COMMENT ON PROPOSED RULE OF JUVENILE PROCEDURE 8.350

Introduction

In *M.W. v. Davis*, 756 So.2d 90 (Fla. 2000), the Florida Supreme Court directed the Juvenile Court Rules Committee to submit proposed rules "that will set forth the procedures to be followed by the dependency court when the Department of Children and Families seeks an order committing a dependent child to a residential facility for mental health treatment." In response, the Committee, by a vote of 18 to 7 proposed adoption of new Rule of Juvenile Procedure 8.350 ("Placement of Child Into Residential Treatment Center After Adjudication of Dependency"). Under that rule, neither the appointment of counsel nor a pre-commitment status hearing was deemed mandatory. On October 25, 2001, the Florida Supreme Court adopted a proposed substitute version of Rule 8.350 making mandatory both the appointment of counsel and a pre-commitment status hearing. *See Amendment to Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 26 FLW S713 (Fla. Oct. 25, 2001). The Supreme Court requested comment from all interested persons prior to making a final decision as to the rule's adoption. Input from "circuit judges presiding regularly" in dependency cases was specifically solicited by Chief Justice Wells. The undersigned, who collectively have over 40 years experience in the Juvenile Division of the Eleventh Judicial Circuit, hereby submit comments addressed to the following issues: (1) whether appointment of an attorney should be required for every dependent child recommended for placement in a residential mental health facility; (2) whether a pre-commitment status hearing should be required; and (3) whether the child should be present at the pre-commitment status hearing.

Comment 1

The mandatory appointment of counsel runs counter to the majority recommendation of the Florida Bar's Juvenile Court Rules Committee. The majority of that committee, composed of individuals with substantial experience in the juvenile court system, concluded that the dependency court need not always appoint an attorney to represent a dependent child who is recommended for placement in a residential mental health facility; rather the appointment of counsel would be within the dependency court's discretion. Ignoring the recommendation of the Florida Bar Juvenile Court Rules Committee and relying upon the comments of various, well intentioned child advocates, many of whom have only limited exposure to dependent children, the Supreme Court concluded that without an attorney, a child would never have a meaningful opportunity to be heard and present evidence. What is interesting is that none of these comments came from circuit judges who preside regularly over dependency cases. Those of us who have devoted our careers to juvenile law and who preside day after day, month after month, year after year in dependency court have valuable expertise about the reality of how dependency court laws and procedures actually effect our children. From our experience most dependency court judges do not feel that the appointment of counsel is necessary or even always beneficial to the child's interests in all cases. Every dependent child should be represented in dependency proceedings. The child's wishes should always be presented to the court by either the guardian ad litem or attorney however, the guardian ad litem or attorney must be free to express his or her own opinion as to the child's

needs. The most informed, effective and most efficient form of representation is through a guardian ad litem. It is tragic that every dependent child does not have a guardian ad litem . At the very least, the court should be afforded the flexibility and discretion, on a case by case basis, to determine whether it would be best for the child to be heard through a GAL, an attorney or both.[1]

Comment 2

Our experience indicates that the appointment of counsel is not always necessary or of benefit to the child. The attached transcript depicts an alarming instance where counsel's actions were in fact inimical to the child's well being. Unfortunately, the transcript does not reflect an isolated incident.[2]

The children under the jurisdiction of the dependency court have already been harmed by people they should have been able to trust. They are among the most vulnerable children in America[3] and they have extensive mental health needs. Many dependent children are seriously emotionally disturbed or even mentally ill. For instance, in California foster children make up 4% of the Medicaid population but use between 40 and 50% of the child mental health dollars.[4] Almost all of these children do not want to be in residential treatment health or out of home placements but wish to return to the familiarity of their homes, notwithstanding the abuse and neglect. We must be vigilant about protecting these children from further harm and should not create a well meaning but uninformed system based on ideology that will have unintended negative consequences for the children we are trying so hard to protect.

We would suggest that instead of requiring the mandatory appointment of counsel in all instances, such appointment should be required only if the Court determines that the child would benefit therefrom. As an alternate proposal the rule could read as follows: "In any case in which it appears to the court that the child would benefit from the appointment of counsel the court shall appoint counsel for the child." Such proposal would comport with the flexibility and informality characteristic of dependency proceedings.

Comment 3

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[1]Although the Legislature mandated a GAL for all children placed in residential health treatment programs, it did not mandate that an attorney be appointed. See generally §39.407(5)(a), Fla. Stat.

[2] Two of the three dependency judges in the 11th Judicial Circuit will no longer appoint the University of Miami Youth Law Clinic to represent dependent children.

[3] Dicker,S., Gordon, E., Knitzer,J., Improving the Odds for the Healthy Development of Young Children in Foster Care, National Center for Children in Poverty, 2001.

[4]Rosenfeld,A., Pilowsky, D., Fine,P., Thorpe,M., Fein,E., Simms,M., Halfon,N., Irwin,M., Alfaro,J., Saletsky,R., and Nickman,S. "Foster Care: An update", Journal of the American Academy of Child and Adolescent Psychiatry, April 1997.

The absence of a funding source for attorneys representing dependent children facing placement has serious ramifications. The State of Florida has never provided funding for guardians ad litem for every dependent child despite a statutory entitlement. Any attempt to enforce yet another unfunded mandate will lead to confusion, delay and unnecessary litigation. As Chief Justice Wells notes "to have rule-mandated counsel without a legislative commitment for funding serves only to create confusion. For this Court to offer a proposed rule with a requirement for such an appointment of counsel is to propose a rule which has a provision which cannot become effective and therefore proposes what the Court cannot deliver."

Comment 4

It is open to debate what kind of representation (guardian ad litem, attorney ad litem or some combination) a child should have in dependency court. The need for appointment of independent counsel for a child is unusual where there is a guardian ad litem representing the child's best interests and the guardian ad litem, in turn, is counseled by a program attorney. Every child needs a guardian ad litem, every child does not need an attorney. Guardians ad litem receive extensive training in dependency law and procedures and child development. Generally, guardians ad litem devote hours each month to visiting the child and meeting with the child's family members, caretakers, school teachers and others involved in the child's treatment. Lawyers usually cannot devote an equivalent amount of time nor do they have training in child development. The guardian ad litem is well qualified to inform the court about the child's needs and desires and protect the interest of our children. In fact, often the guardian ad litem has much more information about the child than the Department of Children and Families. At the very least, the dependency court should be granted the flexibility and discretion to determine what type of representation is in the child's best interests.

Comment 5

Although we do not doubt the commitment of the few attorneys who provide pro bono service in this important area, we fear there may <u>not</u> be a sufficient pool of attorneys with adequate training and experience to provide representation in every case. From past experience, it is doubtful there would be an adequate number of pro bono volunteers available to meet this need.

Comment 6

- We agree with Chief Justice Wells' conclusion that absent a statutory or constitutional right to counsel,[5] "the Florida Supreme Court can <u>not</u> mandate counsel by rule."

[5]In *M.W. v. Davis, supra*, the Court did not address the issue of whether an attorney or pre-commitment hearing is constitutionally required when a child is being committed to a (continued...)

Notwithstanding the majority's decision, we are convinced that incorporating in a court rule the mandatory appointment of counsel and a pre-commitment status hearing would be inconsistent with the statutory scheme set forth in §39.407(5), Fla. Stat.[6]

Comment 7

To the extent the Supreme Court's proposed rule mandates a pre-commitment status hearing it is contrary to the recommendations of the Juvenile Court Rules Committee and the procedure set forth by the legislature in §39.407(5), Fla. Stat. While administrative convenience is certainly no excuse for not protecting the interests of our children, requiring a pre-commitment status hearing in all cases adversely impacts upon the flexibility and discretion which is the hallmark of juvenile dependency proceedings.[7] A child in acute distress may need emergency residential treatment and could be seriously harmed by the delay in placement as a result of the necessity of a pre-commitment hearing.

Comment 8

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[5](...continued)
residential treatment center.

[6]Shortly after the Florida Supreme Court released its decision in *M.W. v. Davis*, 756 So.2d 90 (Fla. 2000) the Florida Legislature amended section 39.407, Florida Statutes (1999), entitled "Medical, a child who is under the legal custody of the Department in a residential treatment center. The law requires that prior to placement, the child must have a suitability assessment completed by a qualified evaluator (a psychiatrist or psychologist with at least 3 years of experience in diagnosing and treating children with serious emotional disturbances) verifying that a residential treatment setting is clinically appropriate for the child's mental health treatment needs and that available less restrictive treatment modalities have been considered. The bill requires that a guardian ad litem be appointed for all children placed in a residential treatment program. The department must provide a written report to the court having jurisdiction over the child at the beginning of each month that describes the child's progress towards achieving his or her individualized plan of treatment. The court must conduct a hearing to review the status of the child's treatment in the residential treatment program no later than 3 months after admission and every 90 days thereafter. Although the Legislature mandated a GAL for all children placed in residential health treatment programs, it did not mandate an attorney.

[7]The Florida Supreme Court has repeatedly detailed the increased burdens on the judiciary corresponding to the increases in statutorily mandated dependency hearings. 756 So.2d 108. Dependency courts are already "bursting at the seams, lacking the time and resources to accomplish the procedures that are already statutorily required." Reasonable work loads are essential to the proper functioning of dependency courts in performing the multiple important reviews and hearings required by them by law and necessary for the best interests of the children. *Id*.

The Supreme Court's proposed rule requires the child's presence at the pre-commitment status hearing. However, the court may exclude the child from this hearing if the court concludes that the child's mental or physical condition is such that a court appearance is not in the child's best interest. We recommend that the dependency court judge be given the flexibility to determine whether the child's presence is in the child's best interest. There is no empirical evidence to support the statement that dependent children always benefit from being present in court. In fact, it is often traumatic and intimidating for children, and especially severely emotionally disturbed or mentally ill children, to be required to appear in court.

Respectfully submitted on this the 10th day of January 2002.

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