

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO THE
RULES OF JUVENILE PROCEDURE
Fla.R.Juv.P. 8.350

Case No. SC-00-2044

REPORT OF JUVENILE COURT RULES COMMITTEE

Joel Silvershein, Chair, Juvenile Court Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, submit these amendments to proposed Rule 8.350, the Florida Rules of Juvenile Procedure, as requested by the Court in its decision of October 25, 2001. The Committee's proposed amendments are incorporated into the Court's proposed rule and, together with the reasoning for each proposed amendment, are attached to this report.

The Committee's proposed amendments were presented to The Florida Bar Board of Governors on February 1, 2002, who unanimously approved the Committee's work by a vote of 39-0.

In drafting these amendments, the Juvenile Court Rules Committee first considered whether to accept the Court's proposed rule or to propose an entirely new Rule 8.350. The Committee vote was 14 - 11 - 0 to accept the Court's proposed rule, and to make comments to that proposal. Those voting against acceptance of the Court's rule favored the minority report of the committee, *i.e.*, that because the Court did not make a finding of law that dependent children facing placement in residential treatment centers have a *constitutional* right to counsel, the Court is without authority to promulgate a rule that requires appointment of counsel in any circumstance.

In reaching its threshold decision, the Committee considered the Court's ruling in *In Interest of D.B.*, 385 So. 2d 83, 92 (Fla. 1980) that "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." The Committee

accepted the Court's authority to impose the requirement of legal counsel for children who disagree with a planned mental health placement, understanding that because the Court did not base its conclusion on constitutional necessity, children's counsel will not be entitled to any fee for their services to dependent children.

This report discusses the proposed changes that are substantive in nature, or that were the product of a divided vote. A complete explanation of all the proposed changes, including those that are technical in nature, is found in Attachment A (Committee Chair's January 18, 2002 Memo to The Florida Bar Board of Governors). A copy of proposed Rule 8.350, as amended by the Committee, is Attachment B. A copy of the minority report is Attachment C.

New subdivision (a)(1). To avoid repetition and confusion, the Committee created a new subdivision (a)(1), to define "residential treatment center or facility" and "hospital," to be used throughout the rule. This addition makes it unnecessary to repeat the detailed information regarding the various types of mental health placements that are subject to the rule. Committee vote: 19-1-3.

In adding this application subdivision, the Committee also added "or facility" to "residential treatment center," to be certain to include in the scope of the rule each of the types of mental health treatment placements licensed under § 394.875, Fla. Stat. Committee vote: 12-0-5.

To further clarify the scope of the Rule, this new subdivision specifically excludes Baker Act proceedings. Committee vote: 17-0-0.

New subdivision (a)(5): The Committee created a new subdivision (a)(5) concerning the immediate placement of a child prior to a hearing when the child's situation so requires. This provision has been moved from (a)(7), formerly the last sentence, to emphasize this placement option in urgent situations. The language concerning the type of placement has also been changed, deleting "long-term" before "residential treatment center or hospital," and changing "the hearing" to "a hearing" in two places. Committee vote: 16-6-2.

New subdivision (a)(6): A substantive proposed modification to the Court's rule is found in new subdivision (a)(6), requiring the child to make some

affirmative indication, which can be nonverbal, that he or she does not agree with the placement before an attorney is required. Committee vote: 22-2-0.

The Committee also proposes requiring counsel to be appointed for the disagreeing child when this information comes to the court from any party other than the department or the guardian ad litem, provided this information is based on communication with the child. Committee vote: 23-0-2.

New subdivision (a)(7): The Committee created new subdivision (a)(7) concerning the timing of the pre-placement status hearing. The Court's rule requires the status hearing to occur within "5 working days." The Committee changed this to "48 hours." When a child is in need of mental health treatment, it is critical that the needed treatment not be delayed. Because dependency courts are accustomed to addressing the critical needs of children on an expedited basis, the initial hearing should be conducted as soon as possible after the recommendation is made. This will reduce the possibility of the child decompensating to the point of needing to be "Baker Acted" prior to the status hearing. The second sentence of new (a)(7) has been amended to change "clerk of court" to "department" and delete "written" before notice. With this expedited time period, the department should be responsible for providing notice to the parties. The department will be the first to know of the recommendation for placement and is better equipped to provide immediate notice to the other parties in the dependency action. Committee vote: 13-8-4.

New subdivision (a)(8): By a divided vote, the Committee amended new subdivision (a)(8) to allow a status hearing to occur in the absence of either the guardian ad litem or the child's attorney, when the court permits this absence "for good cause." This change was made to address concerns that a child's mental health may be placed in jeopardy when a hearing could not be held, and the child therefore not quickly placed, if the guardian ad litem or attorney did not appear for the hearing. Committee vote: 11-10-1.

However, the Committee also recognizes the competing need to provide the child access to the court with representation by the child's guardian ad litem and/or attorney. Therefore, the Committee added language requiring the court to schedule an additional hearing within 24 hours, upon request, at which both the attorney and the guardian ad litem must appear. However, this additional hearing is required only

if the initial status hearing occurred in the absence of both the child's guardian ad litem and attorney. Committee vote: 9-8-1.

New subdivision (a)(9): Two sentences were added to the beginning of the subdivision regarding the procedure to be followed if the child appears at the hearing without representation or does not appear at the hearing. The amendment provides a procedure for the court to determine whether the child agrees or disagrees with the placement in these circumstances. Committee vote: 17-1-0.

In the third (originally first) sentence, "all parties are in agreement at the scheduled hearing" has been changed to "no party disagrees with the department's motion at the status hearing." In the next sentence, "is not in agreement" has been changed to "disagrees." Frequently in dependency cases one or more of the parties will not participate in the proceedings or a party will have no position on an issue before the court. Requiring a party to affirmatively disagree with the placement would ensure that evidentiary hearings are not convened unnecessarily just because a party chose not to participate or remained silent on the issue of placement. This change treats all parties equally, as each party, including the child, must now affirmatively make a showing of disagreeing with the proposed placement. Committee vote: 16-0-1.

New subdivision (a)(10)(B): The words "and witnesses" have been added after "present evidence." This amendment clarifies that at the hearing on placement, any party may present witnesses as well as evidence. Committee vote: 16-0-0.

Subdivision (b)(2): The Committee amended the rule concerning placement review hearings to require the court to renew its inquiry of any child who is not represented, to provide a mechanism for a child who initially did not object to the placement to change his mind and have an attorney appointed. Committee vote: 17-0-0.

The remaining amendments by the Committee, explained in Attachment A and set forth in Attachment B, are technical in nature, and were approved either unanimously or by an overwhelming majority.

Because of the philosophical division within the Committee as to the Court's authority to propose its version of Rule 8.350, and to require appointment of

counsel without a ruling that appointment of counsel is constitutionally required, the Committee authorized a minority report, which is set out as Attachment C.

The Committee respectfully requests that the Court adopt the proposed rule with the Committee's amendments.

Respectfully submitted _____, 2002.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. Mail to: Christian A. Zawisza and John M. Ratliff, Children First Project, Nova Southeastern University, Shepard Broad Law Center, 3305 College Avenue, Suite 325, Davie, FL 33314-7721; Carolyn S. Salisbury and Bernard Perlmutter, Children & Youth Law Clinic, University of Miami School of Law, 1311 Miller Drive, Ste. F305, Coral Gables, FL 33124; Professor Susan Stefan, University of Miami School of Law, 1311 Miller Drive, Coral Gables, FL 33124; Ira Burnim, Bazelon Center for Mental Health Law, 1101 15th Street N.W., Suite 1212, Washington, DC 20005; Howard H. Babb, Jr., President, Florida Public Defender's Association, 550 W. Main Street, Suite 401, Tavares, FL 32778-3115; Ward L. Metzger, Public Defender's Office, 25 North Market Street, Suite 200, Jacksonville, FL 32202-2802; Deborah Anne Schroth, Florida Legal Services, Inc., 126 West Adams Street, Suite 503, Jacksonville, FL 32202-3849; Sarah H. Bohr, Bohr & Harrington, LLC, 2337 Seminole Road, Atlantic Beach, FL 32233-5988; Karen Gievers, Children's Advocacy Foundation, 524 West College Avenue, Suite 2, Tallahassee, FL 32301; Professor Bruce J. Winick, University of Miami School of Law, 1311 Miller Drive, Coral Gables, FL 33124; Judge Ginger Lerner Wren, Broward County Courthouse, Suite 429, 201 S.E. 6th Street, Ft. Lauderdale, FL 33301; Brent R. Taylor, Advocacy Center for Persons with Disabilities, Inc., 706 East College Avenue, Tallahassee, FL 32301-2912; Teresa A. Kramer, Assistant General Counsel, Dept. of Children and Families, Building 2, 1317 Winewood Blvd., Ste 204, Tallahassee, FL 32399-6570; Judge Daniel P. Dawson, Osceola County Courthouse, 2 Courthouse Square, Kissimmee, FL 34751-5487 on _____, 2002.
