ORIGINAL

IN THE SUPREME COURT OF FLORIDA

AMENDMENT TO THE RULES OF JUVENILE PROCEDURE

CASE NO. SCOO-2044

/

COMMENTS OF
CHILDREN FIRST PROJECT, SHEPARD BROAD LAW CENTER
NOVA SOUTHEASTERN UNIVERSITY

The Children First Project is a statewide public interest law firm dedicated to the enhancement of children's legal rights through consideration of their social, medical, and educational needs. Children First appeared as ainicus curiae in **M. W. v. Davis,** 756 So. 2d 90 (Fla. 2000) in which this Court directed the Juvenile Rules Committee to submit proposed rules of procedure applicable when the State seeks to commit a dependent child to a residential facility for mental health treatment.

Children First seeks to comment on that portion of the rule that mandates the appointment of an attorney for the guardian ad litem (Proposed Rule 8.350 (a)(3) but only permissively allows the appointment of an attorney for the child. (Proposed Rule 8.350(a)(4)(hereinafter the Proposed Rule.) Children First believes that it is important to appoint an attorney to represent the subject child.

In support Children First states:

1) In its opinion, this Court called upon the Juvenile Rules Committee to draft

rules that would recognize the individuality and dignity of children who find themselves in the courtroom solely as a result of their parents' abuse or neglect. **M. W**. at 108. According to this Court, "...this case...presents the question of whether a child believes he or she is being listened to and that his or her opinion is respected and counts." **Id**.

2. By failing to mandate the appointment of an attorney to represent the child, the Proposed Rule does not honor this Court's opinion in that it does not recognize the child's right and need to be listened to and have his or her opinion respected and counted.

3. There is a vast difference in obligations among an attorney for the child, a guardian ad litem (hereinafter GAL) and an attorney for the GAL, The GAL does not advocate for the child's opinion. The GAL, in Florida usually a lay volunteer, makes an independent investigation on behalf of the child and reaches an independent position with respect to the child's best interests. The attorney for the GAL advocates the GAL's position before the court. Haralambie, **The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases,** 14 (American Bar Association, 1993). Neither the GAL nor the attorney for the GAL have an attorney-client privileged relationship with the child and that individual's conduct towards the child is not regulated by the Rules of

Professional Responsibility. Haralambie, 5-11. An attorney for the child, on the other hand, is charged with ascertaining and advocating to the court the child's expressed wishes to the extent appropriate given the child's age and capabilities. An attorney for the child owes the child the same duties of undivided loyalty, confidentiality and zealous representation of the child's expressed wishes as he or she would owe to an adult client, Haralambie, 12-14. It is the attorney for the child who can give meaning to the child's right to have his or her opinion heard, respected and **counted.** Lacking an attorney for the child, the only opinion that will be heard and counted is the opinion of a lay volunteer regarding what she or he views is "best" for the child.

4. The Model Rules of Professional Conduct, ER 1.14(a), adopt the general principle that attorneys for children must "as far as reasonably possible" maintain the traditional attorney role toward child clients. Haralambie explains that the reason for this rule is that if the child's attorney does not advocate the child's position as the child sees it, the child really has no independent voice in the proceeding. Haralambie, 12.

5. Another expert, Jean Koh Peters, who teaches and writes about the ethical and practical dimensions of representing children, frames the issue of representation of the child's expressed wishes thusly:

> "Children are entitled to all the benefits of having a lawyer....Children too often become lost in the adult dynamics that drive powerful systems around them. The central job of the lawyer is to prevent both social systems, and himself, from missing the child in the middle of the adult dynamics that shape the lawyer's life." Peters, **Representing the Child in Child Protective Proceedings,** xiv (Lexis Law Publishing, 1997).

Under the Proposed Rule, it is the opinion of the adults and the adult dynamics that count, not the opinion of the child that counts.

6. In arguing for the appointment of counsel for children in civil proceedings, Catherine Ross, former chair of the ABA's Legal Needs of Children Committee, decries the truncated results arising from the lack of voice for children in seminal cases involving the relationships among parents, children and the state. One example she gives is **Wisconsin v. Yoder,** 406 U. **S.** 205 (1972), a case in which no one asked the Amish children whether they wished to receive a secular education. This lack of voice, according to Justice Douglas, arguably prevented any of the children from becoming a pianist, an astronomer, or an oceanographer, in favor of Amish tradition. Ross, "From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation, 64 **Fordham Law Review** 1571, 1587(1996). Similarly, results will be truncated in civil commitment proceedings for children such as M. W., when the only views advocated by an attorney are the views of adults.

7. The Proposed Rule's schizophrenic provision of mandatory counsel for the guardian ad litem but not for the child is seemingly based on fear of the child's expressed wishes. Many children are too young to advise counsel, the majority of the Committee might argue. But most children facing mental health commitment are teenagers and able to express their wishes. The number of very young children, for whom the expression of wishes is problematic, and for whom civil commitment is even a possibility, is extremely small. Even a GAL would agree that for the most part the institutional confinement of a young child is both contrary to best practices and contrary to the best interests of the child, The fear of some that giving voice to a child in this setting will h a m the child is not confirmed by reality. Ross argues that appointment of counsel for children facing involuntary confinement will result in the court's hearing arguments from every viewpoint. The court would then apply the proper legal standard. It is the court that determines the child's best interests. Ross says:

> "Our justice system rests on the assumption that the adversary system encourages the best expression of each position. Based on that foundation principle, and knowing that the judge will decide the matter, a lawyer for a child may pursue the child's preferences without undue angst." Ross, 1617.

8. Some on the Rules Committee might argue that counsel for the child will delay the child's receipt of necessary treatment. Nothing could be further from the

reality. Because of the confidential relationship built up between the child and his lawyer and the trust therefore engendered, the lawyer can counsel the child about available options, often developing a suitable treatment plan that will please the child, the GAL and the state. The child does not have the skills to negotiate any alternatives, and thus the lack of counsel for the child prolongs the time frame rather than shortens it.

9, The Proposed Rule seemingly requires each juvenile judge to figure out how to determine the child's views, independent of the recommendations of the guardian ad litem, but provides no procedures for that requirement. Proposed Rule 8.350 (d). Ross, in reiterating the tenet that the right to be heard is meaningless without the right to be heard through counsel who can navigate a complex juvenile process, describes the hurdles to corninunication experienced by children attempting to advocate on their own behalf. She quotes the Danish novelist, Peter Hoeg, who explains how difficult such communication is for children:

> "Speaking is not easy. All your life you have listened, or looked as if you were listening. The living word came down to you, it was not something you, personally, gave voice to. You spoke only after having put up your hand, and when you had been asked a question, and you said what was certain and correct,,.," Ross, "From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation, 64 **Fordham Law Review** 1571, 1578 (1996).

A rule that requires children to speak **up** on their own in order to effectuate their

right to have their opinion counted sorely lacks understanding of child development.

8. This Court has consistently held that the opportunity to be heard must be meaningful, **In re Whetstone,** 188 So. 579 (Fla. 1939); **Jones v. State,** 24 Fla. L. Weekly S290 (Fla, June 17, 1999). Further, a meaningful hearing requires the appointment of counsel. **In the Interest of T. W.**, 551 So. 2d 1186, 1196 (Fla. 1989); **A. A. v. Rolle**, 604 So. 2d 813 (Fla. 1992). The Proposed Rule leaves the expressed wishes of the very person who will suffer a loss of liberty through residential commitment unrepresented. This Court in **T. W.** held that in proceedings where a minor can be wholly deprived of authority to exercise a fundamental right, counsel is required under the Florida constitution. **T. W.** at 1196. The Court quoted with authority **Indiana Planned Parenthood Affiliates Assn. v. Pearson**, 716 F. 2d 1127 (7th Circuit 1983), which aptly describes the effect on the child of lack of counsel:

> "A minor, completely untrained in the law, needs legal advice to help her understand how to prepare her case, what papers to file, and how to appeal, if necessary. Requiring an indigent minor to handle her case all alone is to **risk** deterring many minors from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own because they are too intimidated by the seeming complexity to try." **Indiana Planned Parenthood** at 1138.

9. For all of these reasons, Children First requests this Court to disapprove that

portion of the Proposed Rule that makes appointment of counsel to represent the expressed wishes of the child optional and require the Juvenile Rules Committee to draft a rule making such appointment mandatory.

Respectfully submitted,

CHRISTINA A. ZAWTSZA
Florida Bar Number 241725
JOHN M. RATLIFF
Florida Bar Number 402599
CHILDREN FIRST PROJECT
Nova Southeastern University
Shepard Broad Law Center
3305 College Avenue, Suite 325
Fort Lauderdale, Fl. 33314-7721
Telephone: 954-262-6030
BY: Christina A. Zawisza
CHRISTINA **A.** ZAWISZA

CERTIFICATE OF SERVICE

T hereby certified service of a copy of these comments on Judge John N. Alexander, Chair, Juvenile Rules Committee, St. Johns County Courthouse, P. **O.** Box 300 St. Augustine, Fl. 32085-0300 this 28th day of November, 2000.

Christina A. Zawisza
CHRISTINA **A.** ZAWISZA