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**IN THE SUPREME COURT OF FLORIDA**

**IN RE AMENDMENTS TO
THE RULES OF JUVENILE PROCEDURE
Fla.R.Juv.P. 8.350** **Case No. SC-00-2044**

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# COMMENTS ON PROPOSED RULE 8.350 GOVERNING THE PLACEMENT OF A CHILD INTO A RESIDENTIAL TREATMENT CENTER AFTER AN ADJUDICATION OF DEPENDENCY

Attached are comments of the Bazelon Center for Mental Health Law and Professor Susan Stefan on the proposed amendments to the Rules of Juvenile Procedure setting forth the procedures required to protect the rights of juveniles in the foster care system who are subject to commitment to residential facilities.

The Bazelon Center for Mental Health Law (formerly known as the Mental Health Law Project) is a national non-profit advocacy organization that has advocated for the rights of children in foster care and in the public mental health system for over twenty-five years. The Bazelon Center is known for groundbreaking litigation in the area of foster care and children's rights.

Professor Susan Stefan, a professor at the University of Miami School of

Law, has written extensively in the field of mental health law, and has served as an expert witness in a number of cases involving mental health law. She teaches Civil Procedure, Disability Rights, and Mental Health Law at the University of Miami, and is most recently the author of *Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act* (American Psychological Association Press 2000).

**Summary**

The proposed rule responds to this Court's mandate that "the procedures that the dependency court must follow before residential treatment is ordered should be clearly set forth for the guidance of dependency court judges, the Department, and the parties to the dependency proceeding." *M.W. v. Davis, 750* So.2d 90, 106 (Fla. 2000).

The Juvenile Court Rules Committee was directed to develop a rule which accomplished two goals: 1) guidance and clarity for the parties to the dependency proceeding, and **2)** protection for the rights and dignity of the child committed against his or her will to a residential facility by the Department of Children and Families.

The proposed rule serves neither of these purposes well. It insufficiently clarifies the roles and duties of the Department **of** Children and Families, the court,

the guardian ad litem, and other parties in the placement process. The proposed rule also conflicts with existing state law and the Court's own order, contemplates unnecessary, harmful, and possibly unconstitutional delays, and gives short shrift to the considerations of justice and dignity that troubled the court in ***M.W.***

## The Proposed Rule Conflicts with State Law and with the Court's Own Order

### A. Timing of Court Notification and Guardian Ad Litem Appointment

This Court made very clear the topics that it expected the proposed rule to address: "neither Chapter 39 nor our own procedural rules adequately address whether an attorney for the child should be appointed before a commitment to a residential facility takes place, what type of hearing is required, what standard of proof should apply and whether the child should have the right to put on evidence ***before the court orders a*** *placement* in a residential psychiatric facility." ***M.W.,*** **756** So.2d 90, 106.

The court noted that research has shown that "children obtain psychological benefit from procedural protections ***prior*** to being placed in psychiatric treatment facilities," and recognized "the need for procedural safeguards ***prior*** to placing a dependent child in a residential psychiatric treatment facility, which may constitute a temporary or prolonged loss of liberty." *Id.* at 107.

Directly contrary to the Court's direction to develop "procedures that the

dependency court must follow ***before*** residential treatment is ordered," *756* So.2d 90, 106 (Ha. 2000), the proposed rule contemplates that residential treatment may take place for over a month before any court order addresses its propriety. The placement hearing may take place as late as 14 days after the guardian ad litem's report, which itself is due 14 days after placement. Rule 8.350(a)(3); Rule 8.350(b)(2).

Although the proposed rule is silent as to whether these time periods include weekends and holidays, Rules of Juvenile Procedure 8.240(a)(2000) suggest that Saturdays, Sundays and holidays shall **be** excluded from the computation of time. Thus, the proposed rule contemplates between 5 and 5 1/2 weeks would pass in a locked psychiatric facility before the child would receive the "meaningful opportunity to be heard" ordered by the court.

In permitting the court to be notified for the first time of a child's placement in a locked psychiatric facility 72 hours after the placement is a fait accompli, the proposed rule runs contrary not only to the requirements of *M.W.* but also to the requirements of Fla.Stat. §39.407(5)(b) and (c). The statute requires that before placement can be accomplished, a "qualified evaluator" from the Agency for Health Care Administration must examine the child and prepare **a** written report, which "must be provided to the guardian ad litem" who "shall have the opportunity to

discuss the findings with the evaluator." Under the statute, this takes place *"before* a child is admitted." (emphasis added).

However, the proposed Rule acknowledges that in some situations a child subject to these proceedings may not have a guardian ad litem, and requires the court to appoint a guardian ad litem ***after*** placement, Proposed Rule 8.350(a)(3)("If a guardian ad litem is not currently appointed in the case..."). The Rule must be modified to ensure that the child has a guardian ad litem prior to placement. In order for the court to appoint a guardian ad litem, it too must be notified that **a** placement **is** imminent,

The Rule should be modified to conform to the Court's direction in *M.W.* and to the statutory language. Thus, the Department should notify the court *before* the proposed placement, preferably at the time that it engages the services of the qualified evaluator, so that a guardian ad litem can be appointed for the child.

When a qualified evaluator is appointed, the child will probably be keenly aware that the process of commitment is swinging into motion. The only person charged with explaining the process to the child is the very "qualified evaluator" on whom the decision to commit or not to commit will rest. Under the proposed rule the child will have neither guardian ad litem nor attorney to consult with or explain the process to him or her until well after the residential facility placement is

complete. This is anti-therapeutic, unnecessary, and unjust. We propose that the court be notified when the qualified evaluator is retained, and appoint a guardian ad litem for the child. The guardian ad litem can determine the preferences of the child at that point, discuss the situation with the qualified evaluator as contemplated by Florida statute, and possibly visit the proposed placement.

> **Recommendation:** We recommend that the court be notified of the pendency of residential placement at the time the Qualified
> Evaluator is retained, and that the court appoint a guardian ad litem for the juvenile at that time.

Thus, Paragraphs **2** and 3 of the Rule would **read**

> The court and all parties shall be notified of a proposed placement at the time that the Department retains a qualified evaluator to evaluate the child. If a guardian ad litem is not currently appointed in the case, the court shall immediately appoint a guardian ad litem for the child. The guardian ad litem shall, pursuant to Fla.Stat. §39.407(5)(c), discuss the findings of the qualified evaluator with the qualified evaluator. At the same time, the guardian ad litem shall ensure that the child understands the process, and will discuss with the child his or her preferences regarding residential placement and visit, if possible, the proposed placement.

## B. Preferences of Child to be Taken into Consideration

This Court commendably did in *M.W.* what courts so rarely do: it tried to understand the perspective of the individual most affected by its ruling, M.W. himself.' "Indeed, the issue presented by this case extends beyond the legal question

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[1] Martha Minow, **Making** All the Difference: Inclusion. **Exclusion and** American **Law** (Cornell **University** Press 1990)(praising Justice Stevens' concurrence in *City of Cleburne v. Cleburne* for

of what process is due; rather, this case also presents the question of whether a child believes that he or she is being listened to and that his or her opinion is respected and counts." *M.W.*, 756 So.2d at 107. It is no exaggeration to say that the proposed rule *makes* a mockery of this concern. The proposed rule requires that the child's preferences be discerned and reported to the court, Proposed Rule 8.350(3) and (6), but the child's preferences play absolutely no part in the factors to be considered by the court in determining whether to uphold or reject the placement, see Proposed Rule 8.350(b)(4)(A). It is hard to imagine a course of action more likely to lead to frustration and bitterness than to repeatedly **ask** the child what his or her preferences are and then have the articulation of those preferences be legally and practically meaningless. This is contrary to the letter and the spirit of the court's ruling in *M.W.*

> **Recommendation:** We recommend that the list of factors governing the court's decision on the "suitability" of the placement (see below for critique of "suitability" as a placement standard) include "the child's preferences."
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> Thus, proposed rule 8.350(b)(4)(A) would begin:
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> "(i) the child's stated preferences."
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> Other factors would be renumbered accordingly.

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the rare **act of** "considering the perspective **of** mentally retarded citizens denied the opportunity to live **in** Cleburne.")

## III. The Proposed Rule is Substantively Insufficient to Protect the Procedural Due Process Concerns Identified by the Court in *M.W.*

### A. The Child Should Receive the Placement Hearing Prior to the Placement, or Within Five Days at the Most

As noted above, the proposed rule contemplates that a total of 5 to 5 1/2 weeks could pass before a child received a placement review hearing. Civil commitment hearings under Florida statute take place within five days, §394.467(6)(a)(1), after an initial detention of no more than 72 hours. A child charged in a delinquency proceeding is entitled to proceedings in a similarly brief time span: a child charged with being delinquent cannot be held in detention without a hearing to determine probable cause, and the judge may not continue the detention for more than 72 hours--with a possible 24 hour extension--without a finding of probable cause. Juvenile Procedure Rules 8.010, 8.013 (2000). The child is entitled to arraignment within 48 hours of the petition, Juvenile Procedure Rules 8.015 (2000).

As this court remarked in *M.W. v. Davis*, "our holding in this case is limited to answering the certified question and should not be construed as precedent for allowing a several week delay in holding an evidentiary hearing regarding the placement of a dependent child into a residential mental health treatment facility." 726 So.2d at 109. The proposed rule would regularize delays of up to five and a half

weeks, and is unacceptable for that reason.

There is no reason to distinguish between the procedural due process rights of children and adults in the right to a prompt hearing. If anything, the research suggests that children need a prompt hearing more than adults.

This court made clear in *M.W.* that if the Department wishes to commit an unwilling child to a locked psychiatric facility, it may not do so without judicial review and a hearing where the child has a meaningful opportunity to be heard. States that provide children with such hearings either require a hearing prior to placement or permit the child to be held in the facility between 12 hours and 15 days prior to a judicial hearing, see Dennis E. Cichon, "Developing a Mental Health Code for Minors," 13 *Thomas Cooley Law Review 529,* 562-65 (1996). No state that provides a judicial hearing comes close to Florida's proposed five week hold, *id.* New Jersey's procedures, referred to by this court in *M.W.*, requires that the order placing the child in an institution "shall fix a date certain for the commitment hearing within 14 days after the initial inpatient admission to the facility, which date shall not be subject to adjournment except that in exceptional circumstances and for good cause shown in open court and on the record, the hearing may be adjourned for a period of not more than seven days." New Jersey Rules of Court, 4:74-7A(b)(2). The Model Act for the Mental Health Treatment of Minors authored by national

experts Drs. *Gary* Melton, Phillip M. Lyons and Willis J. Spaulding provides for a hearing "no sooner than 24 hours and no later than 72 hours after the petition is filed." Sec. 108 of the Model Act for Treatment of Minors, in *Gary* Melton, Philip Lyons and Willis Spaulding, No Place to Go: The Civil Commitment of Minors (University of Nebraska Press 1998) at p. 171.

> **Recommendation:** We recommend that the placement review hearing be held within 5 working days of the court's notification of placement and appointment of an attorney for the child (see below); i.e., we propose replacing the current provision for a "status conference" with a provision for the placement hearing.

**B. The Rule Should Require the Appointment of an Attorney for the Child**

The proposed Rule contemplates appointment of an attorney after every placement of a child in a locked residential facility. What is the child whose liberty is at stake to think upon realizing that this attorney is not representing his or her point of view, but that of the guardian ad litem? As noted above, this Court commendably attempted to imagine M.W.'s perspective in the *M.W.* case, and commented on the therapeutic value of giving the child a sense of being heard. An attorney for the child will more clearly protect the values of liberty and dignity contemplated by the court in *M.W.* As the Rule stands now, everyone gets an attorney except the child whose liberty is at stake.

Procedurally, appointing an attorney for the child makes more sense. The proposed rule contemplates that at the placement review hearing "all parties shall be permitted to present evidence concerning the suitability of the placement." Proposed Rule 8.350(b)(4)(B). We assume the child is a party. It is difficult to imagine how a child can meaningfully present evidence without the assistance of an attorney. If the child's preferences do not coincide with the perceptions of the guardian ad litem as to the child's best interest, the child will be deprived of precisely what this court ordered in *M.W.*: a meaningful opportunity to be heard.

Given that the standard of "suitability" adopted by the Legislature sets the standard for placement very low—perhaps unconstitutionally low--the need for the child to have an attorney is even greater.

The Model Act for the Mental Health Treatment of Minors authored by national experts Drs. *Gary* Melton, Phillip M. Lyons and Willis J. Spaulding provides that unwilling children subject to involuntary commitment shall have appointed counsel, Sec. 108 of the Model Act for the Mental Health Treatment of Minors, in *Gary* Melton, Philip Lyons and Willis Spaulding, No Place to Go: The Civil Commitment of Minors (University of Nebraska Press 1998) at **p.171.**

The Juvenile Court Rules Committee majority rejects the notion of both a preplacement hearing and an attorney on the basis that §39.407(5) does not require

either, the fact is that §39.407(5) does not require an attorney for the guardian ad litem either. In fact, §39.407(5) does not describe or address--or purport to describe or address--the court hearing on placement or the procedural protections attendant upon the court hearing. Thus, §39.407(5) does not preclude the appointment of an attorney-either an attorney for the child, or an attorney for the guardian ad litem, mandated by the proposed rule.

> **Recommendation:** We recommend that upon notification that a child has been placed in a locked psychiatric facility, the court appoint an attorney to represent the child, rather than the current proposal to appoint an attorney to represent the guardian ad litem.

**C. The Rules Should Specify the Right to Subpoena Witnesses and Documents, and to Cross-Examine Witnesses as well as the Child's Right to Retain and Present His or Her Own Expert Witness**

This court in *M.W.* specifically expressed concern that the child be entitled to a hearing with a "meaningful opportunity to be heard." Traditionally, a "meaningful opportunity to be heard" has been equated with the right to present and cross-examine witnesses, to subpoena witnesses and to be able to subject witnesses to cross-examination. Yet the proposed rule confines procedural protections to the single sentence "All parties shall be permitted to present evidence regarding the suitability of the placement." This eviscerates the notion of any meaningful procedural protection. For example, a child who opposes placement must be able to cross-examine the qualified evaluator (yet another reason to require that the child be

given the assistance of an attorney, see above).

The Florida commitment statute gives adult subject to commitment procedures the right to retain independent expert witnesses. The New Jersey procedures referred to by this court give the minor the same procedural rights in a hearing as adults have, New Jersey Rules of Court 4:74-7A (West 2000). The Model Act for the Mental Health Treatment of Minors also grants minors these rights. This right is even more crucial when the standard of "suitability of placement" is so easy to meet.

## III. The Rule Insufficiently Clarifies the Roles and Duties of the Parties

At a minimum, a rule must make clear the roles and responsibilities of the parties bound by the rule. In addition, rules establishing procedures for hearings must have clear time-lines regarding those procedures. This rule is unclear as to the role of the guardian ad litem, the role of the qualified investigator, the function of the status conference, and the timing of the initial placement review.

### 1. Roles and Responsibilities of Parties Bound by the Rule

#### A. Role of Guardian Ad Litem

The rule provides that the child's guardian ad litem will be represented by an attorney unless the guardian ad litem is "acting as an attorney." (Proposed Rule 8.350(a)(3)). This means that some children will be represented by a guardian ad

litem acting as an attorney, who will be bound by the Rules of Professional Responsibility to represent the child's expressed interests[2], while other children will be represented by a lay guardian ad litem, who is mandated to act in the perceived best interests of the child[3] and will presumably instruct his or her attorney to take this position as well. Thus, under the proposed rule a child could get very different kinds of representation more or less randomly.

> **Recommendation:** we recommend that the child have a right to appointed counsel, as is the case in Florida whenever an involuntary commitment by the state to a locked psychiatric facility is contemplated, see further discussion of this recommendation below at III.(B). The guardian ad litem can then fulfill the traditional role of **a** guardian ad litem.

### B. Role of the Oualified Evaluator

Under the proposed rule, the first notification that the child has been placed in a residential facility "shall include ...the written findings of the qualified evaluator."[4] The rule creates a crucial role for the qualified evaluator: he or she conducts the only pre-placement screening the child receives. It is essential that the evaluator be a neutral party; thus, it is troubling that the statute only contemplates that the qualified evaluator will make written findings ***in support*** of residential placement; there is no room in the statute for written findings against placement, Fla.Stat. §39.407(5)(c).

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[2] Florida Rules of Professional Conduct, 4-1.14(a)(2000).

[3] ***See*** Juvenile Procedure Rules, 8.215(c)(3)(2000); Fla.Stat. §39.40825(20) (1999).

[4] Although "qualified evaluator" is not defined or explained anywhere in the rule, it presumably refers to the requirements of **a** law passed this year, which is codified **at** Fla.Stat. §39.407(5).

Neither the statute nor the proposed Rule contain any provision that envisions a finding against placement by the qualified evaluator. Nor are evaluators assigned randomly, or by the court. They are chosen from an **AHCA** register by the department--the entity seeking placement. We recognize that this Court cannot alter the terms of the statute. However, the procedures it adopts can help to alert the guardian ad litem and the juvenile court to potential problems--if they exist--with the neutrality of the qualified evaluator. We therefore suggest that the Rule be revised to require the qualified evaluator to include in his or her written findings how many times he or she has served as a qualified evaluator to date, and how many times he or she has recommended in favor of and against placement.

> **Recommendation:** Rule 8.350(a)(2) would be revised to add to change the period in the final sentence to a comma and to add the following material after the coma: "including a summary **of** the number of times the qualified evaluator has served as a qualified evaluator, and the number of time the qualified evaluator has recommended in favor of and against placement."

While the statute provides that the qualified evaluator will "discuss the findings" with the child's guardian ad litem, it is important to specify that the qualified evaluator discuss the basis for the findings, and release any test results, with both the guardian ad litem and the child's attorney, if any ***(see*** above II.B) and be required to be present and available for examination **and** cross-examination at both the initial hearings contemplated by the rule.

**Recommendation:** We recommend that the last sentence of 8.350(a)(6) be amended to add the following material prior to the period "and the qualified evaluator." The last sentence of 8.350(b)(3)(A) should be amended to add **"and** the qualified evaluator" prior to the period.

**2. Purpose or Function of the Status Conference**

Second, the Rule provides for a status conference within five working days, but is entirely unclear as to the purpose or goal of the status hearing, other than, apparently, a report as to the preferences or objections of the child to placement, Proposed Rule 8.350(a)(6). The Report of the Rules Committee (although not the Rule itself) states that the purpose of the status hearing is to ensure that the substantive procedural protections of §39.407(5) have been met. First, the "substantive protections" of the statute amount to the written evaluation by a qualified evaluator. There is no need for a status hearing to ensure that this has taken place, because the proposed Rule contemplates that the court will have received the written findings of the qualified evaluator as **part** of the required notification of placement. Under §39.407(5), the guardian ad litem will have been appointed prior to placement, and will have interviewed the qualified evaluator and the child prior to placement. The child's preferences will be known prior to placement and can be reported to the court with the notification of placement. There is no reason to have a status hearing within five working days rather than judicial review of the placement itself. See *above* II.A.

**Recommendation:** We recommend that the status conference be eliminated in favor of holding the placement hearing at the time currently scheduled for the status conference.

If our recommendation to eliminate the status hearing and hold the placement review at the time contemplated for the status hearing is not adopted by this Court, at the very least the Rule should clarify the purpose of the status hearing and explicitly state that the judge may order the child discharged from placement if he or she determines that the placement is not suitable for the child.

**3. Timing of the Initial Placement Hearing**

Third, the Rule represents an extraordinary departure from most regulations setting out procedural protections in leaving the timing of the judicial review of the placement up to the parties: "the initial placement review hearing *must be conducted within the time period requested by the moving party* or within fourteen days of the filing of the motion or the guardian ad litem's report." Proposed Rule 8.350(b)(2). Fourteen days is a relatively long time to wait after filing a motion to review the involuntary institutionalization of a child, and there seems to be no reason for it. As noted below, because the guardian ad litem's report is due fourteen days after placement, and the hearing can take place fourteen days after the guardian ad litem's report, the child may have to wait one month to be heard. There seems to be no reason for such delay.

## IV. Summary of Recommended Changes in the Rule 8.350

1. The court and all parties will be notified of a proposed placement at the time the Department appoints a qualified evaluator. The guardian ad litem will be appointed at that time, in conformity with the requirements of the state statute. The guardian ad litem will determine if the child opposes placement.

**2.** If the child opposes placement, and the qualified evaluator recommends placement, the qualified evaluator will so note in his or her report to the court. The report will be due within 24 hours of placement, and will include the number of times a qualified evaluator has evaluated a child for placement into a locked residential facility, **and** the number of times he or she has supported and opposed placement. The guardian ad litem's report will be due at the same time. Upon receipt of the report of the qualified evaluator and the guardian ad litem, the court will appoint an attorney to represent the child.

3. The placement review hearing will be held within 5 worlung days after the child's placement in the facility. The child will have the right to subpoena witnesses and documents and cross-examine witnesses. The qualified evaluator must be present for the hearing.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Comments on Proposed Rule 8.350 Governing the Placement of a Child Into a Residential Treatment Center After an Adjudication of Dependency were sent this 30th day of November, 2000, to Judge John N. Alexander, Chair, Juvenile Court Rules Committee, St. Johns Courthouse, P.O. Box 300, St. Augustine, FL 32085-0300.

Susan Stefan