ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SCOO-2044

IN RE: AMENDMENT TO THE FLORIDA RULES OF JUVENILE PROCEDURE (RULE 8.350)

COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

Comes now the Florida Public Defender Association, by and through the undersigned counsel, pursuant to this Court's order and provides these comments and recommendations regarding the proposed Rule of Juvenile Procedure 8.350. The Public Defenders say:

A. PROCEDURAL HISTORY

In M. W. v. Davis, 756 So.2d 90 (Fla. 2000) this Court directed the Juvenile Court Rules Committee to submit proposed rules that would set forth the procedures to be followed by Florida Dependency Courts when the Department of Children and Family Services (Department) sought orders committing dependent children to residential facilities for the purpose of obtaining mental health treatment. Id. at 109.

In response to this Court's directive, the Juvenile Court Rules Committee submitted a proposed rule 8.350. By order of November 1, 2000, the Court then invited comments to be filed by December 1, 2000.

B. PROPOSED RULE 8.350

1. Initial Placement

In relevant part proposed rule 8.350 provides:

> "(a)(3) If a guardian ad litem is not currently appointed in the case, the court immediately shall appoint a guardian ad litem for the child. The guardian ad litem must be represented by an attorney at all proceedings under this rule, unless the guardian ad litem is acting as an attorney. The guardian ad litem shall file a report with the court within 14 days of the placement that shall include a recommendation regarding the placement and a statement of the child's wishes."

(Appendix A, proposed rule 8.350, PLACEMENT OF CHILD INTO RESIDENTIAL TREATMENT CENTER AFTER ADJUDICATION OF DEPENDENCY)

> "(a)(4) On notification that a child has been placed into a residential treatment center, the court may appoint an attorney to represent the child."

(Id.)

> "(a)(5) On notification that a child has been placed into a residential treatment center, the court shall set the matter for a status hearing within 5 working days, excluding weekends and holidays..."

(Id.)

> "(a)(6) The child's attorney and/or guardian ad litem shall notify the child...and shall attempt to ascertain whether the child

consents or refuses to consent to the placement. No hearing shall proceed without the presence of the child's guardian ad litem or attorney.''

(Id.)

2. Initial Placement Review

After an initial placement has occurred the rule provides for a judicial review of the placement. As part of the review process:

"(b)(3)(B) The child's guardian ad litem, or attorney if one has been appointed, shall notify the child and shall attempt to ascertain whether the child consents or objects to the placement."

(Id.)

As part of the review process, the court is to consider:

"(b)(4)(A)(i) Based on an independent assessment of the child, the recommendation of a department representative or authorized agent that the residential treatment or hospitalization is in the child's best interest and a showing that the placement is the least restrictive available alternative.

(b)(4)(A)(ii) The recommendation of the guardian ad litem.

(b)(4)(A)(iii) A case review committee recommendation, if any.

> (b)(4)(A)(iv) The written findings of the evaluation and suitability assessment prepared by a qualified evaluator."

(Id.)

As to the conduct of the hearing:

> "(b)(4)(B) All parties shall be permitted to present evidence concerning the suitability of the placement."

(Id.)

In reaching its decision regarding the proper placement:

> "(b)(5) ORDER. If the court determines that the child is not suitable for continued residential treatment, the court shall order the department to place the child in the least restrictive setting that is best suited to meet the child's needs."

(Id.)

Regarding the child's presence at hearings relating to the mental health commitment:

> "(d) Presence of Child. The child shall be present at all court hearings, except the initial 5-day status hearing, unless the court finds that the child's mental or physical condition is such that a court appearance is not in the child's best interest. In such circumstances, the child shall be provided the opportunity to express his or her views to the court by a method deemed appropriate by the court."

(Id.)

C. PRACTICAL APPLICATION OF THE PROPOSED RULE TO CHILDREN NOT REPRESENTED BY LEGAL COUNSEL

The proposed rule does not mandate the appointment of counsel to represent children who may be committed against their wishes to residential mental health facilities. Subsection (a)(4) provides only that "...the court may appoint an attorney to represent the child." In contrast, subsection (a)(3) mandates that the guardian ad litem, "...must be represented by an attorney at all proceedings under this rule, unless the guardian ad litem is acting as an attorney." It is axiomatic that the Department will be represented by an attorney because this Court long ago determined that social workers could not appear unrepresented in dependency court proceedings. The Florida Bar. In Re Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909 (Fla. 1989). Thus, while the Department and the guardian ad litem are represented by counsel in these proceedings, the child, who is the subject of the potential commitment, is not necessarily so represented.

While the child is to be notified of the initial status hearing, subsection (a)(5), and an "attempt" is made to ascertain the child's wishes, subsection (a)(6), there is no

absolute requirement that the child's wishes actually be determined and communicated to the court. Even if it is determined that a child is opposed to the placement, there is no established mechanism by which the child's position may be advocated to the court. Subsection (d) presumes that the child will not be present at the 5-day status hearing. Therefore, it is logical to conclude that at the status hearing while the court may hear of the child's refusal to consent, there will be no representative of the child to argue for the child's release. Should the Department and the guardian ad litem and their respective attorneys agree with the placement, no one will be present to advocate against the placement or challenge any information provided to the court.

Subsection (a)(6) mandates that, "No hearing shall proceed without the presence of the child's guardian ad litem and/or attorney." As a result, additional problems arise. Assuming that the court is not required to appoint an attorney and no guardian ad litem is available (for any number of reasons including a general lack of available guardian ad litems) the 5-day status hearing cannot occur by the terms of the proposed rule. In that situation, a nonconsenting child would remain in

a residential placement with no counsel, no hearing, no access to the court and no timely review of the initial placement.

The procedures set forth for the initial placement review are also problematic for an unrepresented nonconsenting child. Subsection (b)(1) provides that any party may file a motion for a placement review. As set forth in subsection (b)(5), apparently the purpose of the initial placement review is to determine the need for and suitability of the child for continued residential placement. The hearing seems to present the possibility of a challenge to the necessity or appropriateness of the placement. However, should the Department and the guardian ad litem agree on the necessity of the placement, there is no need or requirement that either of those parties file a motion. In those circumstances, an unrepresented child who contests the placement and who has either not communicated that fact to the guardian ad litem or who has changed his or her mind, has no access to the court.

Should a motion be filed and the child noticed, pursuant to subsection (d), the child need not be present if the court finds the child's presence to not be in the child's best interest. Again, if the Department and the guardian ad litem agree as to

the placement and the child is not present or is unrepresented, no one will advocate for the child. Even if the court is aware of the child's disagreement with the placement, there will be no advocacy of that position. Given the possibility that the residential placement could be an inappropriate decision, the unrepresented child has no remedy.

The unrepresented child encounters further difficulties at the initial placement review hearing. Subsection (b)(4) requires the court to consider an independent assessment, the guardian ad litem's report, a possible case review committee's report and the written findings of a qualified evaluator. Notably missing is any requirement that the court consider the child's position. Should the court waive the child's presence and the child be unrepresented, the rule does not provide for any access to the court by the child.

Subsection (b)(4)(B) does provide that all parties are permitted to present evidence regarding the suitability of the placement at the initial placement hearing. However, the proposed rule leaves unanswered the question as to how an unrepresented child is to present evidence in any situation, including those where the child disputes the Department's and

the guardian ad litem's conclusions that the placement is in the child's best interest. Absent counsel, a child in those circumstances has no meaningful ability to argue for his or her release and has no ability whatsoever to develop and present evidence in support of his or her position. The rule denies any such child the right to meaningful access to the court.

Subsection (C)'s creation of Continuing Residential Placement Review provides for a hearing no later than three months after the child's admission. No provisions are made for representation of the child or presentation to the court, by the child, of any evidence or argument relating to the appropriateness of the continued placement.

In a worst case scenario, an unrepresented child can be placed into a residential treatment facility against the child's wishes. The child may not appear at the 5-day status hearing or the initial placement review. The child need not appear at any continuing placement review. Lacking an attorney, the court may never be presented with evidence or advocacy suggesting or demonstrating the inappropriateness of the placement. Because there is no ultimate time limitation on the placement, other than regular three month reviews, the unrepresented child can

remain in the mental health residential placement until the age of majority. At that point, continued mental health placement may be sought pursuant to the provisions of Chapter 394, Florida Statutes. Finally, having turned eighteen and being subject to continued involuntary mental health commitment, the unrepresented child would be entitled to representation by legal counsel. See, In Re Beverly, 342 So. 2d **481,** 489 (Fla. 1977) (holding that the subject of an involuntary civil commitment proceeding has the right to the effective assistance of counsel).

While the possibility may appear small of a child being wrongfully committed to a mental health facility at a young age and remaining there until an attorney is appointed when the child reaches age eighteen, the potential does exist. The possibility of an extended inappropriate confinement is real. It is important to remember that in O'Connor v. Donaldson, 422 U.S. 563 (1975) the Supreme Court was presented with a Florida case in which a father had committed (through the courts) his son to the Florida State Hospital where Mr. Donaldson remained for a period of fifteen years, Id. at 565-565, even though a jury later found that he was a nondangerous individual who was

capable of surviving safely in freedom with the help of willing and responsible friends or family members or by himself. Id. at 576. The Supreme Court determined the confinement to be unconstitutional. Id. The proposed rule does nothing to prevent an extended inappropriate placement and procedurally invites such an occurrence. Without counsel, a child has no ability to contest an inappropriate placement. In failing to provide for counsel, the proposed rule fails to protect the interest of children against the Department that has determined a need to commit the children to residential mental health facilities.

D. SUBSTANTIVE DUE PROCESS ANALYSIS

In addition to the practical problems inherent in the operation of the proposed rule as outlined above, the Public Defenders believe that the due process clauses of the state and federal constitutions require the appointment of counsel for children who the state seeks commitment to residential mental health facilities.

In M.W., supra, this court addressed the application of due process principles to the commitment of dependent children to residential mental health facilities. Relying on Parham v. J.

R., 442 U.S. 584 (1979) this Court determined that three minimum due process requirements must be provided when such a child is committed; there must be: 1) an inquiry by a neutral fact finder that is not required to be in the form of a judicial inquiry; 2) the inquiry must examine the child's background utilizing all available resources; and 3) there must be a periodic review by a neutral fact finder. M. W., supra at 99. This Court found the procedure followed in the case to have satisfied minimum constitutional due process requirements. Id. Notably, at all times material to the case, the child was represented by court-appointed counsel. Id. at 92. What was not resolved in M.W. was whether an unrepresented child for whom the Department seeks a mental health commitment is entitled to the appointment of counsel. As was specifically recognized, "...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..." Id. at 106-107. The Public Defenders believe that the answer to the unresolved question is that an attorney must be provided to represent any child subject to potential involuntary commitment. There must be an attorney in order to assure, "...a meaningful opportunity to

be heard.", Id. at 108-109, because, '"[i]t is not disputed that *a child,* in common with adults, *has* a *substantial* ***liberty*** *interest in not being confined unnecessarily for medical treatment* and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment."' Id. at 97 (quoting Parham, supra at 442 U.S. 600).

It is indisputable that in Florida, "The subject of an involuntary commitment proceeding has the right to the effective assistance of counsel at all significant stages of the commitment process." Beverly, supra at 489. (citing; Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974). Significant stages are, "...All judicial proceedings and any other official proceeding at which a decision is, or can be, made which may result in a detrimental change to the conditions of the subject's liberty." Beverly, supra at 489. Clearly; \\...court approval is necessary before such treatment can be administered to a dependent child.", M.W., supra at 106; placement of a dependent child in a locked residential facility against the wishes of that child deprives the child of liberty...," Id. at 107, and the state's involvement constitutes state action under the Fourteenth Amendment, Id. at 94. Accordingly, there is no

meaningful distinction between a dependent child for whom the Department seeks commitment and any other citizen subject to involuntary mental health commitment. The commitment of dependent children to residential mental health facilities by the Department must conform to the statutory requirements of section 39.407, Florida Statutes (2000). Judicial supervision of the case is mandatory. Thus, due process requires the appointment of counsel to children involved in dependency proceedings where their liberty may be deprived through court proceedings that may result in their commitment to residential mental health facilities.

The United States Supreme Court has also recognized the application of due process to involuntary hospitalization situations. For example, in the Florida case of Zinermon v. Burch, 494 U.S. 113 (1990) (citing Parham v. J.R., supra) the Court noted that, "…the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." Id. at 127. There is a substantial liberty interest in avoiding confinement in a mental hospital and such commitment entails '"…a massive curtailment of liberty…"' that requires due process protection.

Id. at 131. (citing: Vitek v. Jones, **445** U.S. **480** (1980); Parham v. J.R., supra; and Addington v. Texas, **441** U.S. **418** (1979)). Given the fact that both this Court and the United States Supreme Court have recognized the liberty interest and, accordingly, the application of due process principles to mental health commitment proceedings, those protections extend to dependent children for whom the state (through the Department) seek commitment.

E. FAILURE OF THE JUVENILE COURT RULES COMMITTEE TO ACT IN ACCORDANCE WITH THIS COURT'S CHARGE

In directing this matter to be considered by the Rules Committee, this Court directed that, "...at a minimum, these procedures should include a hearing in which the child has a meaningful opportunity to be heard." M.W., supra at 109. By failing to provide for the appointment of counsel, the Rules Committee wholly failed in its responsibility to ensure the ability of the child to have a meaningful opportunity to be heard.

As demonstrated above, counsel is not required to be appointed pursuant to the provisions of the proposed rule. As a result, should a trial court elect to not provide counsel,

unrepresented children may be placed in situations where they have no opportunity to be heard. Even if a child is afforded the opportunity to address the matter in court, it is inconceivable that any child (much less a child with alleged mental health infirmities) has the ability to present evidence, confront evidence, or contest the testimony of experts. As such, the meaningful opportunity to be heard contemplated by the rule is meaningless. Only the appointment of legal counsel can render the proposed opportunity to be heard meaningful.

In all likelihood the proponents of the proposed rule will argue that the mandatory appointment of a guardian ad litem will resolve these problems. Assuming the availability of a guardian ad litem, that argument is not well taken as it ignores the fundamental difference between a guardian ad litem and an attorney. While an attorney's role is to advocate for the child and the child's wishes, the guardian's role is to advance those matters that are perceived by the guardian to be in the child's best interest. There may be a major difference in what is perceived as the best interest of the child and the actual wishes of the child. In those situations, the guardian ad litem cannot act as a child's advocate without the existence of an

actual conflict of interest. It takes little imagination to foresee situations where the child does not want to be committed, the court is so informed by the guardian, and the guardian ad litem also opines that commitment would be in the child's best interest. In those circumstances, having had a guardian ad litem appointed by state law, it is impossible to characterize the child's ability to be heard as "meaningful" within the concepts of the due process clauses. The Rules Committee's inclusion of the mandatory appointment of a guardian ad litem instead of an attorney in the proposed rule does not address this Court's requirement that the child have a meaningful opportunity to be heard.

F. PROCEDURAL **VS. SUBSTANTIVE** NATURE **OF THE** PROPOSED RULE

Article V, section 2 of the Florida Constitution provides that the Supreme Court has the responsibility to adopt rules for the practice and procedure in all courts of the state. Substantive law is the responsibility of the legislature and procedural matters are the responsibility of the Court. See: In Re Florida Evidence Code. **372** So. 2d **1369** (Fla. **1979);**

Clarified, 376 So. 2d 1161 (Fla. 1979); modified, 404 So. 2d 743 (Fla. 1981). Succinctly stated:

> "Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term 'procedure,' I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term 'rules of practice and procedure' includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution."

In Re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972)(Adkins, J., concurring); amended, 272 So. 2d 513 (Fla. 1972).

It is the liberty interest of any child for whom involuntary commitment is sought and the "massive curtailment" of liberty that firmly roots the substantive right to counsel in the federal and state constitutions. "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." In Re Gault, 387 U.S. 1, 20

(1967). The due process clause of the Fourteenth Amendment establishes the right to counsel for children in delinquency proceedings that may result in commitment. Id. at 41. In the context of delinquency proceedings, the right to the assistance of counsel is as essential for a child as it is for an adult facing a criminal prosecution. Id. at 36.

Similarly, this Court has already determined the constitutional existence of the right to the assistance of counsel for adults facing involuntary civil commitment. Beverly, supra at 489. There is simply no meaningful distinction between adults for whom the state seeks involuntary commitment and children for whom the state, through the department, seeks similar commitment. The Public Defenders believe that the principles of Gault and Beverly are equally applicable herein and that both the federal and state constitutions require effective assistance of counsel for these children.

Consequently, a provision in the proposed rule that the court "shall" appoint counsel does not create a substantive right. Such a provision simply effectuates an already constitutionally established right and sets forth a time at

which the appointment **of** counsel is to occur. In our view, the inclusion of the word "may" in the statute does nothing to effectuate the constitutional right to counsel. In fact, reliance on the procedurally permissive appointment of counsel as opposed to that which is constitutionally required, may result in the unconstitutional confinement of these children in secure mental health facilities. It is the opinion of the Public Defenders that the inclusion of language mandating appointment of counsel in the proposed rule is procedural and not substantive in nature.

G. POLICY CONSIDERATIONS

During the last decade, this Court has consistently held that the interests of Florida's children must be considered to be paramount within the judicial system. As recently as July of this year in the context of a delinquency matter, Justice Lewis wrote:

> "Our children must never be short-changed in the name of technological advancement. The measure of a society can be found not in the words spoken about its youth, but in the action and methods utilized in its relationships with its youth.
>
> . . .

> However, our youth must never take a second position to institutional convenience and economy…'
>
> . . .
>
> Florida's off-repeated pledge that 'our children come first' cannot ring hollow in - of all places - our halls of justice.
>
> . . .
>
> It is time that we understand that these youth are individuals and require sufficient resources if we are to expect a brighter tomorrow. Personalized attention and plans are necessary to properly address the multiple and complex problems facing today's children. The juveniles that become involved in this process have, at some point, allegedly failed to make the right decision and we must not compound the problem by subjecting them to a system that has lost its humanity and become an emotional wasteland.
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> . . .
>
> Respect for the individual begets respect while we fear coldness and sterility may breed contempt. (citations omitted)

In Re: Amendment To Florida Rule Of Juvenile Procedure 8.100(a), 25 Fla. L. Weekly 5516, 517 (Fla. July 6, 2000)

In M.W., Justice Pariente observed:

> "While the child's best interests may in fact be paramount in the eyes, minds and hearts of every participant in the dependency proceeding, it is important that our procedures in dependency cases ensure that each child is treated with the dignity to which every participant in a dependency proceeding should be entitled.
>
> . . .

> However, of paramount concern is the question of whether M.W. perceived that anyone had his best interests at heart when he was placed against his wishes in a locked psychiatric facility without the opportunity to be heard.
>
> Indeed, the issue presented by this case extends beyond the legal question 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.
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> . . .
>
> This question is particularly important when the child is an adolescent like M. W., who was fifteen years of age when he was placed in Lock Towns.
>
> . . .
>
> In striking this balance [procedural flexibility and safeguards] the judicial system must recognize the individuality and dignity of the children who find themselves inside the courtroom solely as a result of their parents' abuse or neglect." (citations omitted)

M.W., supra at 107-108.

In presenting this Court with a proposed procedural rule that denies counsel to children for whom the state seeks to commit to residential psychiatric facilities, the Rules Committee and proponents of the rule have completely ignored the guiding principles of respect for children set forth by this Court. The proposed rule represents a significant step backward

in the relationship of the state and the judiciary and Florida's children. In failing to recognize the right and need of these children to counsel, the rule dehumanizes our children, treating them as cases instead of people. The Public Defenders believe the proposed rule to be a step in the wrong direction and to be wholly inconsistent with the policy and principles of this state and this Court with respect to our children.

H. PROVISION OF COUNSEL TO CHILDREN FOR WHOM COMMITMENT IS SOUGHT

Commensurate with our beliefs that the appointment of counsel is constitutionally mandated in these cases, the Public Defenders recognize that should the legislature amend Chapter 27, Florida Statutes, it may become our responsibility to represent these children.

I. CONCLUSION

The Florida Public Defender Association recommends that this Court reject the proposed rule that fails to provide for the appointment of counsel to these dependent children. Further, we recommend the following changes to the proposed rule: section (a) Placement;

> (4) On notification that a child has been placed into a residential treatment center,

the court shall appoint an attorney to represent the child.

(5) On notification that a child has been placed into a residential treatment center, the court shall set the matter for a status hearing within 5 working days, excluding weekends and holidays. The clerk of the court shall timely provide written notice of the date, time, and place of the hearing to all parties, participants and counsel.

(6) The child's attorney and/or guardian ad litem shall notify the child of the date, time and place of the hearing and shall attempt to ascertain whether the child Consents or refuses to consent to the placement. No hearing shall proceed without the presence of the child's guardian ad litem and the child's attorney.

Section (b) Initial Placement Review

(3)(A) Parties and Participants. The moving party shall provide written notice of the motion and of the date, time, and place of the hearing to all parties, participants and counsel.

(B) The child's guardian ad litem or attorney shall notify the child of the date, time, and place of the hearing and shall attempt to ascertain whether the child consents or objects to the placement.

Section (c) Continuing Residential Placement Reviews

(1) The court shall conduct a hearing to review the status of the child's residential treatment plan no later than 3 months after

the child's admission to the residential treatment program. ***An*** independent review of the child's progress towards achieving the goals and objectives of the treatment plan must be completed by a qualified evaluator and submitted to the court, all parties and the child's attorney in writing at least 72 hours before the 3-month review hearing.

Section (d) Presence of Child

(d) Presence of Child. The child shall be present at all court hearings, including the pre-trial 5-day status hearing, unless the court finds that the child's mental or physical condition is such that a court appearance is not in the child's best interest. No decision to exclude a child shall be made without prior notice to and an opportunity to be heard by the child's counsel.

Wherefore, the Florida Public Defender Association respectfully prays this Honorable Court to deny the Petition of the Juvenile Court Rules Committee and to adopt the changes to the propose'd rule as suggested herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the brief complies with the font requirements of Rule 9.210 and is submitted in Courier New 12-point font this 7th day of December, *2000.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to: Honorable John M. Alexander, Circuit Court Judge, Chair, Juvenile Court Rules Committee, St. Johns County Courthouse, Post Office Box **300,** St. Augustine, Florida **32085-0300 and** John **F.** Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida **32399-2300** this 7th day of December, 2000.

Barbara E. Loche