

IN THE SUPREME COURT OF FLORIDA

**AMENDMENT TO THE RULES OF
JUVENILE PROCEDURE
Fla. R. Juv. P. 8.350**

Case No. SC 00-2044

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**COMMENTS SUBMITTED BY THE FLORIDA BAR
COMMISSION ON THE LEGAL NEEDS OF CHILDREN**

In its ruling in this case dated, October 25, 2001, this Honorable Court requested the Florida Bar Commission on the Legal Needs of Children to provide data to the Court to assist it in its decision regarding the proposed rule. The Court also asked for comments. The Commission has collected the following data and provides its findings regarding representation in the following pages.

I. Number of Attorneys Needed

As the chart in Appendix A indicates, as of June 30, 2001, there were 256 children in residential treatment facilities.¹ Assuming this was not an abnormal number,

¹ The Court requested more information regarding the children in care including the children's age and length of stay. As indicated in Section IV of this brief, the Commission was unable to collect this data from the Department of Children and Families.

there would be a need for approximately 250 attorneys at any one time around the State available to provide representation to these children. However, the children are not evenly distributed throughout the State. There are some circuits from which more children are committed to residential treatment centers than other circuits. This could be due to differences in population density however we have no verifiable explanation for the differences throughout the State. The attached chart breaks down the number of children in each Department of Children and Families district.

II. Funding for the Attorneys

The question of who will pay for attorneys in dependency proceedings is not new. When grappling with the issue of whether parents in dependency proceedings should have attorneys prior to the statutory right to attorneys, the Florida Supreme Court addressed the issue of funding. *See In the Interest of D.B. and D.S., 385 So.2d 83* (Fla. 1980). The Court concluded that the responsibility to provide parents with representation is split between the counties and the legal profession. *Id.* at 91-93.

As the Court explained:

When appointment of counsel is desirable but not constitutionally required, the judge should use all available legal aid services, and when these services are unavailable, he should request private counsel to provide the necessary services. Under these circumstances, no compensation is available, and the services are part of the lawyer's historical professional responsibility to represent the poor. *Id.* at 92.

This assumes no state funding for these attorneys. There is pending legislation that would provide some attorneys to represent children in the dependency system. *See* Florida Senate Bill 686 and Florida House Bill 629. It is not clear that either of these bills will become law or that there will be funds appropriated to provide adequate representation throughout the State. Thus, it leaves the question of the availability of experienced attorneys to provide this representation with and without state compensation.

If the State were to pay attorneys to represent these children, there are several methods of payment that could be used. There could be a group of attorneys who, on a rotation basis, accept appointments. These attorneys could be paid by the hour or per case. Assuming the representation was limited to the issue of the commitment proceedings and review of that commitment, based on the experience of the Ninth Judicial Circuit's Attorney Ad Litem program, these cases would average 15 hours. If the attorneys were paid \$75 an hour, these cases would average \$1125 per child.² If the attorneys were paid by the case, the fees would be set in negotiations with the counties or whichever State office would be responsible for providing these funds.

One model contemplated by the pending legislative proposal would have full-time staff attorneys providing this representation. This staff driven model could be

² The \$75 an hour rate is used as a demonstration. Obviously, the actual rate would be set in negotiations with the Counties or whichever State office would be responsible for providing these funds.

created either through contracts with law firms to provide all of the representation or by establishing offices with state employees who provide representation. There are two staff driven pilot projects in the State, one operated by Barry University School of Law and one by the Palm Beach County Legal Aid Society. The Barry University project is part of the Ninth Judicial Circuit's Attorney Ad Litem project. This representation costs the State on average approximately \$2500 per child per year, however, the representation is much broader than the commitment hearing.³

Public defender offices already have experience representing children in delinquency proceedings and have experience representing persons facing mental health commitments through Baker Act proceedings. It is arguable that these offices already have the authority and obligation to provide this representation.⁴ Presumably, this option would be less expensive than contracting with private practitioners on a

³ As indicated in § 39.4086(2)(f), Fla. Stat. (Supp. 2001), "The court shall appoint the entity responsible for representation of children in the Ninth Judicial Circuit under the pilot program who are continued in out-of-home care at the shelter hearing conducted under s. 39.402 if the court deems attorney ad litem representation necessary. At any time following the shelter hearing, the court may appoint an attorney ad litem upon the motion of any party, or upon the court's own motion if an attorney ad litem has not yet been appointed and the court deems such representation necessary." Thus, the attorneys in this project are appointed for a variety of issues and their representation is not restricted to a commitment hearing or review of a commitment to a residential treatment center.

⁴ Section 27.51(1)(d) Fla. Stat. (2000) states "The public defender shall represent, without additional compensation, any person who is determined by the court to be indigent as provided in s. 27.52 and who is: . . . (d) Sought by petition filed in such court to be involuntarily placed as a mentally ill person or sexually violent predator or involuntarily admitted to residential services as a person with developmental disabilities."

case-by-case or full-time basis. However, the cost of this model has not been calculated.

III. Availability of Experienced Attorneys

When addressing the question of available experienced attorneys, the Commission has attempted to match the location of the available lawyers with the location of the children being placed in residential treatment. Thus, Appendix B has a chart which breaks down the availability of attorneys into the same Department of Children and Families districts as the chart in Appendix A.

Not all of the children detailed in Appendix A would be granted an attorney if the Court adopts its proposed rule. The proposed rule would only require an attorney be appointed if a child objected to placement. Presumably, the number of children objecting to placement would be less than the 256 listed in Appendix A. This list also does not include those children for whom the Department petitioned for commitment and were not placed in residential treatment. Children may not have been placed because a court rejected the Department's request for commitment or because a waiting list prevented the placement. Thus, there could be additional children needing representation but who are never placed in the facilities and thus do not appear on Appendix A.

The Commission considered several possible sources of experienced attorneys for children. First, using the suggestion of the Court in *D.B. and D.S.*, there are Legal Service Programs and Legal Aid offices in the State that could provide representation to children.

Second, there are five law schools throughout the state that run clinical programs specializing in advocacy for children. These programs can provide the type of representation suggested by the Court. Although the locations of these programs are indicated on the chart, the students or faculty in these programs are not included in the numbers of attorneys available. Graduates of these clinical programs have had an intensive training program in children's law and are dispersed throughout the State and could be tapped by local judges for appointments. There have been more than 450 graduates of these specialized children programs in the last five years alone.

Third, there are volunteer attorneys who presently work with the GAL programs or other offices representing the children in one capacity or another. The volunteer lawyers generally represent the GAL programs on a case by case basis or may be appointed as an attorney for the child. These lawyers have experience with dependency from their prior volunteer work and could easily be appointed as the attorney for the child rather than as an attorney for the GAL program in cases

involving residential treatment.⁵ In those districts where there are the greatest number of children placed in residential treatment, there are the greatest number of volunteer lawyers.

Fourth, there are attorneys who contract with the counties to provide representation to parents in dependency proceedings. Obviously, an individual attorney could not represent a parent and child in the same case. However, these same attorneys who are experienced in dependency law could be appointed by the courts to provide pro bono representation for children objecting to residential treatment.

Fifth, many attorneys have worked as public defenders in the juvenile court or have represented persons facing involuntary mental health commitments. Either of these experiences would be relevant. If the public defender offices were to accept these appointments their staff attorneys would be available. If the public defenders did not accept these appointments, the attorneys who leave the employment of public defender offices on an annual basis could be tapped as a possible resource. The number of these attorneys is unknown.

⁵ As the Court notes in its ruling in this matter on October 25, 2001, in approximately 50% of the cases statewide the child does not even have GAL representation due to the lack of available individuals to serve as GALs. The Commission recognizes that each office must set priorities for the use of its volunteer resources. The question will remain whether the office uses these volunteer lawyers for traditional dependency cases or for these commitment cases. However, the data indicates there are adequate numbers of attorneys available if these commitment cases become a priority.

Finally, there is a group of attorneys who leave the employment of the Department of Children and Families, Child Welfare Legal Services Offices each year. Unfortunately, this data is not available.⁶

IV. Unavailable Data

Following the Court's request that the Florida Bar Commission on the Legal Needs of Children provide data and comment on the proposed rule, the Commission made a public records request of the Department of Children and Families on December 20, 2001. The Commission requested the following information:

1. What is the number of dependent children currently in residential treatment, whether a licensed RTF or otherwise, by Judicial Circuit, DCF district or region?
 - a. Their ages at commitment?
 - b. Their expected length of stay?
2. What is the number of dependent children who were actually placed in residential treatment (during fiscal year 2000-2001, or calendar year 2000), whether a licensed RTF or otherwise?
3. What is the total number of children considered for placement in any secure facility (during fiscal year 2000-2001, or calendar year 2000), whether a licensed RTF or otherwise?

⁶ As indicated in Section IV of this brief, the Commission was unable to collect this data because it is in the control of the Department of Children and Families.

4. What is the total number of children considered for placement in any secure facility, (during fiscal year 2000-2001, or calendar year 2000), whether a licensed RTF or otherwise, by Judicial Circuit, DCF district or region?

There was a subsequent request on January 10, 2002 for the following information:

5. How many dependency lawyers were in DCF's employ during fiscal year 2000-2001?
6. What is the turnover rate for dependency lawyers during fiscal year 2000-2001?

The Commission is aware that the Court requested similar information on November 8, 2001. The Commission had hoped to obtain this information in time to analyze it and incorporate the data into our comments. Unfortunately, although it was promised, the Commission never timely received the data from the Department of Children and Families.⁷

V. Commission Findings

Although the Florida Bar Commission on the Legal Needs of Children has not completed or released all of our recommendations, the Commission completed the work of the Representation Subcommittee at its meeting on January 11, 2002. The

⁷On Thursday February 14, 2002, after completion of the Commission's response to the Court, DCF provided some data which could not be timely incorporated into our response.

Commission approved the following recommendation at that meeting related to this specific issue as follows (at Appendix C., 1. d., at p.6):

- II. C. 1. The appointment of legal counsel to represent the child’s legal interests shall be as follows: . . .
 - d. In cases where the state is seeking commitment or placement of a dependent child, for longer than 24 hours, into a staff-secure or physically-secure residential treatment facility, including those licensed under Chapter 394 and 395, for substance abuse or mental health treatment, the court shall appoint counsel.⁸

Conclusion

As the Commission recommended, dependent children facing commitment or placement in secure treatment facilities should have legal counsel. Although the Commission recommends adequate funding from the State to provide this representation, the research detailed in these comments and their attached appendices indicate there are available resources throughout the State to provide these children legal counsel until adequate State funding is provided.

⁸ Attached as Appendix C. are the Commission’s full recommendations regarding the representation of children and the need for adequate funding of such representation.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of these Comments were mailed on February _____, 2002, to: Charles Auslander, Department of Children and Families, 410 N.W. 2nd Avenue, North Tower, 1018, Miami, FL 33128; Howard H. Babb, Jr., Public Defender's Office, 550 West Main Street, Suite 401, Tavares, Florida 32778-3115; Sarah H. Bohr, Bohr & Harrington, L.L.C., 2337 Seminole Road, Atlantic Beach, Florida 32233-5988; Ira A. Burnim, Bazelon Center for Mental Health Law, 1101 15th Street N.W., Suite 1212, Washington, DC 20005; The Honorable Daniel P. Dawson, Osceola County Courthouse, 2 Courthouse Square, Kissimmee, FL 34741-5487; Karen A. Gievers, 524 East. College Avenue, Suite 2, Tallahassee, Florida 32301-2529; Joni Goodman, The Guardian Ad Litem Program, 3302 N.W. 27th Avenue, Miami, FL 33142; Barbara W. Green, ACLU of Florida, Gables One Tower, 1320 South Dixie Highway, Suite 450, Coral Gables, FL 33146; Teresa A. Kramer, Assistant General Counsel, Department of Children & Families, 1317 Winewood Blvd., Ste. 204, Tallahassee, FL 32399-6570; The Honorable Cindy Lederman, Juvenile Justice Center, 3300 N.W. 27th Avenue, Miami, FL 33142; The Honorable Ginger Lerner-Wren, 201 Southeast 6th Street, Suite 429, Fort Lauderdale, Florida 33301-3302; Ward Lee Metzger, Public Defender's Office, 25 North Market Street, Suite 200, Jacksonville, Florida 32202-2802; Bernard Perlmutter and Carolyn Salisbury, Children and Youth Law Clinic, University of Miami School of Law, Coral Gables, Florida 33124-8087; Deborah Schroth, Florida Legal Services, Inc., 126 West Adams Street, Suite 502, Jacksonville, Florida 32202-3849; Joel M. Silvershein, Chair, Juvenile Court Rules Committee, 201 S.E. 6th Street, Ste. 600, Ft. Lauderdale, FL 33301; Susan Stefan, University of Miami School of Law, 1311 Miller Drive, Coral Gables, FL 33124; Brent Robert Taylor, 706 East College Avenue, Tallahassee, Florida 32301-2912; Professor Bruce J. Winick, University of Miami School of Law; 1311 Miller Drive, Coral Gables, FL 33124; Christine Zawisza, Children First Project, Nova Southeastern University, 3305 College Avenue, Ft. Lauderdale, FL 33314.

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