IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO THE RULES OF JUVENILE PROCEDURE

Case No.:

PLACEMENT OF DEPENDENT CHILD IN RESIDENTIAL MENTAL HEALTH TREATMENT FACILITY

Hon. John M. Alexander, Chair, Juvenile Court Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, submit this petition to amend the Florida Rules of Juvenile Procedure to create *Fla. R. Juv. P.* 8.350, as requested by this Court in *M.W. v. Davis*, 756 So.2d 90 (Fla. 2000). The proposed rule is attached to this pleading.

The final vote of the Juvenile Court Rules Committee was 18-7-0. Because of time constraints, the rule was reviewed by the Executive Committee of The Florida Bar Board of Governors, who approved it by a vote of 8-3. Those voting against approval of the rule favored the minority report of the committee, *i.e.*, that children in these circumstances should have appointed counsel.

In the drafting of this proposed rule, the Juvenile Court Rules Committee considered both this Court's decision in *M.W. v. Davis, supra*, and the provisions of section 39.407(5), Florida Statutes (2000). This new statutory provision sets forth, in detail, the procedure that must be followed when the Department of Children and Family Services seeks to place a dependent child in its custody into a residential mental health treatment center. Because *M.W.* was issued and the statute was enacted within a few weeks of each other, the committee recognized that neither the Court nor the legislature had the benefit of the other's actions.

This proposed rule is the result of numerous meetings of both the full Committee and the Dependency Subcommittee. The two issues that generated the majority of the discussion in both groups were:

1. Whether a court hearing should be required before the placement of a dependent child in a residential mental health treatment facility.

2. Whether appointment of an attorney should be required for every dependent child recommended for placement in a residential mental health treatment

facility.

Preplacement Court Hearing

The Court's decision in *M.W.*, was predicated on an agreement by all parties to the case that chapter 39, Florida Statutes, required a preplacement court hearing. That agreement was based on an interpretation that residential placement in a mental health treatment facility did not qualify as "ordinary medical, dental, psychiatric, and psychological care," and that a court order would be required to enlarge the authority of the department to make the placement. See § 39.01(70), Fla. Stat. (1998 Supp.) The Court found that, although there is an abundance of guidance provided by the statutes and rules concerning other aspects of treatment and care for children as they move through the dependency system, no statute or rule specifically set forth procedures that the department must follow to place a dependent child in a residential mental health treatment facility. This is no longer the case. Through the recent adoption of Chapter 2000-265, Laws of Florida, the legislature has given the department authority to place dependent children in residential mental health treatment centers without a prior court order.

When originally filed, Senate Bill 682 (the enacting legislation for Chapter 2000-265 and the creation of section 39.407(5), Florida Statutes) required a court hearing before the placement of a dependent child in a residential mental health treatment facility. However, this requirement was affirmatively removed by the legislature and replaced with an extensive process of independent evaluations, monthly reports to the court, periodic independent evaluations, and court reviews every 90 days — due process safeguards similar to those required by the United States Supreme Court in *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2492, 61 L.Ed.2d 101 (1979).

Based on this legislative action and the resulting detailed preplacement procedure, the majority of the Juvenile Court Rules Committee determined that a preplacement court hearing was not required. The committee, however, created subdivisions (a)(5) and (a)(6) to require the court to conduct a status hearing within 5 working days of the placement to ensure that the substantive safeguards required by section 39.407(5), Florida Statutes (2000), have been met.

The committee also adopted subdivision (b), to provide for an initial post-placement review hearing. This provision allows any party to the dependency proceeding, including the child, to request that the court conduct an evidentiary hearing to review the appropriateness of the placement. This hearing must then be

held within 14 days of the request or within the time requested by the moving party. This hearing must be scheduled within 14 days of the filing of the report, without need for a motion, if the guardian ad litem's report indicates that the child objects to the placement.

Appointment of an Attorney to Represent the Child

In *M.W.*, this Court recognized that a child can be heard either through a guardian ad litem or an attorney, or both. The legislature, however, chose to mandate in section 39.407(5), Florida Statutes (2000), that a guardian ad litem be appointed for all children placed in a residential mental health treatment program and did not require the appointment of an attorney for these children. For this reason, subdivision (a)(3) requires the court immediately to appoint a guardian ad litem for the child, if one is not currently serving. The guardian ad litem must be represented by legal counsel (each guardian ad litem program has a program attorney) at each hearing concerning the child's placement in the residential mental health treatment center. If no volunteer is readily available to serve as the guardian ad litem, section 39.820(1), Florida Statutes (1998), allows the guardian ad litem program itself or staff members of the program to serve as the guardian ad litem.

In subdivision (a)(4), the dependency court is given the discretion to appoint legal counsel for the child when the court deems such appointment to be appropriate. This provision allows the court to consider factors such as the chronological and mental age of the child, the child's consent or objection to the placement, and the child's ability to communicate with and assist legal counsel before appointing an attorney.

The committee respectfully requests that the Court adopt the proposed rule.

Minority Report

Although the proposed rule was voted out of committee by an approximate two-thirds majority, the issue of appointment of legal counsel for a child placed or to be placed in a residential mental health facility generated very close and conflicting votes, sufficient to justify a Minority Report. A majority of Juvenile Court Rules Committee members initially voted to require the court to appoint an attorney to represent the child, on notification that the child has been placed in a residential treatment center. By a vote of 13-11-1, subdivision (a)(4) of the proposed rule was amended to read: "Upon notification that a child has been

placed into a residential treatment center, the court shall appoint an attorney to represent the child" (emphasis added).

Immediately following this vote for appointment of counsel, however, a member disclosed that because of this mandatory appointment of counsel amendment, this member ultimately would vote against the rule in its entirety. This generated discussion concerning the Committee's authority to recommend to this Court, and the Court's authority to enact, substantive measures through rulemaking. The dissenters to the appointment of counsel amendment stressed that mandatory appointment of counsel, in their opinion, was a substantive requirement, not appropriately addressed by court rule without specific directives from the Florida Legislature.

This discussion of the Court's authority generated a motion to amend subdivision (a)(4): "Upon notification that a child has been placed into a residential treatment center, the court ~~shall~~may appoint an attorney to represent the child." This amendment, permitting but not requiring, the court to appoint a lawyer for the child, passed by a vote of 15-11-0, and is found in the attached rule presented to the Court. The Minority Report addresses this issue.

Procedural due process. The Juvenile Court Rules Committee was charged with delineating the procedures to be followed when the Department of Children and Family Services seeks an order committing a dependent child to a residential facility for mental health treatment. In giving this directive, this Court stated 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. It should be noted that in *M.W.*, the child was represented by counsel.

A "meaningful opportunity to be heard" is the hallmark of procedural due process, guaranteed by the Fourteenth Amendment to the United States Constitution. To be "meaningful", the opportunity to be heard "'must be full and fair, not merely colorable or illusive." *State Plant Board v. Smith*, 110 So.2d 401, 407 (Fla. 1959), quoting *Ryan's Furniture Exchange, Inc. v. McNair*, 162 So. 483, 487 (Fla. 1935). As a threshold matter, any rules implementing the dependent child's meaningful opportunity to be heard are thus procedural in nature, and are within the purview of the Juvenile Court Rules Committee to recommend to this Court for adoption.

Procedural due process requires that judicial proceedings ensure fairness to

the litigants. For a child to have a meaningful opportunity to be heard in a commitment proceeding, that child must have an attorney who can advocate the child's position before the court. This advocacy involves more than merely announcing the child's stated wishes as set forth in the proposed Rule 8.350(b). Rather, the child must be given the opportunity to subpoena witnesses in his or her own behalf; to present testimony and documentary evidence before the Court; to cross-examine the witnesses called by the other parties to the case; and to present legal argument to the court. A child, particularly a child in the legal custody of a separate party to the case and one who arguably is in need of mental health treatment, cannot advocate his or her own position in any meaningful fashion, particularly when the protection of the child's constitutional rights are at issue.

This Court has previously noted: "It is the lawyers who bring cases before a court and advocate issues which assure the integrity of the Constitution and protect individual rights in our society. The availability of lawyers to challenge government conduct that interferes with constitutional rights is essential to assure that these rights are protected." *In re Amendments to Rules Regulating The Florida Bar–1.3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid)*, 598 So.2d 41, 43 (Fla. 1992). The role of counsel in ensuring full access to the courts is so important that The Florida Bar devoted an issue of The Florida Bar *Journal* to the subject. See *Pro Bono in Florida: The Search for Full Access*, 73 Fla. Bar J. No. 4 (Apr. 1999). For an excellent discussion of the role of counsel in ensuring access to justice, see Van Nortwick, Spuhler & Doyle, *Pro Bono Services in Florida*, 73 Fla. Bar J. 30.

The minority believes that this advocacy cannot be provided by the guardian ad litem or the guardian ad litem's attorney, as set forth in subdivision (a)(3) of the proposed rule. The guardian ad litem is charged by statute to represent the "best interests of a child," which is not the same as the child's expressed wishes. See § 39.820(1), Fla. Stat. (1998). The American Bar Association's Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (approved by the ABA House of Delegates, February 5, 1996), provide that a child's attorney is charged with providing "legal services for a child" and "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." In contrast, a lawyer who is appointed as a guardian ad litem is "appointed to protect the child's interests without being bound by the child's expressed preferences." Thus, only an attorney for the child can properly advocate for the child and provide him or her with a "meaningful opportunity to be heard."

Mandatory counsel for the guardian ad litem. Despite its view that mandatory appointment of counsel for the child is a substantive requirement, the Committee ironically adopted, by a vote of 17-6-1, subdivision (a)(3), which states that the guardian ad litem "must be represented by an attorney at all proceedings under this rule," unless the guardian is acting as an attorney. The minority believes it is inconsistent to submit that requiring the guardian ad litem to be represented by an attorney is procedural, whereas requiring an attorney for the child is substantive.

Requiring the guardian ad litem to appear through legal counsel results in a situation in which every party to the case *except* the child, whose constitutional liberty interests are at stake, has an attorney in these commitment proceedings. Not only is this result absurd, it is legally unsound, because the guardian ad litem's attorney is thereby faced with a potential ethical dilemma. If the child's position conflicts with that of the guardian ad litem, the guardian ad litem's lawyer will be prohibited ethically from representing the child's legal interests, which will then result in failing to advise the court of the child's stated wishes.

The minority submits that requiring legal counsel for the guardian ad litem, while leaving the child as the only unrepresented party, stands the notion of "a meaningful opportunity to be heard" on its head. Not only will court rules provide more procedural protections for delinquent than for dependent children, see *M.W.*, *supra*, at n.36, but they will provide for full representation of every party, except the one who is to be protected by the courts.

Based on the foregoing, the minority requests this Court to modify proposed Rule 3.850(a)(4) as follows:

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

With this amendment, the minority then concurs with the full committee and recommends adoption of proposed Rule 8.350. Otherwise, the minority opposes the adoption of the proposed rule and requests this Court to remand the matter to the Juvenile Court Rules Committee with more specific instructions.

Respectfully submitted _____, 2000.

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RULE 8.350. PLACEMENT OF CHILD INTO RESIDENTIAL TREATMENT CENTER AFTER ADJUDICATION OF DEPENDENCY

(a) **Placement.**

(1) The placement of any child who has been adjudicated dependent into a residential treatment center licensed under section 394.875, Florida Statutes, or a hospital licensed under chapter 395, Florida Statutes, for residential mental health treatment shall be as provided by law.

(2) The court and all parties shall be notified of the placement within 72 hours of the child's placement in the facility. This notification shall include a statement as to why the child is suitable for placement in a residential treatment center and why less restrictive alternatives are not appropriate and also shall include the written findings of the qualified evaluator.

(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.

(4) On notification that a child has been placed into a residential treatment center, the court may 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 court shall timely provide written notice of the date, time, and place of the hearing to all parties and participants.

(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/or attorney.

(b) **Initial Placement Review.**

(1) **Motion.** Any party to the dependency proceeding may file a motion for placement review with the court that has jurisdiction over the child.

(2) **Setting Hearing.** On receipt of a motion for placement review, or if the guardian ad litem's report indicates that the child objects to the placement, the court shall set the matter for hearing. The initial placement review hearing must be conducted within the time period requested by the moving party or within 14 days of the filing of the motion or the guardian ad litem's report.

(3) **Notice of Hearing.**

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

(B) **Child.** The child's guardian ad litem, or attorney if one has been appointed, 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.

(4) **Hearing.**

(A) At the hearing, the court shall consider, at a minimum, all of the following:

(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.

(ii) The recommendation of the guardian ad litem.

(iii) A case review committee recommendation, if there has been one.

(iv) The written findings of the evaluation and suitability

assessment prepared by a qualified evaluator.

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

(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.

(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 and all parties in writing at least 72 hours before the 3-month review hearing.

(2) Review hearings shall be conducted every 3 months thereafter, until the child is placed in a less restrictive setting,

(3) If the court determines at any hearing 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.

(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.