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SUPREME COURT OF FLORIDA

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

Case No. SC-00-2044

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

Following are the comments of the Public Interest Law Section of The Florida **Bar** to the proposed amendments to Rule 8.350, 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 mental health treatment facilities.

The Public Interest Law Section (“PILS” or “the Section”) is a voluntary section of The Florida **Bar**. The Section was founded in 1989 as “an organization for those who have a common interest in advocacy and enhancement of constitutional, statutory or other rights that protect the dignity, security, justice, liberty, or freedom of the individual or public and to advocate for the legal needs of people who are generally disenfranchised, under-represented or lack meaningful access to traditional public forums.”¹ The Section is comprised of five substantive law committees, including the Legal Needs of Children Committee, with the purpose to advocate for

¹ This description of the Section’s purpose is published on its letterhead.

the legal needs of children in the dependency system.²

To avoid unnecessary repetition, PILS adopts the Minority Report of the Juvenile Court Rules Committee (“Minority Report”) submitted to this Court with the proposed Rule 8.350 concerning the need or appointment of an attorney for the child, as well as the comprehensive comments submitted by the Bazelon Center for Mental Health Law (“Bazelon Center”), written by Professor Susan Stefan and Ira Burnim.

INTRODUCTION

In *Palm Beach County Canvassing Board v. Katherine Harris, et al.*, Case Nos. SC00-2346, SC00-2348 & SC00-2349 (Fla. Nov. 21, 2000)³, this Court cautioned that “Courts must attend with special vigilance whenever the Declaration of Rights is in issue.” *Id.*, at 30. Nothing in our Constitution’s Declaration of Rights permits children, even dependent children, to be treated differently than adults, other than for purposes of criminal punishment. Art. 1, Sec. 15(b), Fla. Const. Rather, the basic rights of children affected by the proposed rule are directly protected by Florida’s Constitutional Declaration of Rights. The affected children possess the right to enjoy “life and liberty”, Art. I, Sec. 2, Fla. Const.; the right of privacy, Art. I, Sec. 23, Fla. Const.; and the right to access the courts, Art. I, Sec. 21, Fla. Const. Dependent children are also guaranteed that they shall not be deprived of these rights without due process of law. Art. I, Sec. 9, Fla. Const.

² PILS sponsored and prepared a CLE in October, 1998 titled “Innovations in Advocacy - Dependency and Delinquency and will be presenting a seminar on advocacy for children at the Bar’s annual meeting in June, 2001. Many of PILS’ members represent children, particularly teenagers, in the courts of this State, and are well-versed in the legal, educational and social needs of their child clients,

³ This decision is not yet reported.

When a child is placed into a residential psychiatric facility, these rights are clearly infringed.⁴ These facilities are secure, meaning that they are locked and monitored. Their residents generally are not permitted even to go outside onto the grounds of the premises without first securing permission.

Another fundamental restriction for children placed in residential psychiatric facilities is the limiting, perhaps the complete cessation, of their communications and visits with their siblings, extended families and friends. Outside contacts become privileges to be earned as part of the therapeutic behavior management plan, which plan supercedes any previous court orders for visitation.

A child placed in a residential facility is subject to being medicated, on a long-term basis and also on an ad-hoc emergency basis. Further, the child is subject to discipline in the facility, which discipline may include physical restraints. It becomes difficult even for the Department to monitor such situations if the child remains restricted from telephone and visitation privileges during times of discipline,

When a child is placed in a residential psychiatric facility, the child is removed from everything that is familiar to that child, including the child's school. Local school districts generally provide instructors who go into the psychiatric facilities to teach classes. However, the classes which are taught are generally limited to basic subjects, and the hours of instruction are fewer in number. Typically there is no foreign language instruction, no science labs, and no honors or advanced placement classes. Further, these children are deprived of participation in any

⁴ See Sally Kestin, *Throwaway Kids*, South Florida Sun-Sentinel, November 6, 7, 8, 9, 1999, a series of articles.

and all extracurricular activities in which they previously had participated,

Clearly there are dependent children who need residential psychiatric care to help them recover from the former chaos in their lives which caused their adjudication as dependent children. But this need for treatment must be carefully tailored to be the “least restrictive” treatment available to avoid further damaging these already traumatized children. While both federal and state statutory laws provide for the placement of children in the least restrictive treatment environment, PILS asserts that Florida’s constitution absolutely requires this. Because the most fundamental rights of dependent children, enumerated in the Declaration of Rights, are affected by a commitment to a residential psychiatric facility, the courts must “attend with special vigilance” in protecting these rights. Procedural due process is of utmost importance in committing dependent children against their will to residential psychiatric facilities.

RECOMMENDATIONS

PILS recommends four changes to the proposed rule.

1. Appointment of counsel. The court should appoint legal counsel to represent the wishes of the child at the earliest opportunity in this process, preferably at the time the child is assessed for suitability for residential treatment by a qualified evaluator pursuant to § 39.407(5)(b),(c), Fla. Stat. (2000).
2. Except in cases of emergency, the court must conduct an evidentiary hearing to determine whether the child should be admitted to residential treatment prior to the child’s admission.
3. The child should have the right to be present at all court hearings relating to his or her commitment, unless the child waives this right or unless the court determines it would be harmful for the child to attend.
4. The court must use a “clear and convincing” standard of proof in determining whether the child should be admitted and retained in residential treatment,

Recommendation 1:

Appointment of counsel. The court should appoint legal counsel to represent the wishes of the child at the earliest opportunity in this process, preferably at the time the child is assessed for suitability for residential treatment by a qualified evaluator pursuant to § 39.407(5)(b),(c), Fla. Stat. (2000).

The Section believes the Minority Report and the Bazelon Center comments clearly point to the need for court-appointed legal counsel for the child at the earliest opportunity. Florida's Declaration of Rights and procedural due process require this.

Additionally, the Florida Legislature in Section 39.4085, Fla. Stat. (1999) has established goals for children in shelter or foster care. These goals have been established to apply to the "delivery of child welfare services" and therefore apply to the residential commitment proceeding dictated by Section 39.407(5), Fla. Stat. (2000). Those goals include the child's right to enjoy individual liberty **and** the protection of civil and legal rights (§ 39.4085(2)), privacy and uncensored communications including access to a telephone (§ 39.4085(3)), and to "minimal disruption to their education and retention in their home school, if appropriate" (§ 39.4085(17)).

PILS asserts that the most important Legislative goal for children placed in State custody, whether it be designated shelter care or foster care, is to have an attorney ad litem appointed to represent the legal interests of the children, where appropriate. Section 39.4085(20), Fla. Stat. (1999). An attorney is able to advocate for the dependent child's access to the necessary and appropriate services within the Department and to advocate for the child's wishes and goals before the Court.

PILS specifically adopts The Bazelon Center's Recommendation I.A., only adding the appointment of an attorney for the child. Therefore, PILS' proposal is:

"The court and all parties shall be notified of a proposed placement at the time 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. Immediately upon notification of a proposed placement, the court shall also appoint an attorney to represent the child. The child's guardian ad litem and the child's attorney shall each have immediate **and** full access to the child, the child's records and the evaluator. The child shall be permitted to contact both the guardian ad litem and the attorney without limitation by the Department."

Recommendation 2: **Except in cases of emergency, the court must conduct an evidentiary hearing to determine whether the child should be admitted to residential treatment prior to the child's admission,**

PILS specifically incorporates and adopts the reasoning of the Bazelon Center in making its Recommendations III.A. and III.C. . The Section would, however, modify the Center's specific recommendations to require an evidentiary hearing prior to the child's placement in a residential facility except in cases of emergency

Recommendation 3: **The child should have the right to be present at all court hearings relating to his or her commitment, unless the child waives this right or unless the court determines it would be harmful for the child to attend.**

When an adult is involuntarily placed into a residential psychiatric facility, Florida law provides for the patient's attendance at the hearing. Only if "the court finds that the patient's attendance at the hearing is not consistent with the best interests of the patient, **and** the patient's counsel does not object", then "the court may waive the presence of the patient from all or any portion of the hearing." Sec. 394.467(6)(a)1, Fla. Stat, (emphasis supplied).

This Court has recently rejected a proposed Rule which would permit children accused of delinquent acts to attend detention hearings through audio-visual devices rather than personal appearances. *Amendment to Florida Rule of Juvenile Procedure 8.100*, 25 Fla. L. Weekly **S516**

(Fla. July 6, 2000). This Court acknowledged difficulties in personally bringing juveniles before the court for this hearing. However, the convenience of such a system is far outweighed by the value to the children that comes with the personalized attention of a traditional court hearing.

This Court adopted the comments of Senior Circuit Court Judge Dorothy H. Pate:

As you are aware, public awareness and understanding of our courts is poor. Most people coming into court have difficulty in grasping the process. This is magnified with children and youth. The detention decision is one of the most important to be made in delinquency cases—both for the child and society. The value of observation of the child, interaction with family (and sometimes victims) is extremely helpful in making a fair and just decision.

Id., at 517.

Certainly the same considerations apply to the court's decision to place a dependent child in a residential psychiatric facility. The court can benefit from seeing the child personally, but more importantly, the child can benefit from seeing that the placement decision is made by an objective judge after hearing the evidence presented, and considering the child's input.

PILS' recommendation permits a child to waive his or her presence, however, should the child choose not to attend. The Section's recommendation also allows for the situation where the child's interests would not be served by a personal appearance before the court.

Recommendation 4: **The court must use a “clear and convincing” standard of proof in determining whether the child should be admitted and retained in residential treatment.**

The United States Supreme Court has discussed the reasoning for choosing the clear and convincing standard of proof rather than the preponderance of the evidence standard. The Court

has indicated that the “standard of proof ‘serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.’” *Herman v. Huddleston*, 495 U.S. 375, 389, (1983), citing *Addington v. Texas*, 441 U.S. 418,423, (1979). Therefore, the Supreme Court has required “proof by clear and convincing evidence where particularly important individual interests and rights are at stake”, including proceedings to terminate parental rights, involuntary adult commitment proceedings and deportation actions. *Id.*

As discussed in the Introduction to these Comments, PILS asserts that the most fundamental individual rights and interests of dependent children facing residential psychiatric treatment are at issue, rights guaranteed by our Constitution’s Declaration of Rights. Placement of a child in a residential psychiatric facility affects the child’s personal liberty and privacy interests, and seriously impacts the child’s entire world, including his or her relationships with family and friends, and the child’s educational development and opportunities, The courts should be especially vigilant in protecting dependent children and these rights by using the “clear and convincing” standard of proof.

CONCLUSION

The Public Interest Law Section of The Florida Bar respectfully requests this Court consider and adopts its proposed recommendations as components of the procedural due process necessary to protect the constitutional rights of Florida’s vulnerable, dependent children in need of mental health treatment.

REOUEST FOR ORAL ARGUMENT

Counsel for the Public Interest Law Section requests oral argument.

Respectfully submitted,

Public Interest Law Section of The Florida Bar

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **has** been furnished by U.S. Mail to The Hon. John M. Alexander, Chair, Juvenile Court Rules Committee, St. Johns County Courthouse, P. O. Box 300, St. Augustine, Florida 32085-0300, this 1st day of December, 2000.

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ATTORNEY