

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC16-553

IN RE: AMENDMENTS TO FLORIDA
RULES OF JUVENILE PROCEDURE
AND FLORIDA RULE OF APPELLATE
PROCEDURE 9.146

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COMMENTS TO THE PROPOSED AMENDMENTS TO RULES

COMES NOW, Jeanne T. Tate, Esq., and hereby respectfully provides the following comments to the proposed amendments to the Florida Rules of Juvenile Procedure and Florida Rule of Appellate Procedure and states as follows:

I am a board certified adoption attorney and have practiced in the adoption arena for over 30 years. I was lead counsel in *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189 (Fla. 2007) and amicus counsel for The Florida Adoption Council, Inc. in *K.D.M. v. J.H.*, Florida Supreme Court Case No. SC09-781, on a Writ of Prohibition from *J.H. v. K.D.M.*, 8 So. 3d 372 (Fla. 5th DA 2009).

COMMENTS ON THE BROAD SET OF AMENDMENTS

I do not support the Broad Set of Amendments or the application of the precepts set out in *J.B. v. Department of Children and Families*, 170 So. 3d 780, 793-95 (Fla. 2015) to non-indigent parents. The premise of court-appointed counsel lies with the inability of the indigent parent to select their lawyer so if the

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State makes that choice for them, the State must provide effective representation. There is no Constitutional right to counsel if the parent is not indigent and hence no right to argue ineffective assistance of counsel as a Constitutional precept. There simply is no State action at issue when a parent selects and hires counsel of his own volition. There are already indeterminable delays for children in foster care and the floodgates should not be opened to provide greater uncertainty about permanency options. The Broad Set of Amendments is neither supported nor requested by the Florida Supreme Court in *J.B.* which explicitly determined an indigent parent's rights. *Id.* at 784, 790 (addressing whether "an indigent parent's state constitutional right to counsel in TPR proceedings . . . [has an attendant right to the effective assistance of state-provided counsel"; "[W]e consider two questions of great public importance concerning an indigent parent's right to counsel in termination proceedings."; "[W]e have previously held that indigent parents have a constitutional right to counsel in proceedings to terminate parental rights"). *See also In Interest of D.B.*, 385 So. 2d 83, 91 (Fla. 1980) (where permanent termination or child abuse charges might result, counsel must be appointed for certain "parents," all of which were defined as "indigent"); *id.* at 91 n.1 ("This position aligns us with other state courts, all of which have recognized a fundamental right to counsel where **indigent parents** face a permanent loss of custody." (emphasis added)).

COMMENTS ON THE NARROW SET OF AMENDMENTS

Regarding the NARROW SET OF AMENDMENTS to these rules, I offer the following comments:

I. Proposed Amendments to Rule 8.510

Rule 8.510(a)(2)(A) should be limited to **indigent** parents as there is no right to counsel for parents who are not indigent.

II. Proposed Amendments to Rule 8.517

In subparagraph (b)(1)(B)(v), the “if any” language is confusing and unclear. Is the withdrawing attorney required to assure there is an order appointing appellate counsel?

In subparagraph (b)(2), the title “Discussion of” should be changed to “Inquiry regarding” in accordance with *J.B.* This avoids any implication that the lawyer should recommend this course of action in order to provide the Appellant with a second bite at the apple. Additionally, the word “inquire” is used in Rule 8.530(b), therefore, use of “inquire” in this title promotes consistency between the rules.

In subparagraphs (b)(2)(A) and (B), the word “discussing” should be changed to “inquiring” in accordance with *J.B.*, and the sentence should be reworded. *J.B.* states that counsel must “inquire whether the parent intends to file a motion claiming ineffective assistance of counsel.” This avoids any implication

that the lawyer should recommend this course of action in order to provide the Appellant with a second bite at the apple. Additionally, the word “inquire” is used in Rule 8.530(b), therefore, use of “inquire” in these subparagraphs promotes consistency between the rules.

III. Proposed Amendments to Rule 8.525

Subparagraph (i) should be eliminated. The new rule obligates the lawyer to discuss the ineffective assistance of counsel issue with the client. This hortatory warning must also be contained in the written order terminating parental rights. Not only is subparagraph (i) excessive, but it treats consent cases where the parent may not be present in court for the adjudicatory hearing (because they signed a consent for adoption waiving further notice) differently than involuntary ones, potentially creating equal protection and/or due process issues.

IV. Proposed Amendments to Rule 8.530

Subparagraph (a) should be eliminated. The new rule obligates the lawyer to discuss the ineffective assistance of counsel issue with the client. This hortatory warning must also be contained in the written order terminating parental rights. Not only is this excessive, but it treats consent cases where the parent may not be present in court for the adjudicatory hearing (because they signed a consent for adoption waiving further notice) differently than involuntary ones, potentially creating equal protection and/or due process issues.

In subparagraph (f), the timeframe of 50 days should be changed to 25 days, as suggested in *J.B.* to reduce further delays in these delicate cases where a child's permanency hangs in the balance. In some cases, a motion challenging the effective assistance of counsel could be filed within five days of the termination of parental rights decree, meaning a ruling would be forthcoming at the 30 day interval, instead of 50 days.

Subparagraph (o) appears a harsh result for the parent given the court's delay; however, I support the finality and permanency objective here.

Finally, I note that, should the proposed amendments be adopted in whole or in part, similar amendments to the Florida Family Law Rules of Procedure will need to be made because court appointed counsel issues also arise for indigent parents who are the subject of a private termination of parental rights action under Chapter 63, Florida Statutes.

WHEREFORE, the undersigned, JEANNE T. TATE, ESQ., respectfully requests this Honorable Court take notice of these comments when deciding the rules and amendments thereto on this very important issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail to: Hon. Sandra Sue Robbins, Chair, Select Committee on Claims of Ineffective Assistance of Counsel in Termination of Parental Rights Proceedings, Marion County Judicial Center, 110 NW 1st Ave., Ocala, FL 334475-6601, srobbins@circuit5.org, Hon. T. Kent Wetherell, II, Chair, Appellate Court Rules Committee, 2000 Drayton Dr., Tallahassee, FL 32399-0950, whetherellk@1dca.org; and Mr. Robert William Mason, Chair, Juvenile Court Rules Committee, 407 N. Laura St., Jacksonville, FL 32202-3109, rmason@pd4.coj.net, Bar Staff Liaisons to the rules committee, Heather Savage Telfer, htelfer@floridabar.org, and Gregory A. Zhelesnik, gzhelesnik@floridabar.org, 651 E. Jefferson St., Tallahassee, FL 32399-2300, on this 1st day of June, 2016.



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