IN THE SUPREME COURT OF FLORIDA

AMENDMENT TO THE RULES OF JUVENILE PROCEDURE
FLA. R. JUV. P. 8.350
_____/

Case No. SC 00-2044

AMENDED AMICUS BRIEF SUBMITTED BY PROFESSOR BRUCE J. WINICK, UNIVERSITY OF MIAMI SCHOOL OF LAW, PROFESSOR KATHY CERMINARA, NOVA SOUTHEASTERN UNIVERSITY SCHOOL OF LAW, JUDGE RONALD ALVAREZ, JUDGE D. BRUCE LEVY, JUDGE JOHN T. PARNHAM, JUDGE GINGER LERNER-WREN, and DR. EDWARD SCZECHOWICZ, Ph.D

I. Introduction

We are interested judges, law professors and a child psychologist working in the juvenile justice system who are committed to the approach of therapeutic jurisprudence, and submit this brief in aid of this Court's consideration of the Proposed Rule 8.350.

On October 25, 2001, this Court issued its decision in *In Re Amendment to the Rules of Juvenile Procedure, FLA. R. JUV. P. 8.350*, 26 Fla. L. Weekly S713 (Fla. 2001), and requested subsequent briefing concerning a number of subsidiary issues relating to how the Court's proposed rule would function and be implemented. This brief will address the feasibility and cost effectiveness of the proposed rule, underscore the therapeutic jurisprudence value of providing counsel at a pre-

commitment hearing, describe the role we believe counsel should and will provide at these hearings, describe the role that we think the judge should and will provide at these hearings, and respond to Justice Harding's inquiry about the disparate treatment accorded dependent children and all other children in this context.

Judge Ronald Alvarez is a Circuit Judge in the Family Division of the Palm Beach County Court. For a number of years, he served in the Juvenile Division, presiding over dependency proceedings. Judge Alvarez is a member of the Florida Bar Commission on the Legal Needs of Children.

Professor Kathy Cerminara is the Director of the Masters of Health Law Program at the Shepard Broad Law Center at Nova Southeastern University.

Judge D. Bruce Levy is a Circuit Court Judge in the Eleventh Judicial Circuit, where he has been a judge for over 20 years. He served as a judge in the Juvenile Division for 12 years, and for 4 years was the Administrative Judge of the Juvenile Division. For most of his 12 years in the Juvenile Division, he presided over dependency cases, including numerous cases involving the commitment of dependent children to residential treatment facilities. Judge Levy also formerly served on the Board of the National Council of Juvenile and Family Court Judges.

Judge John T. Parnham is a Circuit Court Judge in the 1st Judicial Circuit in the Pensacola

Family-Focused Parent Drug Court. He is the founder and current presiding judge in this unique program. In the Summer 2001 he co-authored an article on the subject of therapeutic jurisprudence in the University of Alabama Law Review.[1]

Dr. Edward Sczechowicz has a Ph.D. in clinical psychology, specializing in pediatric and child psychology. Currently, he is director of a private mental health practice and is regularly appointed by the judges of the Eleventh Judicial Circuit to evaluate dependent children. He has over 25 years of clinical practice specializing in forensic psychology, specifically in the area of abuse. He has lectured numerous times nationally and has been an expert witness in court 200 to 400 times. He has conducted over 3,500 forensic evaluations, and he has participated in the psychiatric hospitalization of over 150 children. Additionally, he has approximately 15 years experience working in residential treatment settings. Dr. Sczechowicz also serves as the child psychologist on the Florida Bar Commission on the Legal Needs of Children.

Professor Bruce J. Winick has been a professor of law at the University of Miami School of Law since 1974, and is 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.

---

[1] Janet Gilbert et al., *Applying Therapuetic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153 (2001).

Judge Ginger Lerner-Wren is a County Court Judge in Broward County. She is the Administrative Presiding Judge on Broward County's Mental Health Court. 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. She also formerly presided over dependency cases in the Juvenile Division of the 17th Judicial Circuit, including many cases involving dependent children committed to residential treatment facilities.

This brief is submitted in response to an invitation by the Court to comment on Proposed Florida Rule of Juvenile Procedure 8.350. [2]

[2] We are informed that some of the briefs that will be filed in this matter will attempt to have this Court revisit its essential holding that children in this context be afforded a right to counsel and a pre-commitment hearing. In the absence of allegations concerning points of law which this Court has overlooked or misapprehended, any such attempt would constitute an improper motion for reargument. FLA. R. APP. P. 9.330(a); *See also Jacobs v. Wainwright*, 450 So. 2d 200 (Fla. 1984)("A motion for rehearing shall not reargue the merits of the court's order.").

II. Providing attorneys for children facing civil commitment in a mental health facility is feasible and economically viable.

Although there may be a concern about the cost associated with mandating legal counsel for every dependent child facing involuntary civil commitment, these costs will be more than offset by the savings to the state that will be achieved by the reduction in hospitalization produced by the rule's procedural justice. The price of a stay in a residential treatment facility can cost as much as $400 per diem.[3] Thus, one month of residential treatment could cost as much as $12,000. Even saving two to three days of hospitalization brought about by the procedural justice benefits of providing children hearings with counsel will save the state roughly $800 to $1200. Therefore, against the cost of providing counsel must be weighed the therapeutic value of the hearing and the cost savings it will effectuate.

In this Court's decision of October 25, 2001, this Court explicitly recognized the therapeutic value of providing representation by counsel. As this Court noted:

> According to Judge Wren and Professor Winick, the dependent child's perception as to whether he or she is being listened to and whether his or her opinion is respected and counted is integral to the child's behavioral and psychological progress. Their comment also explains that feelings of voluntariness rather than coercion in children facing placement tend to

[3] Shana Gruskin, *State Seeks to Move Disturbed Children*, Ft. Lauderdale Sun-Sentinel, Jan. 19, 2002, at pg. 1B, *also available at* www.sun-sentinel.com/news/local/broward.

> produce more effective behavior. Thus, Judge Wren and Professor Winick contend that '[e]ven 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.' As such, a child who feels that he or she has been treated fairly in the course of the commitment proceedings will likely be more willing to accept hospitalization and treatment.

In re Amendment to the Rules of Juvenile Procedure, FLA. R. JUV. P. 8.350, 26 Fla. L. Weekly, S713, S714 (Fla. 2001).

This Court thus recognized that children who perceive themselves to have been treated fairly and with dignity and respect at the hearing will achieve better therapeutic responses to hospitalization and treatment than will children who are denied these procedural benefits. This conclusion has recently received empirical verification in the context of a study of adult patients subjected to civil commitment who received the benefits of procedural justice. Dr. Norman Poythress, a preeminent psychologist, who is on the faculty of the University of South Florida, and his colleagues, concluded as a result of their study that:

> Clinical outcomes might be positively affected by procedural justice enhancements to commitment hearings. A wide range of immediate, short-term, and long-term outcomes could potentially be affected … In addition, persons who perceive their commitment hearings as being fair may leave with enhanced feelings of self-worth and self-respect. These immediate outcomes may lend themselves to other possible short-term effects during the period of involuntary hospitalization. For example, there may be marked improvement in the patient's involvement in the therapeutic milieu as measured by participation in unit

> activities, compliance with medication, and reduction in the disruptive behaviors prompting the use of highly intrusive behavior controls such as restraint or seclusion. Long-term effects could include compliance with after-care treatment plans, and more positive involvement in the community, such as based overlay services, attaining and maintaining employment post-discharge, and reduction in recommitment or subsequent in-patient hospitalization.[4]

According children the right to counsel and the other benefits of procedural justice therefore predictably will reduce their hospital stay, increase the likelihood of a positive post-hospital community response, and reduce the likelihood of re-hospitalization. In accordance with the therapeutic value of providing children due process, both the American Psychological Association and the American Psychiatric Association have drafted model legal procedures for children who face commitment to residential treatment facilities, and both APA proposed procedures are very similar to Florida's Baker Act.[5]

---

[4] Michele Cascardi, Ph.D. et al, *Procedural Justice in the Context of Civil Commitment: An Analogue Study*, 18 BEHAVIORAL SCIENCES AND THE LAW 731, 739 (2000). See also J. Susman, *Resolving Hospital Conflicts: A Study on Therapeutic Jurisprudence* 23 JOURNAL OF PSYCHIATRY AND LAW 107 (1994), for a study considering the effects of procedural justice on people with mental disorders who were being subject to involuntary commitment in mental health facilities. Susman reported that patients who were listened to and given serious consideration were more likely to feel that the procedure was fair than were those who felt that they had not been listened to or taken seriously (77.7% versus 20%). The ratings of outcome fairness were also consistent with this point of view. The empirical study showed that patients accorded procedural justice experienced a heightened sense of fairness in the proceeding and an increased willingness to accept the outcome. 78.9% of patients who thought the procedure was fair also rated the outcome as fair.

[5] *See* American Psychological Association, *A Model Act for the Mental Health Treatment of Minors*, in App. A in GARY B. MELTON et al., NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS, (University of Nebraska Press 1998); American Psychiatric Association Official Action, *Guidelines for the Psychiatric Hospitalization of Minors*, 139 AM. J. PSYCHIATRY 7 (1982).

While it is impossible to put a price tag on the emotional well-being that these children will experience as a result of the due process mandated by this Court's rule, it is possible to assess the financial savings to the state of reduced hospitalization. Many days or even weeks of reduced hospitalization will be avoided for each child as a result of these procedures. Even if the savings is two to three such days ($800 – $1200) it will more than offset the added cost of providing counsel to each child.

How much will the cost of counsel amount to per child? A reasonable figure would be $750, as this is the amount paid in Miami-Dade County to a private attorney who represents a parent in a dependency matter. *See Administrative Order of the Eleventh Judicial Circuit 94-27 and Official Billing Manual.* Given that costs generally run higher in Miami-Dade County than in the state generally, this $750.00 amount may well be less in other counties.

How many lawyers will be needed and how will they be recruited to represent children in this context? At oral argument, on March 8, 2001, counsel for the Department of Children & Families (DCF), speaking on behalf of the majority of the Juvenile Court Rules Committee, informed this Court that there were approximately 1,200 children in residential treatment facilities throughout the State of Florida. However, more recent information provided on behalf of DCF has indicated that

approximately 256 dependent children were in residential treatment facilities state-wide as of June 30, 2001.[6] Given this small number of children, the provision of counsel for each of them should not be difficult.

This point is more fully developed in the brief of the Florida Bar Commission on the Legal Needs of Children, which also includes the Commission's recommendation that every child facing commitment to a residential treatment facility shall be provided with an attorney. This recommendation should be adopted in the rule.

A rule with mandatory appointment of counsel for each child is entirely feasible, as well as cost-effective, and ultimately most beneficial for the child. There is a sufficient pool of resources already in place within the State of Florida to provide attorneys for each child. Attorneys working on a pro bono basis, court appointed attorneys, public defenders, and Florida law school clinics will be able to adequately meet this demand.[7]

Adopting a rule with mandatory appointment of counsel for each child would not unduly burden the State's resources, but rather would benefit both the child and the

---

[6] Data supplied by DCF on November 27, 2001, by John Slye, Chief Legal Counsel, to attorney Karen Gievers, in response to her public records request of October 26, 2001.

[7] *Id*. Law school clinics include: University of Miami School of Law Children & Youth Law Clinic (approximately 20 students), Florida State School of Law Children's Advocacy Center (approximately 30 students), the University of Florida Gator Team Child Project (approximately 18 students), Barry University School of Law Attorney Ad Litem Project (approximately 10 students), and Nova Southeastern Clinics (approximately 19 students).

State.

III. The concern that attorneys will subvert the process by making it too adversarial is unfounded.

It is our understanding that one or more briefs will express concern that the use of lawyers will merely subvert the process and make it too adversarial. This conclusion is unfounded. In this context, the lawyer plays a therapeutic role as counsel as well as a legal one.[8] The lawyer may, when the lawyer believes that commitment is imminent or appropriate, recommend to the client that commitment is the best choice.

> A lawyer who has met previously with the child and established the child's trust and confidence may be in a unique position to explain to the child why hospitalization is appropriate in the circumstances, and to point out its benefits and its perhaps likely inevitability. This is not unlike the role played by criminal defense attorneys in plea bargaining. Some children, following such consultation, may well accept voluntary admission to the mental hospital, thereby waiving their right to a hearing and saving the state the cost of providing one. Such a voluntary admission can be more beneficial to the juvenile than an involuntary commitment, can increase the therapeutic value of hospitalization, and can be less stigmatizing.[9]

---

[8] Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 54 (1999).

[9] *See* Bruce J Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zinermon v. Burch*, 14 INT'L J. L. & PSYCHIATRY 169 (1991).

> The attorney can then negotiate and mediate the terms of the voluntary commitment, including the patient's treatment plan.[10] This role for the attorney can be described as "mediational."[11]

Additionally, the lawyer has a very important role in counseling the child throughout the legal process. The *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Abuse & Neglect Standards)* state that a child's attorney should "[c]ounsel the child concerning the subject matter of litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process[.]"[12] The *Abuse & Neglect Standards s*upport the proposition that by counseling the child and protecting the child's legal interests, a lawyer promotes the child's welfare.

It is inappropriate to conclude that lawyers will take their role to be to subvert these proceedings by making them hyper-adversarial. Lawyers representing mentally ill clients, particularly children, have and should have, a special sensitivity to the therapeutic needs of their clients.[13] To help train lawyers in this area, three of us (Professor Winick, Judge Lerner-Wren, and Dr. Sczechowicz) will conduct a

---

[10] *See also* AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (ABUSE AND NEGLECT STANDARDS), Part I, C-6 ("The child's attorney should participate in settlement negotiations to seek expeditious resolution of the case, keeping in mind the effect of continuances and delays on the child").

[11] *See* Winick, *supra* note 8, at 55.

[12] ABUSE AND NEGLECT STANDARDS, Part I, B-1(5).

[13] *See generally* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al., eds., 2000).

training program for lawyers who will work on these cases at the Florida Bar Annual Meeting in Boca Raton on June 21, 2002. At this training session, we will stress the role of therapeutic jurisprudence and how lawyers representing children in this context can play an important therapeutic role in helping their clients to understand the need for hospitalization when appropriate and in promoting both their clients' therapeutic and legal interests when the clients contest commitment.[14] We submit that the concern that introducing lawyers into this process will subvert its principle purpose—to promote the child's welfare—is unfounded. Moreover, we strongly believe that each lawyer can be properly trained to represent dependent children in these proceedings.

IV. The presence of the children at the hearings is imperative as the child's absence will deprive the child of the hearings' therapeutic value.

This Court should clarify the scope of the rule's exception under which children need not be present at the hearings in certain instances. This Court stated, "[a]s with all other hearings, 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

[14] If the court orders commitment, the child's attorney "should discuss the order and its consequences with the child." ABUSE AND NEGLECT STANDARDS, Part I, E-2.

is not in the child's best interest."[15] This Court should clarify that this exception is a narrow one. As the University of Miami Children & Youth Law Clinic proposes in its comments to the Court, this exception should apply only when record evidence supports the conclusion that the child's presence would be detrimental to the child. Any wider exception to the presence of the child would deprive the child of the therapeutic value of the hearing that served as an important underpinning for this Court's prior decision. Moreover, we support the Clinic's position that, when this exception to presence applies, the child should have the opportunity to speak directly to the court. The therapeutic jurisprudence considerations that strongly support the therapeutic value of providing procedural justice in this context would be lost if the child did not have the opportunity to achieve the human need for providing "voice" to the only official who really mattered—the judge deciding the child's initial commitment and continuing commitment.

V. The therapeutic and educative role of the judge

What should be the role of the judge at these proceedings? Aside from adjudicating the issue of hospital admission and continuing placement, the judge should be sensitive to the fact that how he or she acts in conducting the proceedings

---

[15] *In Re Amendment to the Rules of Juvenile Procedure, FLA. R. JUV. P. 8.350*, 26 Fla. L. Weekly S713 (Fla. 2001).

can have an important therapeutic impact on the child. To aid the judiciary, the authors of this brief would be willing to offer a training session to the Florida Conference of Circuit Judges-Juvenile Section concerning their role as therapeutic agents in this context.

Although a hearing concerning civil commitment could be a stressful event for a child who is not knowledgeable about the purpose of the hearing and the function of mental hospitalization, it need not be, and will not be, if conducted properly. The judge can be an important vehicle for providing the child with information control concerning the proceedings and the hospitalization process. The social cognition literature places emphasis on "information control," the perception of control that results when an individual obtains information relating to a stressful situation or event.[16] An important function of the hearing can and should be seen as educating the child concerning the reasons why the hearing is being held, the purposes of hospitalization, the views of the expert witnesses concerning the child's condition and needs, the fact that the entire process is done in order to effectuate the child's best interests and, if the judge orders commitment, that the judge believes treatment will be beneficial to the child.[17] Through the judge's conveyance of this information, the child would be more

---

[16] *See* Winick, *supra* note 8, at 46 *citing* Susan T. Fiske & Shelley E. Taylor, SOCIAL COGNITION 122 (1984).
[17] *Id*. at 58.

likely to accept the commitment determination and the judge would "create expectancies of positive treatment."[18]

By the judge providing the child with this information prior to the child's commitment, the assurances it will bring can significantly reduce the stress and anxiety that the child otherwise might face if the child had not been afforded a court hearing prior to hospitalization. Moreover, it can increase the child's acceptance of the commitment determination, create expectancies of positive treatment results that can themselves help bring about acceptance, and can facilitate a successful response to whatever hospitalization and treatment the court orders.

In addition to "information control" judges "play an important symbolic role."[19] The judge's actions should affirm the child's dignity and humanity.[20] This may be accomplished if the judge listens to the child and conveys to the child the sense that what he or she says "is important and will be given full consideration."[21] In addition, the child "should be told that although he or she suffers from a mental illness, such illness is very likely to respond to hospital treatment within a reasonably

[18] *Id*. at 47.
[19] *Id*. at 57.
[20] *Id*. at 58.
[21] *Id*. at 59.

brief period," but this information must be presented within the child's level of education and understanding, avoiding professional jargon.[22]

Dr. Anne Graffam Walker, in her important book, *Handbook on Questioning Children*, reinforces and expands the point, explaining that the judges must adapt their traditional court procedures to cater to the needs of the children that come before the court. "The children who come into our courts cannot function adequately without our willingness to speak their language. The responsibility for clear communication has to be ours."[23]

Moreover, it is important that the child be allowed to speak directly to the judge, so that the child will know that the judge is truly listening to him or her. The usual strictures of evidentiary rules should be relaxed in this context in order to facilitate the child's sense of "voice" and "validation." Additionally, there are some simple points that would make the experience of the child in the courtroom more positive. For example, judges should make an attempt to familiarize themselves with the correct

---

[22] *Id*.

[23] ANNE GRAFFAM WALKER, Ph.D., HANDBOOK ON QUESTIONING CHILDREN, 7 (ABA Center on Children and the Law 1999). Dr. Graffam Walker suggests some guidelines that judges may follow. For example, when framing the event, the judge may ask: (1) Did I tell the child my name and what my job is-in non-technical terms? (2) Did I help the child become familiar with the surroundings of the interview? (3) Did I tell he child the purpose of our talk, and why it is important, and what will happen afterward? (4) Did I give the child a chance to ask me questions about this talk? Did I try to establish a common vocabulary for the things we talked about? Was I listening to the kind of words and sentences that the child used? *Id*. at 87.

pronunciation of the child's name.[24] From the child's perspective this adds a sense of dignity to the proceeding. In addition, the judge should speak slowly and clearly so as to minimize the child's confusion. This is especially important given the fact that when "[f]aced with someone in authority, particularly someone who acts as if the listener ought to understand, even adults will let a misunderstanding pass by."[25] Moreover, of importance in this regard is that these children are alleged to be mentally ill. Special care in recognizing how this may inhibit their understanding of verbal communications is important.

In every case, the judge should make every attempt to ensure that children understand what is transpiring, and this can only occur if the judge is speaking directly to the child. This is important not just at the pre-commitment hearing, but also at the continuing review hearings. Judges, as well as lawyers, if conscious of their therapeutic role in this context, can do much to achieve the therapeutic value of the hearings and increase the therapeutic efficacy of any hospitalization deemed appropriate.

VI. All children facing civil commitment should receive a right to counsel

---

[24] Carrie Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, CRIMINAL LAW JOURNAL (forthcoming March 2002)(manuscript at 33, on file with author).

[25] WALKER, *supra* note 23, at 15.

This Court limited the opportunity to be represented by counsel to cases in which DCF or the guardian ad litem advised the Court that the child was not in agreement with hospitalization. We submit that the therapeutic value of counsel would be lost for children who did not assert their right to consult with counsel on this issue because of their lack of understanding of their rights or the pressure that they might feel to waive them. There is a therapeutic value in having the child consult with counsel even in (and perhaps especially in) cases in which the child agrees to accept hospitalization. Consultation with counsel will enable the child to feel that such a decision is a voluntary one, a feeling that will engage the therapeutic value of choice that this Court recognized could apply in this context. Moreover, it will hope to avoid the anti-therapeutic effects that a feeling of coercion can produce.[26]

As this Court has stated: "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 or because they are too

[26] Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DEN. L. REV. 1145, 1159 (1997), *citing* Andrea K. Blanch & Jacqueline Parrish, Reports of Three Roundtable Discussions on Involuntary Interventions, 1 Psychiatric Rehabilitation and Community Support Monograph 1 (1993); Diamond, *supra* note 11, at 61; see also Donald Meichnebaum& Dennis C. Turk, Facilitating Treatment Adherence: A Practitioner's Guide-Book 20, 76-79 (1987); Hiday et al., *supra* note 8, at 236.

intimidated by the seeming complexity to try."[27] Without counsel, a child may acquiesce to commitment, even if the child does not want to be committed, simply because the child believes that he or she has no chance of contesting commitment, as he or she has no lawyer, while everyone else in the proceeding is represented by legal counsel.[28] Therefore, given that a smaller number of children are affected than previously thought,[29] we firmly believe that all dependent children who face commitment to a residential treatment facility, and who face continued commitment, should have "the guiding hand of counsel at every step in the proceedings".[30]

VII. Response to the Concurrence of Justice Harding's inquiry.

In his concurrence in *In Re Amendment to the Rules of Juvenile Procedure, FLA. R. JUV. P. 8.350*, Fla. L. Weekly S713 (Fla. 2001), Justice Harding expressed concern "that dependent children who are involuntarily placed in treatment facilities under section 39.407(5) are given less protection than a child civilly committed under

---

[27] *In Re T.W.*, 551 So. 2d 1189, 1196 (Fla. 1989). See also *In Re T.W.*, 543 So. 2d 837 (Fla. 5th DCA 1989)(stating that the requirement that the court appoint counsel for a minor if she did not have private counsel "ensured that the proceedings would be conducted fairly … [and] that the interests of the minor would be fully protected, that appropriate legal challenges to the procedure be made and that the issues for appeal would be properly preserved).

[28] Should this Court decline to mandate appointment of counsel in all such cases, at a minimum the rule should mandate that the trial judge inform every child that he or she has a right to the appointment of an attorney prior to the child waiving the pre-commitment hearing, and that the attorney will help the child if the child wishes a hearing to contest commitment. The rule should further mandate that the trial judge inform every child at each continuing review hearing that the child will be appointed an attorney if the child wishes to contest continued commitment. However, this colloquy should be unnecessary, as we firmly believe that every child facing commitment should be appointed an attorney.

[29] *See supra* note 6.

[30] *Application of Gault*, 87 S.Ct. 1428, 1448 (1967)(quoting *Powell v. State of Alabama*, 287 U.S. 45, 69 (1932)).

the Baker Act."[31] Justice Harding is correct about this, and this is a particular concern when comparing the cases of two groups of children who are both committed by the State—dependent children and delinquent children.

> Unlike in dependency proceedings, children in delinquency proceedings are provided a lawyer and a hearing prior to being committed to a mental health facility. If dependent children are not provided a lawyer and a pre-commitment hearing, the message this sends dependent children is that they have fewer legal rights and are worth less than children similarly situated in the delinquency system. These children are left with the immediate perception that the state is arbitrary in its treatment of them. Such disparity in treatment gives the perception that these dependent children are "worse" than children in delinquency proceedings in that they do not even deserve a lawyer and a hearing before they are committed to a facility. Their sense of dignity is diminished, as their first impression of the system is one of bad faith. This severely impedes the possible therapeutic benefits that a hearing may provide. Therefore, at a minimum, it is important that dependent children

[31] *In Re Amendment to the Rules of Juvenile Procedure, FLA. R. JUV. P. 8.350*, 26 Fla. L. Weekly S713 (Fla. 2001).

who face commitment to residential treatment facilities be afforded similar procedures as delinquent children who face commitment to residential treatment facilities.

VIII . Conclusion

Providing attorneys for dependent children facing civil commitment in a mental health facility is feasible and economically viable. Given the small number of dependent children in residential treatment centers and the available pool of attorneys to represent these dependent children, mandating counsel for these children will not present an undue financial burden. Therefore, the rule should require that counsel be provided to each dependent child who faces commitment to a residential treatment facility and who faces continued commitment to the facility.

The concern that attorneys will subvert the process by making it too adversarial is unfounded. In addition to representing the legal interests of the child, the attorneys, when appropriate, will negotiate and mediate the terms of voluntary commitment for the child. The attorney will also play an important therapeutic role in helping their client to understand the need for hospitalization.

The presence of the children at the hearings is imperative, as the child's absence will deprive the child of the therapeutic value of the hearing. If the court finds, based

on record evidence, that the child's presence in court would be detrimental to the child and the court rules that the child should not be present, then the child should be provided an opportunity to speak directly to the judge.

The judge in these proceedings has an important therapeutic and educative role. The judge should provide the child with information control concerning the proceedings and the hospitalization process. An important function of the hearings can and should be seen as educating the child concerning the reasons why the hearing is being held, the purposes of hospitalization, the views of the expert witnesses concerning the child's condition and needs, the fact that the entire process is done in order to effectuate the child's best interests and, if the judge orders commitment, that the judge believes treatment will be beneficial to the child. This will increase the child's acceptance of the commitment determinations, create expectancies of positive treatment results that can themselves help bring about acceptance, and can facilitate a successful response to whatever hospitalization the court orders at the initial hearing and at the continuing reviews.

Respectfully submitted,

Judge Ronald Alvarez
Palm Beach County Courthouse
205 N. Dixie Hwy
West Palm Beach 33401

Prof. Kathy Cerminara
Nova Southeastern University
Shepard Broad Law Center
3305 College Avenue
Ft. Lauderdale, FL 33314

Judge D. Bruce Levy
73 W. Flagler St. Suite 308
Miami, Fl. 33130

Judge John T. Parnham
190 Governmental Center
Pensacola, Fl 32501

Dr. Edward Sczechowicz, Ph.D.

1570 Madruga Avenue, Suite 309
Coral Gables, Fl 33143

Judge Ginger Lerner-Wren
Broward County Courthouse
609 S.W. 1st Avenue, Room 429
Ft. Lauderdale, Fl 33301

By: _____
Bruce J. Winick, Professor of Law[32]
University of Miami School of Law
P.O. Box 248087
Coral Gables, Fl 33146
Phone: (305) 284-3031
Fax: (305) 284-6619

[32] Prof. Winick and the other authors of this amicus brief gratefully acknowledge the assistance of law students Joshua Poyer and Sara Duda, students at the University of Miami School of Law, in the preparation of this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent this 14th day of February 2002, to the following:

Kathleen A. Kearney, Esq., Secretary, Department of Children and Family Services, 1317 Winewood Blvd., Tallahassee, FL 32399-6570

Joel M. Silvershein, Esq., Chair, Juvenile Court Rules Committee, Office of the State Attorney, 201 S.E. 6th Street, Ste. 600, Ft. Lauderdale, FL 33301-3304

Hon. Daniel P. Dawson, Osceola County Courthouse, 2 Courthouse Square, Kissimmee, FL 34741-5487

Hon. Sandy Karlan, Chair, Florida Bar Commission on the Legal Needs of Children, Dade County Circuit Court, Family Division, 175 N.W. 1st Avenue, Suite 2327, Miami, FL 33128-1846

John F. Harkness, Jr., Esq., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300

Ward Lee Metzger, Esq., Office of Public Defender, 25 North Market Street, Ste. 200, Jacksonville, FL 32202-2802

Karen A. Gievers, Esq., Children's Advocacy Foundation, 524 East College Avenue, Ste. 2, Tallahassee, FL 32301-22529

Sarah H. Bohr, Esq., Bohr & Harrington, LLC, 2337 Seminole Road, Atlantic Beach, FL 32233-5988

Deborah A. Schroth, Esq., Florida Legal Services, Inc., 126 West Adams Street, Suite 502, Jacksonville, FL 32202-3849

Hon. Howard Babb, Jr., Office of the Public Defender, 550 West Main Street, Ste. 401, Tavares, FL 32778-3115.

Christina A. Zawisza, Esq., Children First Project, Nova Southeastern University, Shepard Broad Law Center, 3305 College Avenue, Ft. Lauderdale, FL 33314

Carolyn Salisbury, Esq. and Bernie Perlmutter, Esq., University of Miami School of Law Children & Youth Law Clinic, 1311 Miller Drive, Suite F305, Coral Gables, Fl. 33146

Prof. Gerard Glynn, Barry University School of Law, 6441 East Colonial Drive, Orlando, FL 32807

Ira A. Burnim, Esq., Bazelon Center for Mental Health Law, 1101 15th Street N.W., Suite 1212, Washington, D.C. 20005

Brent R. Taylor, Esq., Advocacy Center for Persons With Disabilities, 706 East College Avenue, Tallahassee, FL 32301-2912

Teresa Kramer, Esq., Dept. of Children & Families, 1317 Winewood Blvd., Suite 204, Tallahassee, FL 32399-6570

Hon. Cindy Lederman, Juvenile Court, 3300 N.W. 27th Avenue, Miami, FL 33142

Hon. Jeri Beth Cohen, Juvenile Court, 3300 N.W. 27th Avenue, Miami, FL 33142

Hon. Lester Langer, Juvenile Court, 3300 N.W. 27th Avenue, Miami, FL 33142

_____

BRUCE J. WINICK