

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA
RULES OF APPELLATE PROCEDURE

Case No. SC06-159

COMMENTS OF GUARDIAN AD LITEM PROGRAM

The Statewide Guardian ad Litem Office (“GAL”) submits the following comments to the Two-Year-Cycle Report of the Appellate Court Rules Committee (“committee”). The GAL’s comments are limited to the proposed amendment of Florida Rules of Appellate Procedure 9.130(a)(3)(C)(iii) and 9.146(b) and their respective committee notes.

I. INTRODUCTION

The 2003 Florida Legislature consolidated Florida’s local, circuit-based guardian ad litem programs into a single, statewide office effective January 1, 2004. § 39.8296, Fla. Stat. (2003). Prior to the creation of the statewide GAL, local programs rarely participated in appeals. Following creation of the statewide GAL, the GAL assessed existing appellate practices, and on October 3, 2005, implemented a statewide appellate practice comprised of three full-time and two part-time attorneys.¹

¹ The GAL has resources to represent only about 60% of Florida’s foster children. *See* Guardian ad Litem 2005 Annual Report at 21

As of March 29, 2006, the GAL is party to approximately 392 pending appellate proceedings.² The GAL appellate team is participating in 245 proceedings involving review of both final and non-final orders. These include proceedings filed on and after October 3, 2005, as well as a few filed before October 2005.

The GAL's statewide experience over the past 19 months, particularly its experience during the most recent six months, provide the GAL with a unique and cohesive, statewide vantage point from which to comment on dependency appeals.

II. FLORIDA RULE OF APPELLATE PROCEDURE 9.130(a)(3)(C)(iii)

The GAL does not believe that the proposed amendment to rule 9.130(a)(3)(C)(iii) is necessary because parents presently possess the ability to obtain expedited certiorari review of non-final shelter orders. Otherwise, the GAL does not oppose the idea of permitting parents to directly appeal non-final shelter orders that mark the beginning of dependency appeals, provided such appeals are taken and prosecuted in strict compliance with the time constraints within rule

<<http://www.gal.fl.gov/forms/Annual%20Report.pdf>>. Accordingly, the GAL is not a party to all dependency appeals. Except in rare circumstances and appeals from Orange County, where the guardian ad litem program is separate from the statewide GAL, the GAL is involved in all appeals from termination of parental rights proceedings.

² The GAL is frequently omitted from certificates of service and, therefore, may not have notice of all appeals to which it is a party. This practice apparently resulted from the prior nonparticipation in appeals by local guardian ad litem programs.

9.130.³ The GAL is concerned, however, with the indefinite language of the proposed amendment to the rule and its committee note.

A. The proposed amendment to Rule 9.130(a)(3)(C)(iii) is unnecessary.

The GAL submits that the proposed amendment is unnecessary because parents and other parties presently possess the ability to seek expedited certiorari review of shelter orders. The certiorari standard of review is sufficient to correct legal errors that occur in connection with shelter hearings, while the standard for reviewing probable cause determinations in direct appeals is sufficiently onerous as to not likely afford greater relief than that available through certiorari review. Moreover, the time for filing a petition for writ of certiorari (30 days from

³ The GAL generally opposes changes that lengthen time on appeal. Time is a right of the child. § 39.013(10)(e), Fla. Stat. (2005) (“Time is of the essence for the best interests of dependent children.... Time limitations are a right of the child....”); § 39.402(14)(e), Fla. Stat. (2005) (same); *see also, e.g., In re D.T.*, 56 P.3d 840, 843 (Kan. App. 2002) (rejecting father’s claim that 10 month delay was reasonable, stating, “...courts must strive to decide these cases in ‘child time,’ rather than ‘adult time.’”); *French v. French*, 452 So.2d 647, 651 (Fla. 4th DCA 1984) (Glickstein, J., concurring and dissenting); *In re L.R.S.*, 877 So.2d 1040, 1047 (La. App. 2d Cir. 2004); *In re Micah S.*, 198 Cal. App.3d 557, 566, 243 Cal. Rptr. 756, 761 (Cal. App. 1988) (Brauer, J., concurring).

Noncompliance with the timelines built into the Florida Rules of Appellate Procedure, noncompliance with procedures governing certiorari and original proceedings, liberal policies regarding extensions of time, and practices among courts and counsel in the transition between trial and appellate counsel for indigent parties appear to be the primary causes for delay in appellate proceedings involving dependency and termination of parental rights matters.

rendition) is not substantially different from that for filing an initial brief under rule 9.130 (15 days from the notice of appeal, which yields a filing deadline of 15 to 45 days from rendition).

Without additional explanation of the anticipated benefits resulting from direct appeals of shelter orders, the GAL is unable to discern a need for the proposed amendment.

B. Any amendment permitting the direct appeal of a non-final custody order in dependency and termination of parental rights cases should utilize specific language to make the intended reach of the rule clear.

If the Court determines that rule 9.130(a)(3)(C)(iii) should be amended, the amendment should provide precise language. The GAL believes that the broad wording of the proposed amendment may be incongruent with the intent that prompted the proposed amendment and may create confusion and unintended appeals.

For example, the committee's report can be read to suggest that the intent of the proposed amendment is to permit only the direct appeal of shelter orders. *See* Two-Year-Cycle Report at 5 ("The current rule...does not extend the right to immediate review to shelter care orders."). Yet, the actual wording of the amendment extends the right of direct appeal more broadly to all determinations of "child custody in...juvenile dependency, or termination of parental rights matters."

Id. at Attachment 2. The committee’s amended note following rule 9.130 confirms that non-final orders beyond shelter orders would be appealable under the amended rule:

Subdivision 9.130(a)(3)(C)(iii) was amended to expand the availability of an immediate appeal on non-final orders determining the right to...child custody beyond family law matters to include, for example, a shelter order in a juvenile dependency matter.

Id. Read together, the wording of the proposed amendment and the committee note’s use of the phrase “for example” unmistakably signal a right to appeal non-final custody orders beyond shelter orders without specifying what those custody orders would be.

Custody changes wrought by adjudications of dependency and termination of parental rights are subject to review as appeals from final orders. Therefore, a rule permitting direct appeal of non-final orders beyond shelter orders is largely duplicative, confusing, and fertile ground for the unintended creation of a right to directly appeal orders effecting every placement change in dependency courts.

The GAL submits that, if rule 9.130(a)(3)(C)(iii) is amended, the amendment should be expressly limited to shelter orders. To the extent the Court elects to permit direct appeals of non-final custody orders beyond dependency shelter orders, the amended rule should specifically enumerate the types of custody orders appealable. Examples of such orders include shelter orders pursuant to section 39.402, Florida Statutes (2005), long term custody orders pursuant to

section 39.622, Florida Statutes (2005), and postdisposition custody orders rendered pursuant to section 39.522, Florida Statutes (2005). In some circumstances, orders relating to prospective adoptive placements may effectuate a change of custody as well.

III. FLORIDA RULE OF APPELLATE PROCEDURE 9.146(b)

The GAL supports the committee's desire to clarify that rule 9.146(b) "does not provide an independent basis for jurisdiction beyond the orders specified in rule 9.130." Two-Year-Cycle Report at 7. However, without amending or clarifying the scope of Florida Rule of Appellate Procedure 9.130(a)(4), the intent to restrict appeal jurisdiction over non-final orders will be frustrated.

Three district courts of appeal have invoked rule 9.130(a)(4) as a basis for appeal jurisdiction over "non-final orders entered after final order." *Department of Children & Fams. v. T.L.*, 854 So.2d 819 (Fla. 4th DCA 2003) (appeal of placement order); *Ayo v. Department of Children & Fam. Servs.*, 788 So.2d 397 (Fla. 1st DCA 2001) (appeal of order resulting from periodic review); *Coy v. Department of Health & Rehab. Servs.*, 623 So.2d 792 (Fla. 5th DCA 1993) (appeal of judicial review order). The GAL knows through experience that this construction of rule 9.130(a)(4) continues. In the context of dependent children, "non-final orders entered after final order" include every order following an order of adjudication and disposition in dependency and termination of parental rights

cases. *See G.L.S. v. Department of Children & Fams.*, 724 So.2d 1181, 1185-1186 (Fla. 1998).

The committee's report and the proposed amended committee note do not reflect whether the committee considered the effect of rule 9.130(a)(4) or whether that rule is consistent with the expressed intent behind the proposed amendment to rule 9.146. The proposed amendment of the committee note for rule 9.146 states in part, "[t]he amendment is intended to approve the holding in *D.K.B. v. Department of Children & Families*, 890 So.2d 1288 (Fla. 2d DCA 2005), that non-final orders in these matters may be appealed *only if listed in rule 9.130.*" Two-Year-Cycle Report at Attachment 2 (emphasis added). The note is unclear, however, as to what the "list" in rule 9.130 is.

If the list contemplated by the committee is that found in rule 9.130(a)(3)(C)(iii), the proposed amendments to rule 9.146(b) and the committee note will be largely symbolic, for rule 9.130(a)(4) will continue to provide a basis for direct appeals of the vast majority of non-final dependency orders. If the list contemplated encompasses matters beyond those listed in rule 9.130(a)(3)(C)(iii), the result is the same, for rule 9.146(b) will then specifically contemplate appeals of non-final orders under rule 9.130(a)(4).

Unless rule 9.130(a)(4) is addressed, the only benefit flowing from the proposed amendments to rule 9.146(b) and the committee note will be clarification

that appeals of non-final dependency orders are governed by the time constraints contained in rule 9.130. Courts entertaining appeals of non-final orders under rule 9.146 have not clarified which briefing schedule applies. Since implementing its statewide appellate practice six months ago, the GAL has not received an initial brief within 15 days of the notice of appeal in any appeal from a non-final order, as required by rule 9.130(e).

The GAL supports the committee's desire to clarify how and when non-final dependency orders may be appealed or otherwise reviewed by a district court. To that end, in addition to adopting the proposed amendments to rule 9.146(b) and the committee note, the GAL recommends that the Court request the Appellate Court Rules Committee to (1) consider the effect of rule 9.130(a)(4) in dependency and termination of parental rights cases and (2) propose revisions necessary to harmonize the effect of rule 9.130(a)(4) with the intent behind the amendments to rule 9.146(b) and the committee note.

IV. CONCLUSION

For each of the foregoing reasons, the GAL respectfully submits that the proposed amendment to rule 9.130(a)(3)(C)(iii) should not be adopted because it is unnecessary and confers no meaningful benefit on parents and other parties. If the Court is inclined to adopt the proposed amendment, the GAL recommends that the proposed terminology be reworded to reflect that the rule is specifically limited to

the appeal of shelter orders or, alternatively, reworded to reflect the specific dependency custody orders contemplated by the rule.

The GAL supports the proposed amendment to rule 9.146(b) with the understanding that the majority of non-final dependency orders will continue to be directly appealable under rule 9.140(a)(4). Adoption of the proposed amendment will at least clarify that appeals of non-final orders must be prosecuted within the time constraints set forth in rule 9.130.

The GAL submits that the apparent inconsistency between the intent underlying the amendment of rule 9.146(b) and rule 9.130(a)(4) provides an opportunity for the Appellate Court Rules Committee to explore additional revisions to the Florida Rules of Appellate Procedure. Accordingly, the GAL recommends that the Court request that the committee (1) consider the effect of rule 9.130(a)(4) independence and termination of parental rights cases and (2) propose revisions necessary to harmonize the effect of rule 9.130(a)(4) with the intent behind the amendments to rule 9.146(b) and the committee note.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Comments of Guardian ad Litem Program was served by U.S. Mail this 3rd day of April 2006 as follows:

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