

IN THE SUPREME COURT OF FLORIDA

AMENDMENT TO THE RULES OF JUVENILE PROCEDURE

Fla.R.Juv.P. 8.350

CASE NO. SC00-2044

I. Introduction

We are a Florida County Court Judge and a law professor interested in the therapeutic jurisprudence approach to law. We submit this brief because we believe that the issues before this Court can have a significant impact on the mental health of the juveniles affected.

Judge Ginger Lerner Wren is a County Court Judge for the 17th Judicial Circuit in Broward County. She is the Administrative Presiding Judge on Broward County's Mental Health Court. Broward County's Mental Health Court was the first specialized criminal court dealing with mental health in the country. She is also a former juvenile judge. The mental health court was developed by Judge Wren and others applying principles of therapeutic jurisprudence to the processing of misdemeanor cases involving those whose principal problem is mental disability.

Bruce J. Winick is a professor of law at the University of Miami School of Law since 1974, and a scholar in the area of mental health law and law and psychology. Professor Winick has pioneered the approach of therapeutic jurisprudence and written about it extensively.

We submit this brief to offer our comments on Proposed Rule 8.350 of Juvenile Procedure.

The proposed rule was prepared by the Juvenile Rules Committee of the Florida Bar in accordance with this Court's order in *M.W. v. Davis* 756 So.2d 90, 109 (Fla. 2000). The Juvenile Rules Committee was split, and a minority report dissenting from the majority's recommendations was filed.

The central difference between the majority and minority relates to whether a juvenile facing civil commitment should be represented at the commitment hearing by an attorney, who is ethically

bound to represent the juveniles articulated wishes¹, in addition to guardian ad litem, who is statutorily bound to articulate the guardian's views of the juvenile's best interest.² A variety of constitutional, legal, and policy considerations are relevant to deciding whether the majority or minority proposal should be adopted by this Court. This brief will limit its consideration to the therapeutic impact of representation by guardians ad litem or by attorneys on juveniles subjected to such hearings.

This brief argues that considerations of therapeutic jurisprudence strongly support the minority proposal that attorneys in addition to guardians ad litem be used. Therapeutic jurisprudence is an interdisciplinary field of legal scholarship and approach to law reform that focuses attention upon law's impact on the mental health and psychological functioning of those it affects.³ The scholarly agenda of therapeutic jurisprudence is to study the therapeutic and antitherapeutic consequences of law with the tools of the behavioral sciences, and its law reform agenda is to reshape law so as to minimize its antitherapeutic consequences and maximize its therapeutic potential when to do so is consistent with constitutional, justice, and other normative values served by law. The focus is not only on the therapeutic dimensions of substantive legal rules and legal procedures, but also on how such rules and procedures are applied by legal actors, such as judges⁴ and attorneys.⁵

Professor Winick is the co-founder of therapeutic jurisprudence, and have written extensively about the therapeutic dimensions of legal rules and procedures. In particular, he has written about the therapeutic aspects of the civil commitment hearing and how it can be reshaped to diminish its antitherapeutic effects and increase its therapeutic potential.⁶ A body of work on the psychology of procedural justice and on the psychological effects of coercion and voluntary choice strongly support the minority's recommendations and demonstrate that the majority's recommendations would produce antitherapeutic effects for juveniles that might frustrate the treatment they are ordered to receive. This brief summarizes these bodies of psychological research and shows how they support the use of counsel in addition to guardians ad litem in these proceedings.

II. *The Psychology of Procedural Justice*

Empirical studies of how litigants experience judicial and administrative hearings have lead to the development of a literature on the psychology of procedural justice.⁷ Research on the psychology of procedural justice suggests that people are more satisfied with and comply more with the outcome of legal proceedings when they perceive those proceedings to be fair and have an opportunity to participate in them. The process or dignitary value of a hearing is important to litigants. People who feel they have been treated fairly at a hearing—dealt with in good faith and with respect and dignity—experience greater litigant satisfaction than those who feel treated unfairly, with disrespect, and in bad faith. People highly value “voice,” the ability to tell their story, and “validation,” the feeling that what they have had to say was taken seriously by the judge or other decision-maker. Even when the result of a hearing is adverse, people treated fairly, in good faith and with respect are more satisfied with the result and comply more readily with the outcome of the hearing. Moreover, they perceive the result as less coercive than when these conditions are violated, and even feel that they have voluntarily chosen the course that is judicially imposed. Such feelings of voluntariness rather than coercion tend to produce more effective behavior on their part. For many litigants, these process values are more important than winning.

Social psychologist Tom Tyler, applying these principles to the civil commitment hearing, has argued that increasing the individual's sense of participation, dignity, and trust during the commitment proceedings is likely to increase his or her acceptance of the outcome of the hearing, lead to a greater willingness to accept hospitalization and treatment, and enhance treatment efficacy.⁸ Civil commitment hearings that appear to juveniles who are subjected to them to be a sham violate their need to be treated with “respect, politeness, and dignity,” and to feel that “their rights as citizens are acknowledged.”⁹ When legal

¹ ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Part IA-1 (1996).

² FLA. STAT. § 39.820(1) (2000)

³ DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* (1997); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184 (1997).

⁴ See *Special Issue on Therapeutic Jurisprudence*, 37 COURT REV. 1-68 (Spring 2000); Conference of Chief Justices & Conference of State Court Administrators, CCJ Resolution 22 & COSCA Resolution 4, *In Support of Problem-Solving Courts* (August 3, 2000).

⁵ See PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds. 2000) [hereinafter PRACTICING THERAPEUTIC JURISPRUDENCE]; *Symposium, Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L. 793-1210 (Bruce J. Winick, David B. Wexler & Edward A. Dauer eds. 1999).

⁶ Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing* 10 J. CONTEMP. LEGAL ISSUES 37 (1999); Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENVER U. L. REV. 1145 (1997) [hereinafter *Coercion and Mental Health Treatment*]; see Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 5, at 309.

⁷ See, e.g., E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); E. Allan Lind *et al.*, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978).

⁸ See Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992); Bruce J. Winick, *Coercion and Mental Health Treatment*, *supra* note 6, at 1155-67.

⁹ Tyler, *supra* note 8, at 440.

authorities treat juveniles with dignity in this sense, their status as competent, equal citizens and human beings is confirmed.¹⁰ When legal proceedings do not treat people with dignity, they feel devalued as members of society. If juveniles who are sought to be committed attribute this denial of dignity to the legal and political authorities who run the hearing -- the judge, the attorney and social worker for the Florida Department of Children and Families, the guardian ad litem and his or her attorney, and the clinicians who testify -- this perception will threaten their feelings of self-esteem, self-worth, and sense of personal responsibility.¹¹ Because juveniles with mental illness or behavioral problems who are sought to be committed on the basis of these difficulties already have been marginalized and stigmatized by a variety of social mechanisms,¹² self-respect and their sense of their value as members of society are of special importance to them. Perhaps nothing can threaten a person's belief that he or she is an equal member of society as much as being subjected to a civil commitment hearing.¹³ Juveniles involved in civil commitment hearings are likely to be particularly sensitive to issues of participation, dignity, and trust,¹⁴ and the psychological effects posited by the literature on the psychology of procedural justice are especially applicable in this context. In addition, this Court also recognized the applicability of therapeutic jurisprudence to juvenile commitment proceedings when it said, "Indeed, the issue presented by this case extends beyond the legal question of what process is due; rather, this case also presents the question of whether the child believes that he or she is being listened to and that his or her opinion is respected and counts."¹⁵

Civil commitment hearings that are perceived by juveniles as phony rituals violate their sense of participation, dignity, and equal citizenship.¹⁶ Civil commitment hearings for juveniles that deny them the ability to articulate their wishes through counsel, but which solely use guardians ad litem to present the guardian's views of the juvenile's best interests, will not fulfill the juvenile's participatory or dignitary interests.¹⁷ Instead, such hearings may actually produce feelings of worthlessness and loss of dignity,¹⁸ exacerbating the juvenile's mental illness or behavioral problems, and perhaps even fostering a form of learned helplessness that can further diminish performance, motivation, and mood in ways that can be antitherapeutic.¹⁹

The proposed civil commitment hearings are very likely to be perceived by the juveniles subjected to them to be phony rituals. The proposed rule promises the juvenile the chance to present evidence. However, a juvenile is not able to prepare his own case or cross-examine adverse witnesses effectively on his own. A guardian ad litem along with the attorney for the guardian ad litem is not responsible for assisting the juvenile in preparing his case. If in fact, the guardian ad litem disagrees with the juvenile about his best interests, then the guardian ad litem and the attorney for the guardian ad litem are statutorily bound to prepare a case *against* the juvenile's articulated position. Without someone to assist the juvenile articulate his position, he will not be able to fully participate in the hearing. This lack of participation undermines the juvenile's participatory interests, making the hearing appear to be a phony proceeding conducted by adults.

III. *The Psychological Effects of Coercion and Voluntary Choice*

The recent research by the MacArthur Network on Mental Health and the Law on patient perceptions of coercion also supports the conclusion that the minority report should be adopted.²⁰ This research examined the correlates and determinants of individuals' perceptions of what makes them feel coerced.

¹⁰ *Id.*

¹¹ *Id.* at 442.

¹² See generally Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373 (1992).

¹³ Tyler, *supra* note 8, at 440.

¹⁴ Alexander Greer *et al.*, *Therapeutic Jurisprudence and Patients' Perceptions of Procedural Due Process of Civil Commitment Hearings*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 923, 927 (David B. Wexler & Bruce J. Winick eds. 1996).

¹⁵ *M.W. v. Davis*, 756 So.2d 90, 108 (Fla. 2000).

¹⁶ *Id.*

¹⁷ See *Marshall v. Jerricho*, 446 U.S. 238, 242 (1980); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7, at 666 (2d ed. 1988); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50 (1976); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in 18 NOMOS 126, 127-28 (J. Roland Pennock & John W. Chapman eds., 1977); Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 801-03 (1989); see also *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁸ Greer *et al.*, *supra* note 14, at 925.

¹⁹ See Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 14-23 (1995).

²⁰ Nancy S. Bennett *et al.*, *Inclusion, Motivation, and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295 (1993); William Gardner *et al.*, *Two Scales for Measuring Patient Perceptions for Coercion During Mental Hospital Admission*, 11 BEHAV. SCI. &

Patient perceptions of coercion in the mental hospital admission process were found to be strongly associated with the degree to which that process was seen to be characterized by procedural justice. The MacArthur research found that people feel non-coerced even in coercive situations such as civil commitment when they perceive the intentions of state actors to be benevolent and when they are treated with dignity and respect, given voice and validation, and not treated in bad faith. Patients who are provided procedural justice in this sense, even if involuntarily committed or pressured by family members and clinicians to be hospitalized, reported experiencing considerably less coercion than patients who were not afforded procedural justice.

The MacArthur work on coercion is significant when considered in connection with a body of theoretical work on the psychology of choice that suggests that people perform more effectively and with greater motivation when they choose voluntarily to do something, and perform less well, with poor motivation and sometimes with psychological reactance, when they are coerced into doing it.²¹ Principles of cognitive and social psychology including the goal setting effect, expectancy theory, intrinsic motivation, the psychology of commitment, and cognitive dissonance in general support the positive value of choice and the negative effects of coercion.²² In the treatment context, this research suggests that people who feel less coerced into accepting treatment and who believe that entering treatment reflects their own choice are more invested in treatment and benefit more from it than patients who feel coerced and disrespected by the treatment process.

The attorney is the primary vehicle for effectuating the juvenile's participatory interests. Both the American Psychological Association and the American Psychiatric Association have recognized the therapeutic importance of having a juvenile represented by an attorney in their Model Act and Guidelines.²³ Without representation by an individual (such as an attorney) who is professionally bound to articulate the juvenile's wishes and preferences, juveniles will not experience the sense of voice and participation in the proceedings that are essential to their having a positive response to the outcome of the hearing.

The attorney also is in an excellent position to diminish the potential for coercion and its perception by the juvenile in the admission process.²⁴ By effectuating, rather than compromising, the juvenile's participatory interests in the commitment process, the attorney can contribute to the juvenile's sense that he or she was treated fairly and to his or her ability to accept the outcome of the proceeding, even if adverse, and to comply with the court's decision in ways that can better achieve the goals of hospitalization. Without this, the juvenile is more likely to experience the hospital admission that may be ordered as coercive, with potentially devastating consequences for his or her ability to gain the benefits that such hospitalization may offer.

IV. Conclusion

The purpose of committing juveniles to mental health facilities is the treatment of their mental health and behavioral problems. The procedures we use in the commitment process can have an enormous impact on whether juveniles so committed respond favorably or unfavorably to such treatment. A process that allows guardians ad litem to "represent" these juveniles but which frustrates the juveniles' ability to experience voice and participation in their own hearings will be antitherapeutic, frustrating the treatment purpose of their commitment. It will reinforce feelings of worthlessness and lack of self-efficacy, and

L. 307 (1993); Steven K. Hoge *et al.*, *Perceptions of Coercion in the Admission of Voluntary and Involuntary Psychiatric Patients*, 20 INT'L J. L. & PSYCHIATRY 167 (1997); Charles W. Lidz *et al.*, *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCHIVES GEN. PSYCHIATRY 1034 (1995); John Monahan *et al.*, *Coercion and Commitment: Understanding Involuntary Mental Hospital Admission*, 18 INT'L J.L. & PSYCHIATRY 249 (1995); John Monahan *et al.*, *Coercion to Inpatient Treatment: Initial Results and Implications for Assertive Treatment in the Community*, in COERCION AND AGGRESSIVE COMMUNITY TREATMENT: A NEW FRONTIER IN MENTAL HEALTH LAW 13 (Deborah L. Dennis & John Monahan eds., 1996); Winick, *Coercion and Mental Health Treatment*, *supra* note 6, at , 1158-59.

²¹ SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 300-01 (1981); BRUCE J. WINICK, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT 327-44 (1997); Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A Therapeutic Jurisprudence Analysis*, 17 INT'L J.L. & PSYCHIATRY 99 (1994); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992) [*hereinafter On Autonomy*]; Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15 (1991) [*hereinafter Competency to Consent*]; Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zinnermon v. Burch*, 14 INT'L J.L. & PSYCHIATRY 169 (1991) [*hereinafter Voluntary Hospitalization*].

²² WINICK, *supra* note 21, at 327-44; Winick, *Competency to Consent*, *supra* note 21; Winick, *Voluntary Hospitalization*, *supra* note 21.

²³ American Psychological Association, *A Model Act for Mental Health Treatment of Minors, Sect. 108*, in GARY B. MELTON, NO PLACE TO GO: CIVIL COMMITMENT OF MINORS, (University of Nebraska Press 1998) at 171; American Psychiatric Association Official Action, *Guidelines for the Psychiatric Hospitalization of Minors, Sect. 4(c)*, 139 Am. J. Psychiatry 7 (1982).

²⁴ Winick, *Voluntary Hospitalization*, *supra* note 21, at 205-12.

will exacerbate the feeling that their dignity and personhood are disrespected by the legal system. It will make them feel coerced by the legal process in ways that are likely to diminish their motivation to accept treatment and their ability to respond favorably to it.

By contrast, juveniles who are treated with dignity and respect at the hearing and given the right to participate through counsel are less likely to experience the process as coercive, and will predictably respond better to any treatment that is ordered. An attorney representing a juvenile who articulates the juvenile's own wishes will fulfill the sense of voice and validation that the literature on the psychology of procedural justice stress as essential to litigant satisfaction and compliance with the outcome of the proceeding.

Representation only by a guardian ad litem who does not advocate the juvenile's wishes and instead presents arguments based on the guardian's perception of the juvenile's best interests will frustrate the sense of voice and validation that are so important. Proceedings using such guardians, without providing the juveniles with attorneys, will be perceived by juveniles as phony rituals conducted by adults that only pretend to allow the juvenile the opportunity to participate. The feelings such hearings will produce will reinforce the disaffection and alienation that such juveniles already experience. Allowing them to participate through counsel, by contrast, will increase their sense of self-worth and self-efficacy, and in turn, increase the likelihood that they will benefit from the treatment they are thought to need.

Respectfully submitted,

PROFESSOR BRUCE J. WINICK
University of Miami, School of Law
1311 Miller Drive
Coral Gables, FL 33124

HON. GINGER LERNER WREN
Broward County Courthouse
609 SW 1st Avenue, Room 429
Ft. Lauderdale, FL 33301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 30, 2000, a true and correct copy was mailed to the Honorable John N. Alexander, Chair Juvenile Court Rules Committee, St. John's County Courthouse, PO Box 300, St. Augustine 32085-0300.

PROFESSOR BRUCE J. WINICK
University of Miami, School of Law
1311 Miller Drive
Coral Gables, FL 33124