary to use the Department's

⁵ It is important to note that the Department's investigative report is only admissible for the dependency court's consideration after the adjudicatory hearing, which is the trial on the merits of the case. § 39.507(1) (b), Fla. Stat. The Ad Hoc Committee envisions that this report may be used by any other court in its adjudicating the merits of child custody and visitation issues concerning the child. This suggested use of a Departmental investigative report would be an untenable violation of traditional notions of due process, to which the parents are entitled.

investigative reports outside the Chapter 39 scheme. And neither the Department nor any judge should participate in a delegation of the Department's statutory obligations to the judiciary by merging Chapter 39 investigations into family law cases.

If the Department concludes that court intervention is necessary to protect a child, the Department has every authority to involve the dependency court in proceedings which have been carefully crafted to protect the liberty interests of the parents and the child. And if the Department determines that the child is not in need of judicial intervention, then the Department's decisions should not be usurped by a judge's use of the investigation outside the dependency arena.

The Court does have the right to be notified of the outcome of the investigation, i.e., whether or not the Department has filed a dependency action to protect the child who is the subject of the abuse report. In the event the Department files a dependency petition, all other proceedings regarding the child's custody and visitation should be abated pending the outcome of that action. And in the event the Department does not file a dependency petition, the judge may act outside his or her official capacity and, as an ordinary citizen and as next friend of the child, independently file a dependency petition. § 39.301(8)(c), Fla. Stat.; § 39.501(1), Fla. Stat. But in no event should the reporting judge intervene in the Department's

decisions concerning the child's protection by accepting non-evidentiary matters and using them in his or her adjudication of the merits of a child's case. Such action converts an independent and impartial judge into an advocate, and thereby subverts traditional notions of due process of law.

CONCLUSION

The Workgroup respectfully suggests that this Court adopt the suggestions of the RJA Committee and not impose mandatory reporting rules upon judges acting in the course of their official duties. Should the Court decide to adopt such rules, the Workgroup requests the Court adopt the suggestions contained in the response of the **RJA Committee**.

REQUEST FOR ORAL ARGUMENT

The Workgroup respectfully requests that it be permitted to participate in the oral argument of this matter.

Respectfully submitted, March 14, 2000.



DEBORAH A. SCHROTH'
FLORIDA LEGAL SERVICES, INC.
FAMILY/JWENILE WORKGROUP
126 West Adams Street, Suite 502
Jacksonville, Florida 32202
Telephone: 904-355-5200
Facsimile: 904-355-5223
e-mail: deborah@floridalegal.org
FLORIDA BAR NO: 290629

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail on this 14th day of March 2000 to:

Sarah Bohr, Esquire
2337 Seminole Road
Atlantic Beach, FL 32233

Honorable Karen K. Cole
Duval County Courthouse, Rm.
227
330 E. Bay Street
Jacksonville, FL 32202-2921

Larry K. Coleman, Esquire
1111 Third Avenue, W., Ste.
100
Bradenton, FL 34205-7834

Honorable Daniel Dawson
2000 E. Michigan Street
Juvenile Justice Center
Orlando, FL 32806-4941

Honorable Robert L. Doyel
Polk County Courthouse
P.O. Box 9000
Bartow, FL 33831-9000

John F. Harkness, Jr., Esquire
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32303-0389

Honorable Charles J. Kahn, Jr.
301 Martin Luther King, Jr.,
Blvd.
Tallahassee, FL 32399-1850

Jennifer C. Newsom, Esquire
420 Bayshore Blvd., Unit 201
Clearwater, FL 33759

Honorable Scott J. Silverman
1351 N.W. 12th Street, Ste.
513
Miami, FL 33125-1629



DEBORAH A. SCHUCK
ATTORNEY