IN THE SUPREME COURT OF FLORIDA

CASE NO: SC06-140

IN RE: AMENDMENTS TO THE FLORIDA

RULES OF JUVENILE PROCEDURE

COMMENT ON PROPOSED AMENDMENTS TO RULE 8.257

Robert J. Jones, serving as a General Magistrate in the Eleventh Judicial Circuit, In and For Miami-Dade County, Florida, files this Comment with regard to the proposed amendments to Rule 8.257, Florida Rules of Juvenile Procedure .

The Juvenile Court Rules Committee's Report provides, in part, as follows:

> Rule 8.257, General Magistrates: Subdivision (f) has been amended to correct an error carried over from *Fla. Fam. L. R. P.* 12.490, on which this rule was based. In the first sentence "serve" has been changed to "file." Exceptions to the general magistrate's report must be filed with the court, as the remainder of this subdivision reflects. See also subdivision (e)(2).
>
> A new subdivision (h) is proposed stating that general magistrates may not hear shelter hearings under section 39.402, Florida Statutes, or adjudicatory hearings under sections 39.507 and 39.809, Florida Statutes. This amendment was proposed to the committee by the Committee on Family and Children in the Courts (the Steering Committee). (See Appendix D.) Section 39.402(8)(a), Florida Statutes, requires that a shelter hearing be held within 24 hours of placement of the child in shelter. This requirement does not allow time for the consent/objection process required for referral to a general magistrate by *Fla. R. Juv. P.* 8.257(b)(1) and (b)(2). In addition, sections 39.507(1)(b) and 39.809(3), Florida Statutes, specifically require that an adjudicatory hearing be conducted by a "judge." Compare section 39.521(1), Florida Statutes ("A disposition hearing shall be conducted by the court") and section 39.701, Florida Statutes ("The

court . . . shall review the status of the child at least every 6 months"). This issue has previously been considered by the committee and the Court. In 2002, the committee proposed that the rule then governing general and special masters, *Rule* 8.255, be amended to prohibit general and special masters from hearing certain types of dependency hearings. The Court declined to approve the amendment, stating "that the ultimate determination of the role of masters in dependency proceedings should be resolved in the larger context of the Revision 7 implementation." *Amendments to Florida Rules of Juvenile Procedure,* 827 So. 2d 219, 221 (Fla. 2002). In recognition of the requirement that certain types of hearings be conducted by a judge, however, the court did amend *Rule* 8.255(i) to state that "'general and special masters may be appointed to hear issues involved in proceedings under this part, *except as otherwise provided by law.'" Amendments,* 827 So. 2d at 221. The Court also asked the committee to consider a rule for obtaining the parties' consent to referral to a general master.

In the 2004 two-year cycle, the committee proposed creation of *Rule* 8.257, governing use of general magistrates in dependency and termination of parental rights proceedings. The Steering Committee commented on the proposed rule, again raising the issue of whether general magistrates should hear certain types of proceedings. The Court, however, declined to address this issue and adopted the rule proposed by the Rules Committee. *Amendments to the Florida Rules of Juvenile Procedure,* 894 So. 2d 875 (Fla. 2005) *(Amendments II).* The court did, however, recognize that "the role of magistrates in juvenile proceedings may need to be reviewed and possibly amended in the future." *Amendments II,* 894 So. 2d at 883.

The committee has considered the role of general magistrates in juvenile proceedings and, for the reasons stated above, is respectfully requesting that the court adopt the proposed amendment to limit the types of hearings that may be heard by a general magistrate.

I respectfully submit that the proposed amendment to subparagraph (f) of Rule 8.257 should not be approved by the Court at this time.

Approving the proposed amendment at this time will potentially create

system wide confusion regarding the exceptions process as well as create inconsistencies in the court rules governing the use of General Magistrates and Special Magistrates in our court system.

Although the Juvenile Court Rules Committee suggests that the proposed amendment corrects "an error carried over from *Fla. Fam. L. R. P.* 12.490," *Fla. Fam. L. R. P.* 12.490(f) did not have an error in it. In fact, the inclusion of the words "serve exceptions" in subparagraph (f) of *Fla. R. Juv. P.* 8.257 and subparagraph (f) of *Fla. Fam. L. R. P.* 12.490 is, in short, a reflection of the historical process for exceptions and of what is currently in subparagraph (h) of *Fla. R. Civ. P.* 1.490 (the rule that previously governed referrals in Juvenile proceedings), subparagraph (f) of *Fla. Prob. R.* 5.697 and subparagraph (g) of *Fla. Fam. L. R. P.* 12.492. See also *Fla. R. Juv. P.* 8.625. Therefore, the premise upon which the proposed amendment is based is without merit.

If, however, the Court determines that it should approve the proposed amendment, it is respectfully submitted that all of the other court rules that govern the use of general magistrates and special magistrates should be amended in the same way. Doing so will harmonize the rules governing the use of general magistrates and special magistrates, avoid confusion and eliminate a potential trap for the unwary.

With regard to the portion of the proposed new subdivision (h) relating to shelter hearings under section 39.402, Florida Statutes, it is respectfully submitted that said portion of the proposed amendment should be approved, but not necessarily because of the consent/objection process required by *Fla. R. Juv. P.* 8.257(b)(1) and (b)(2).

It is conceivable that an order of referral to a general magistrate could be entered and directly served prior to the commencement of the required shelter hearing. It is also conceivable that an objection to the referral could be filed prior to the "commencement" of the shelter hearing or the parties could elect not to file the objection prior to the "commencement" of the shelter hearing. Thus, it is conceivable that the consent/objection requirements of *Fla. R. Juv. P.* 8.257(b)(1) and (b)(2) could be satisfied.

However, because, under Section 39.402(8), Florida Statutes, a child may not be held in a shelter longer than 24 hours unless an **"order"** so directing is entered by the court after a shelter hearing, and because a party has a right to serve exceptions to a Report of General Magistrate pursuant to *Fla. R. Juv. P.* 8.257(f), and no order can be entered on the Report of General Magistrate until an actual hearing is held on the exceptions, and because the Report of General Magistrate has no force or effect until an order is entered on the report, it makes sense, and best practices dictate, that

that portion of the proposed new (h) regarding shelter hearings under Section 39.402, Florida Statutes, be approved by the Court. The need for an immediate **"order"** is the key issue!

With regard to the portion of the proposed new subdivision (h) relating to adjudicatory hearings under sections 39.507 and 39.809, Florida Statutes, it is respectfully submitted that said portion of the proposed amendment should not be approved at this time.

First, whether a statute uses the word "judge" or the word "court," I respectfully submit that, in general, it is contemplated that an Article V judge will be presiding over all judicial proceedings in the Circuit Court, as a litigant has the right to have his or her Circuit Court matter heard and determined by an Article V judge. However, I also respectfully submit that a litigant generally has the right to waive his or her right to have his or her civil matter initially heard by the presiding Article V judge.

As a general rule, **any right may be waived, whether arising out of the constitution** or conferred by statute or secured by contract." (emphasis added) Turner v. Turner, 383 So.2d 700, 703 (Fla. 4th DCA), rev. denied, 392 So.2d 1381 (Fla. 1980) (Waiver of right to petition for modification) See also Knupp v. Knupp, 625 So.2d 865 (Fla. 3d DCA 1993) ("As previously stated, the question presented by this case is whether a party

may, through counsel, validly waive the requirement for a written record of the master's proceedings. We conclude that a party, through counsel, may so waive this requirement and that such a valid waiver was accomplished in this case."); Hartwell v. Blasingame, 564 So. 2d 543, 545 (Fla. 2d DCA 1990) (surviving spouse could waive her homestead rights provided in Article X, section 4 of the Florida Constitution); Miami Dolphins v. Genden & Bach, P.A., 545 So.2d 294 (Fla. 3d DCA 1989) ("Generally, one can waive any contractual, statutory or constitutional right. . . .The doctrine of waiver can encompass not only the intentional or voluntary relinquishment of known rights, but also conduct that warrants an inference of the relinquishment of those rights. . . ."); Ferris v. Ferris , 417 So.2d 1066, 1067 n.2. (Fla. 4th DCA 1982) ("Rule 1.490(f) provides in part: The evidence shall be taken in writing by the master or by some other person under his authority in his presences and **shall be filed** with **his report**. (emphasis added) Neither party raised this requirement by objection, thus waiving the master's failure to comply with the rule.").[1] There is no due process violation where there is an intentional relinquishment of a known right or privilege. Barbon-Zurita v. State, 415 So.2d 824 (Fla. 3d DCA

[1]A party's failure to object to a reference before the commencement of the hearing on the referred matter in conjunction with that party's voluntary participation in the proceeding before the master constitutes a **waiver** of that party's right to object to even an invalid referral. See Martinez v. Garcia, 575 So.2d 1365 (Fla. 3d DCA 1991)

1982). Florida law recognizes that individuals can waive the **fundamental constitutional rights** that protect their liberty as well as their property. Hartwell v. Blasingame, supra.

Therefore, any analysis of the proposed amendment would be incomplete unless the concept of waiver is thoroughly considered.

Rule 8.257 provides that a party has a right to object to any referral and have his or her matter heard by the judge, mandates that the general magistrate establish a record by electronic means or the use of a court reporter in each matter heard, mandates that the general magistrate file and serve a report which includes findings of fact, conclusions of law and recommendations, allows a party to serve exceptions or file cross-exceptions to a General Magistrate's Report, and requires, inter alia, that the following language, **in bold type, be included in all orders of referral**:

> **A REFERRAL TO A GENERAL MAGISTRATE REQUIRES THE CONSENT OF ALL PARTIES. YOU ARE ENTITLED TO HAVE THIS MATTER HEARD BEFORE A JUDGE. IF YOU DO NOT WANT TO HAVE THIS MATTER HEARD BEFORE THE GENERAL MAGISTRATE, YOU MUST FILE A WRITTEN OBJECTION TO THE REFERRAL WITHIN 10 DAYS OF THE TIME OF SERVICE OF THIS ORDER. IF THE TIME SET FOR THE HEARING IS LESS THAN 10 DAYS AFTER THE SERVICE OF THIS ORDER, THE OBJECTION MUST BE MADE BEFORE THE HEARING. FAILURE TO FILE A WRITTEN OBJECTION WITHIN THE APPLICABLE TIME PERIOD IS DEEMED TO BE A**

CONSENT TO THE REFERRAL.

REVIEW OF THE REPORT AND RECOMMENDATIONS MADE BY THE GENERAL MAGISTRATE SHALL BE BY EXCEPTIONS AS PROVIDED IN FLORIDA RULE OF JUVENILE PROCEDURE 8.257(f). A RECORD, WHICH INCLUDES A TRANSCRIPT OF PROCEEDINGS, WILL BE REQUIRED TO SUPPORT THE EXCEPTIONS.

If a party elects not to object to the referral and elects to have his or her matter heard by the general magistrate, isn't that party **waiving** his her right to have the matter heard and determined by the judge in the first instance, subject to the party's right to seek review of the general magistrate's findings, conclusions of law and recommendations, if the party so desires?

Along the same line, is it possible for parties to confer jurisdiction on someone other than a constitutional judicial officer to determine a matter in controversy? This Court held in Turnberry Associates v. Service Station Aid, Inc., 20 F.L.W. S99 (Fla. March 2, 1995), that **"parties by agreement may waive their entitlement to have the circuit court decide the issue of attorney's fees and by doing so may confer subject matter jurisdiction upon an arbitrator to award attorney's fees."** See also Pierce v. J.W. Charles-Bush Securities, 603 So.2d 625 (Fla. 4th DCA 1992)(en banc).

Secondly, it cannot be assumed, in the absence of specific legislative

history suggesting otherwise or specific intent language contained in the statute itself, that when the legislature included the word "judge" instead of "court" in a statute, that it meant that **only** a "judge" could hear a particular matter notwithstanding the fact that the affected parties may be willing to waive their right to appear before the "judge" in the first instance and be willing to consent to the referral of their civil matter to a duly appointed General Magistrate; who will hear the matter and then file and serve a report containing findings of fact, conclusion of law and recommendations. In the absence of specific legislative history that suggests otherwise or specific intent language contained in the statute itself, the use of the word "judge" instead of the word "court" may simply be the result of a scrivener's error or how the Bill came out of the legislature's Bill drafting office, nothing more and nothing less. To assume otherwise, and to base a major rule decision on that type of assumption, could result in long term unintended consequences! See, e.g., Section 61.075(6), Florida Statutes.

Thirdly, various Circuits in our state are using general magistrates to assist the Court in various adjudicatory hearings governed by the Florida Rules of Juvenile Procedure, including those adjudicatory hearings that would be prohibited by the proposed amendment. Without that assistance, one or more of those Circuits might not be able to meet the time standards

required in various juvenile matters and certain children may be adversely impacted.

The Court has ascertained and publicly acknowledged that General Magistrates, and similar supplemental resources, are essential elements of the Court and are necessary to the proper functioning of our Court system. At the Court's urging, our Legislature has also acknowledged that General Magistrates, and similar supplemental resources, are essential elements of the Court and are necessary to the proper functioning of our Court system. Further, even with the Legislature's admirable effort to fully fund the number of Judges certified by the Court, the Court's certification takes into consideration the current supplemental resources, including the existing General Magistrates. The loss of this essential supplemental resource to assist in certain juvenile matters in certain Circuits runs counter to the following concept: "**statewide practices and policies should be flexible enough to accommodate the unique circumstances and needs of each circuit or county within our state."**

The portion of the proposed new subdivision (h) relating to adjudicatory hearings under sections 39.507 and 39.809 represents a major practice and policy change that is not "**flexible enough to accommodate the unique circumstances and needs of each circuit or county within our**

state." As such, said portion of the proposed new subdivision (h) should not be approved by the Court without a broader study of the issue and input from all of the Chief Judges serving in our state and potentially from a Workgroup or Ad Hoc Committee appointed by the Court to investigate and report on the specific issue or on a broader range of policy issues regarding the use of General Magistrates, Child Support Enforcement Hearing Officers and Traffic Hearing Officers in our state. Alternatively, if the Court determines that it should approve said proposed amendment at this time but desires a degree of flexibility so that the **unique circumstances and needs** of certain Circuits can be met, then it is respectfully submitted that the Court should reword the proposed amendment to read as follows: "(h) Prohibition on Magistrate Presiding Over Certain Matters: Notwithstanding the provisions of this rule , a general magistrate shall not:

(1) preside over a shelter hearing under section 39.402, Florida Statutes; or

(2) preside over an adjudicatory hearing under section 39.507, Florida Statutes, or an adjudicatory under section 39.809, Florida Statutes, unless authorized by an Administrative Order entered by the Chief Justice of the Supreme Court of Florida.

WHEREFORE, the undersigned respectfully requests that the Court

consider the above comments before it makes its final determination on whether to approve or not approve the proposed amendments to Rule 8.257, Florida Rules of Juvenile Procedure.

Respectfully submitted March 31, 2006.

ROBERT J. JONES
General Magistrate
Lawson E. Thomas Courthouse Center
175 N.W. 1st Avenue, Room 1745
Miami, Florida 33128
(305) 349-5710
FLORIDA BAR NO.: 333476

I HEREBY CERTIFY that a true and correct copy of the foregoing comment was mailed this 31st day of March, 2006 to: Alan Abramowitz, Chair, Juvenile Court Rules Committee, 400 West Robinson Street, Orlando, Florida 32801-1782.

ROBERT J. JONES