IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO THE RULES OF
JUVENILE PROCEDURE, FLA. R. JUV. P.8.350
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COMMENTS TO THE PROPOSED AMENDMENTS TO FLA. R. JUV. P. 8.350, AS PROPOSED BY THIS COURT

Nancy Schleifer, a member of the Florida Bar,[1] files these comments to the Proposed Amendments to Fla. R. Juv. P. 8.350, drafted by this Court and published in *Amendments to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 26 Fla. L. W. S713 (Fla. 2001),* and states:

At the time that *M.W. v. Davis*, 756 So.2d 90 (Fla. 2000) was briefed before this court, the undersigned filed an amicus brief on behalf of the Guardian ad Litem Program of the Eleventh Judicial Circuit (The Program). The Program asserted a very strong position that use of the Baker Act was not in the best interest

[1] The undersigned attorney has practiced in the area of juvenile dependency since approximately 1985. Since 1985, the undersigned attorney has been, a pro-bono guardian ad litem attorney (1985-present), a staff attorney at the Guardian ad Litem Program (1988-89), the Chief attorney at the Department of Health and Rehabilitative Services (1990), consultant to the Florida Bar Commission for Children (1991), the Director of the Children's Law Project at Nova Southeastern University School of Law (1992-1994), and the Administrative Attorney for the Guardian ad Litem Program for the Eleventh Judicial Circuit (1998-2001).

for these children, as it was not customized to address the needs of dependent children. The undersigned attorney suggested that a specific rule of juvenile procedure was needed to assure that these fragile dependent children had procedural rights that were adequate, flexible, and tailor-made for their needs. This Court responded to that suggestion and convened the Juvenile Rules Committee.

Shortly after this Court released *M.W.*, the Florida Legislature amended 39.407. The legislation permits placement of the child without a hearing and without any type of legal representation except that it assumes the child will have a guardian ad litem. No hearing with respect to the placement is required under the new statute for three months from the date of placement.

Most child advocates were very unhappy with this legislation, as it did little to protect a child who protests the placement.

The Juvenile Court Rules Committee and this Court have struggled with both the conceptual basis and the specific language of the new rule. This Court has now set forth its own proposed rule and invited comments. The undersigned appreciates this Court's commitment to the welfare of these children, and submits these comments in the hope that it will improve the already superior rule that has been proposed by this Court.

I. Appointment of an Attorney for the Child

As this Court has stated, the appropriateness of mandatory appointment of an attorney for the child and the desirability of a pre-commitment hearing have generated much discussion.

Needless to say, the issue of whether a child should be appointed an attorney is a vortex that pulls into it all manner of heated discussions. It is a powerful issue that tugs on the emotions of lawyers and child advocates. The appointment of lawyers for children has been the subject of Florida Bar committees and commissions and fodder for legal articles concerned with the judicial process and what it does to our most vulnerable children. Perhaps this is a good time to address the subject, not just as it impacts the process for dependent children who are undergoing the commitment process, but as it effects dependent children, period.

In 1980, this court decided *In The Interest Of: D. B.*, 385 So 2d 83 (Fla. 1980). In that case, this Court specifically and emphatically held, "there is no constitutional right to counsel for the subject child in a juvenile dependency proceeding."

D.B. was a decision that had long term regrettable consequences for children in the dependency system. It has dramatically affected the lives of thousands of

children who have been placed in the system too long without permanency; moved around the system, sometimes unconscionably; given too much medication; given too little services; and, far too frequently, placed in abusive foster homes. While the abusive parent has a court appointed lawyer for fear that the allegedly abusive parent might lose his or her "rights" to the child, the child, who has been abused or neglected and now is removed from virtually everything he or she loves, is not entitled to an attorney under *D.B.* There is a certain stark unfairness in this scenario. Lay people, like those training to be guardians, are generally shocked by this law. If anyone needs a lawyer in a child abuse case, it is the child!

Perhaps it is a chicken and egg conundrum, but when addressing the issue of a child's right to counsel in a dependency proceeding, it is at least provoking to wonder whether, if a child really had a choice for the timing of legal representation, the child would prefer (1) to be appointed an attorney at the time when the child is taken away from his parents–when he or she is taken away from his siblings, her pets, his toys, her home, his surroundings, her extended family; or (2) to be appointed an attorney before a commitment for therapeutic residential placement. In a hierarchy of children's legal needs, this child advocate would suggest that there are two points at which a child's need for proper representation is greater than at a commitment hearing. The first is at the adjudicatory hearing to determine whether

the child is a dependent child. The second is at the TPR hearing. Despite the binding precedent of *D.B.*, the undersigned believes that children have a constitutional right and moral right to effective advocacy when their entire world is being torn apart.

After almost seventeen years of representing children and of administrating legal programs which provide for the representation of children, the undersigned has come to the conclusion that many children could be saved from much of the emotional trauma that leads to serious clinical mental and emotional problems that result in commitment if the children had more effective advocacy

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A. Who should Advocate for these children?

Saying that, there is no doubt that when a child's mental health does decompensate, that child needs a properly trained, effective advocate to represent the child's interest during commitment proceedings. There is a great deal of discussion as to what constitutes properly trained effective advocacy for these vulnerable children.

1. Who should represent the child?

There has certainly been a good deal of discussion as to what kind of representation is needed for these cases. Is representation by a Guardian ad Litem

program enough–what happens when the Guardian ad Litem program has no guardian ad litem to assign to the case? Assuming that the case can be assigned to a lay guardian, does the guardian ad litem require legal representation by GAL program attorneys? Should the child have his or her own attorney in addition to a guardian ad litem or in lieu of a guardian ad litem? If so, should that attorney represent the express interest of the child, or the best interest of the child, or should the attorney work with a hybrid model? Does the child–or at least certain children-- need both best interest and express interest representation?

To some extent, the answer to these questions depends upon the abilities of the guardian ad litem or attorney and on the situation of the child.

Historically, there are certain advantages to having a guardian ad litem on the case. Typically, at least in the Eleventh Circuit, guardians are volunteers with a very small number of cases. Most of the time, these guardians can spend significantly more time with a child than a busy lawyer, or even than a caseworker with a large case load. These guardians go to the child's home, the child's school, the child's therapist. Often the guardian ad litem remains the only constant in a child's life. The child and the guardian ad litem often have a significant relationship based upon trust and love. The guardian advises the court of the child's express

wishes, but advocates for the child's best interest– giving the court guidance in those situations where the child's expressed wishes could endanger the child if fulfilled. The guardian ad litem also has program staff to rely upon, supervisory staff with significant experience in the field, and legal staff to give legal guidance and in-court representation.

A lawyer, on the other hand, knows the landscape of the court. Only a lawyer can file motions, cross examine witnesses, and make a closing argument to the court. A child's discussions with a lawyer are held confidential.

Nevertheless, while some lawyers may indeed have the time to see the child on at least a monthly basis, and to make a personal investigation of the child's circumstances–realistically, with any kind of caseload, most lawyers will not have the time to do this regularly or dependably. They are not social workers, and they will and should spend most of their time writing and filing motions, taking discovery, preparing for trial, and in trials or hearings. Moreover, if a pure "express wishes" standard is followed, a lawyer bound by such standards may use legal efforts to achieve a result that could endanger a fragile child who suffers from a reason-impairment. Of course, this particular problem can be alleviated by setting a standard of representation which permits the attorney for the child to notify the court when the child's best interest might be endangered, and to assure that there is

someone who will speak for the best interest of that child.

There is no doubt that a combination of guardian ad litem best interest representation coupled with representation by an attorney is the safest, surest, and most sophisticated way to deal with the thorny problems of child dependency representation.

As for these children, representation by an attorney may not always be absolutely necessary. Very young children may not be capable of any significant personal involvement in the process. Children who are extremely decompensated to the point where they can not comprehend their attorneys advice, or make decisions based upon that advice, may not be able to benefit from "counseling" provided by an attorney client relationship. In these cases, the best assistance for the child and the court may be a guardian who the child trusts and feels comfortable with, a guardian who can investigate the child's situation, see the prospective placement, and talk to the therapists and evaluators. After a guardian discusses the situation with the child, the child may agree that placement is the best solution to help the child through his or her present crisis. The entrance of an attorney who is unknown to the child at this juncture may not be a great benefit to the child, who will most likely feel overwhelmed by what is happening anyway. For these children it may be more swift and sure, less adversarial, and less

overwhelming for the court to simply rely upon a guardian ad litem. As this is part of a court proceeding, and lay guardians cannot file motions or practice law, the guardian ad litem should always have access to legal counsel in commitment cases and all dependency case. Appropriate legal staffing in the Guardian ad Litem program assures a large measure of safety for the very young or acutely clinically ill child.

This Court has struck a very good balance to deal with these questions. It provides for a guardian ad litem who has the support of a guardian ad litem attorney, and it gives discretion to the trial court to provide an attorney for the child when it is perceived that there are legal complications or conflicts. Certainly in cases where the child's express interest differs from the guardian's opinion concerning the child's best interest, independent counsel should always be appointed for the child.

2. Standards of Representation

The rule should probably address the appropriate "standard" of representation which an appointed lawyer for the child will use.

A pure express representation model treats the child as an adult. The client dictates the ultimate direction of the litigation, and the child's best interest is not a factor.

A pure best interest model is similar to that used by the Guardian ad Litem program, although a Guardian ad Litem must disclose the child's wishes, even though the guardian is making a recommendation based upon best interest).

There is also a hybrid model, where the attorney represents the child's express interest, but has an affirmative obligation (1) to counsel the child in order to assist the child to make a decision in his or her best interest, and (2) to disclose to the court situations where the child's express interest might constitute a danger to the child. Lawyers for Children America does an excellent job in teaching a fairly sophisticated version of this type of hybrid representation.

The Florida Legislature has carefully crafted an easy-to-understand and simple to follow standard of representation in Section 39.4086 (g). It calls for the attorney to "represent the child's wishes for purposes of proceedings under this chapter as long as the child's wishes are consistent with the safety and well-being of the child." After practicing for many years in this field, this attorney believes that to be an appropriate standard for the attorney representation of children. This attorney also believes that it is also time for the Rules of Professional Conduct to be amended so that lawyers for children will better understand their ethical duties of representation.

3. Quality of Advocacy

There is no question that the child needs an **effective and trained** advocate during the process. However, this Court's proposed rule does not address any qualifications for the guardian or the attorney.

The issues confronting advocates in this type of proceeding are and unique and very complex. Injecting unknowledgeable lay guardians and attorneys into the child's life at a time when the child is extremely fragile poses an actual risk! Lawyers and non-legal advocates need specific training. These children have had at least one, and often multiple disruptions in their placements. They have been exposed to various kinds of trauma and neglect. They are of varying ages and states of development. They have suffered a range of mental and emotional problems of varying severity.

There are no jurisdictions in this state that have a sufficient number of volunteers and paid staff to represent every dependent child adequately. The rule proposed by this Court requires the appointment of guardians and attorneys in a system which is already overwhelmed and understaffed. If these children are to be properly represented we must avoid the "warm body" syndrome. We need guardians and attorneys who are knowledgeable about children's mental health issues, child development, and the dependency system.

When the Legislature developed the pilot attorney ad litem program, the

Florida Legislature paid careful attention to the issue of qualifications and training. It is suggested that this Court should add language to the proposed rule to ensure that appointed attorneys must be knowledgeable about children's mental health issues, child development, and the dependency system.

II. Pre-hearing commitment.

Just as justice delayed is denied, mental health treatment delayed is denied as well. Due process may dictate that a pre-commitment hearing is desirable, but delays in the actual adjudication may be very detrimental to the child if the child is not getting treatment. The present proposed rule provides for commitment before hearing if the evaluator indicates that the child requires immediate placement and that such placement cannot wait for the hearing. The exception is necessary.

However, the undersigned also wants to paint a picture of what is really happening, at least in the Eleventh Circuit. In the Eleventh Circuit, as illustrated by the facts in the *M.W.* case, the court calendars are incredibly congested. Non-emergency evidentiary hearings are often set months in advance. Even assuming that the courts can set the initial hearing within the deadline set by the proposed rule, the hearing may not be completed in ten days.

There are multiple parties and attorneys in dependency actions. Very often all of the necessary parties and attorneys (and witnesses) don't show up and

hearings must be reset. Although this seems avoidable, it does occur all the time, and is partly responsible for the congestion and delays of the court calendars. (Parents complain of often valid transportation problems. Attorneys have multiple conflicts. Notice may not have been properly made.)

Then there are requests for continuances. They are requested and often granted. Sometimes, but not always, the continuance is for very good cause.

Some of these children are suicidal. Some are dangerous to their foster families or their siblings or society in general.

The evaluator must be kept in the scheduling link. Most of the children who are to be committed are in some kind of a crisis. There are too many possibilities for delays that can be dangerous to the child's mental and emotional health and to society's needs. There must be continuous monitoring or therapy or something to prevent a disaster while the child is waiting for a hearing.

The following revision of section (a) (7) of the proposed rule is suggested (with additions redlined):

> If all parties are in agreement at the scheduled hearing then the motion for placement may be approved by the court. However, if any party, including the child, is not in agreement, then the court shall set the matter, ~~for hearing within~~ which shall be heard not later than 10 working days from the date of the filing of the motion. Continuances shall be granted only for good cause shown, and, if granted, for the shortest time period

possible, not to exceed ten days. The evaluator, the guardian ad litem, and the child's present placement shall be notified of the hearing date and of any continuances or further hearings. If the evaluator~~'s~~ in the written assessment, or upon subsequent notification to the court, indicates that the child requires immediate placement in a long term residential treatment center or hospital and that such placement cannot wait for the hearing, then the department may place the child pending the hearing, unless the court order's otherwise.

III. Continuing Reviews.

The review component of the proposed rule needs to be tightened. The first review should be set sooner, and the rule should spell out the type of inquiries that must be made in order to assure that the court makes an **informed** decision.

From a historical prospective, reviews that lack guidelines are far less helpful and less trustworthy than reviews that include specific guidelines. Historically, inadequate judicial reviews have contributed to foster care drift. Over the years, Chapter 39 provisions governing judicial reviews have undergone an evolution of specificity.

It is easy to lose track of these children once they become dependent. Similarly, children who are committed to residential institutions are often warehoused and forgotten. The review component may, in the long run, be more important to the child's development and well being than the initial decision.

Since the squeaky wheel gets the grease, reviews of the hum-drum day-to-

day, year-to-year life in foster care tended to be short, uninformative, and inadequate. Since the mandated changes of Chapter 39 which occurred after the adoption of the Federal Adoption and Safe Families Act and the subsequent Kayla McKean act, judicial review provisions have become very specific and comprehensive. They call for inquiries into the child's present placement, education, medical and developmental progress, and into the parent's progress under the case plan. They trace the child's history–the history of placements, the history of parental attempts, the history of prior abuses. They are informative, and result in orders which do a much better job in determining the needs of the child and in assisting the court to make permanency decisions.

The comprehensive statutory requirements also assist lawyers and judges. No one has to guess about what the inquiry should be. Judicial review orders are prepared to track the statutory requirements. When specific questions are answered, the court is not likely to overlook the fact that this is the child's fifth placement, or that the child needs braces, or that the child has had to move from school to school; or that the parent has a previous adjudication as to other children.

Finally, a comprehensive judicial review document will alert judges, counselors, and guardians to significant problems-- and even abuses--with specific mental health placements that might endanger the children who are committed. And

because such assessments will have that effect, it may also be a preventive measure. Placements that understand that a careful inquiry is being made on a frequent basis will be less likely to permit abuses.

From the undersigned's experience, here are some of the things that the court needs to know in order to make an adequate inquiry as to the status of the child in a residential placement.[2]

1. What is the child's diagnosis?

2. Have there been any new evaluations?

3. What types of therapies and behavior management techniques are being used?

4. How often have restraints been used on the child. What kind of restraints have been used, and for what reason?

5. What kinds of medications are administered to the child, and how often and for what purpose?

6. What kind of school arrangements have been made for the child, and with what success? Is the child getting regular individualized educational

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[2] The University of Miami School of Law, Children & Youth Law Clinic will also, no doubt, be able to give excellent input as to the type of information should be required for a proper review, as much of their legal representation is devoted to these children.

assessments that are sufficient for the child's needs?

7. How is the child progressing towards a less restrictive placement?

8. What are the child's wishes concerning the placement?

9. If there are parental visits and or sibling visits, are the parents being diligent in attending and are the siblings being transported, and are the visits helpful or hurtful to the child?

10. Does the child have specific medical needs, and are these being adequately addressed.

Conclusion.

It is hoped that these comments will be helpful to the court. It is a great privilege to be able to present these comments in the hope that our services to our children will be improved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been

served by mail on the following this day of to: Caroline Salisbury, Esq., Director, University of Miami School of Law, Children & Youth Law Clinic, P.O. Box 248296, Coral Gables, Florida 33146; Charles Auslander, Department of Children and Families, 410 N.W. 2nd Avenue, North Tower, 1018, Miami, Florida 33128, Christina Zawisza, Esq. Children's First Project, Nova Southeastern University, Shepard Broad Law Center, 3305 College Avenue, Suite 325, Fort Lauderdale, FL 33314-7721; Barbara W. Green, Esq., ACLU of Florida, Gables One Tower, 1320 South Dixie Highway, Suite 450, Coral Gables, FL. 33146; and The Honorable Cindy Lederman, Circuit Court Judge, Juvenile Justice Center, 3300 N.W. 27th Avenue, Miami, Fl. 33142, Joni Goodman, Executive Director, The Guardian ad Litem Program , 3302 N.W. 27th Avenue, Miami, FL 33142, and Joel Michael Silverstein, Chair, Juvenile Court Rules Committee, c/o State Attorney's Office, 201 S.E. 6th Street, Suite 600, Fort Lauderdale, FL 33301-3304

Respectfully submitted,

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