IN THE SUPREME COURT OF FLORIDA

IN RE AMENDMENTS TO FLORIDA
RULES OF APPELLATE PROCEDURE Case No. SC06-159

STATEWIDE GUARDIAN AD LITEM OFFICE'S RESPONSE TO THE APPELLATE COURT RULES COMMITTEE'S SUPPLEMENT TO RESPONSE TO COMMENTS ON PROPOSED RULE 9.130(A)(3)(C)(iii)

The Statewide Guardian ad Litem Office (GAL) submits the following response to the data and conclusions submitted by the Appellate Court Rules Committee ("the committee") in the committee's *Supplement to Response of the Appellate Court Rules Committee to Comments on Proposed Rule 9.130(a)(3)(C)(iii)* ("*Committee Supplement*").

I. INTRODUCTION

The GAL previously commented on the proposed amendments to Florida Rules of Appellate Procedure 9.130(a)(3)(C)(iii) and 9.146(b) and participated in oral argument on June 5, 2006. The GAL summarized its position on the proposed amendment to rule 9.130(a)(3)(C)(iii) as follows:

> 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 9.130. The GAL is concerned, however, with the indefinite language of the proposed amendment to the rule and its committee note.

Comments of Guardian ad Litem Program at 3-4.

During oral argument, which focused primarily on the proposed revision of rule 9.130(a)(3)(C)(iii), the Court inquired about the prevalence of certiorari proceedings in connection with dependency and termination of parental rights cases. That prompted the committee to gather data from each of the five District Courts of Appeal relating to the number of certiorari proceedings filed. The data collected reflects that the district courts have collectively disposed of only 71 certiorari petitions in dependency and termination of parental rights cases since year 2000.[1] That number is consistent with what the GAL told the Court during oral argument – *i.e.*, the majority of appellate cases involving review of nonfinal orders are filed as direct appeals and not as certiorari proceedings. This remains true even since the second district's January 2005 opinion declaring, "When an order is not listed in rule 9.130, review 'shall be by the method prescribed by rule 9.100.' *See* Fla. R. App. P. 9.130(a). That method is normally common law

[1] According to the committee's supplement, over 46% of all the petitions were filed in the fifth district. The committee's report also reflects that the availability of data varied from district to district. For example, the first district reported 10 petitions in all juvenile matters since 2000, while the fifth district provided specific numbers for every year since 2003. The second district provided a total number since 2004, while the third district provided data for 2005 only, and the fourth district provided data for 2005 and 2006. *See Committee Supplement* at 3-4.

certiorari." *In re R.B. (D.K.B. v. Dep't of Children & Fams.)*, 890 So. 2d 1288, 1289 (Fla. 2d DCA 2005).[2]

The GAL's concern with the Committee's Supplement relates to the conclusions the committee draws from the data collected. *Committee Supplement* at 4. The GAL is also concerned about what the committee has not addressed – the need for assuring expedited appellate review. The committee's response and supplement pretermit discussion of the reality that the existing expedited timeframes in rules 9.100 and 9.130 are routinely disregarded in dependency and termination of parental rights cases.

II. RESPONSE

The GAL does not dispute the number of petitions for writ of certiorari reported by the committee, but the GAL does disagree with the committee's suggestion that those petitions represent all nonfinal orders reviewed in dependency and termination of parental rights cases. *See Committee Supplement* at 4 (referencing "challenges to custody orders in dependency and termination of parental rights cases" and stating "[T]he district courts are converting these appeals to petitions for writs of certiorari."). The GAL's experience has been that many nonfinal orders are reviewed as direct appeals and that the district courts do not uniformly convert appeals to petitions for writs of certiorari. Indeed, the GAL's

[2] *D.K.B.* is the case that prompted the proposed amendment to rule 9.146(b).

experience is illustrated by *Guardian ad Litem Program v. Dep't of Children & Fams.*, -- So. 2d --, 31 Fla. L. Weekly D2235 (Fla. 5th DCA Aug. 25, 2006), in which the fifth district did the opposite of what the committee reports is happening:

> While this case reached us as a petition for writ of certiorari, we consider it an appeal from a non-final order entered after a final order, and review it pursuant to rule 9.130(a)(4), Florida Rules of Appellate Procedure.

Id. at n. 1.

As of the September 15, 2006, GAL data reflected 350 open appellate cases.[3] Of those, 207 are appeals from final orders terminating parental rights; 43 are from final orders adjudicating children dependent; and 100 are from other types of orders, most of which would necessarily constitute nonfinal orders.[4] In other words, GAL data reflects that more than one-fourth (¼) of its appellate caseload involves review of nonfinal orders. This experience is irreconcilable with the conclusion drawn in the committee's supplement.

The most probable explanation for the discrepancy between the certiorari data reported by the committee and the GAL's data is the willingness of the first, fourth, and fifth districts to review nonfinal orders under Florida Rule of Appellate

[3] This number does not represent every dependency and termination of parental rights case pending in an appellate court because the GAL has not yet achieved 100% representation of children involved in dependency proceedings.

[4] A handful of these "other" orders, such as final orders of adoption and orders terminating the protective supervision of the Department of Children and Family Services, are also final in nature.

Procedure 9.130(a)(4). *See, e.g., Dep't of Children & Fams. v. T.L.*, 854 So. 2d 819 (Fla. 4th DCA 2003) (appeal of placement order); *Ayo v. Dep't of Children & Fam. Servs.*, 788 So. 2d 397 (Fla. 1st DCA 2001) (appeal of order resulting from periodic review); *Coy v. Dep't of Health & Rehab. Servs.*, 623 So. 2d 792 (Fla. 5th DCA 1993) (appeal of judicial review order).

The treatment of nonfinal orders in the second district remains unsettled. Although the second district appears to have definitively rejected direct appeals of nonfinal orders in dependency and termination of parental rights cases, *D.K.B.*, 890 So. 2d at 1289, the GAL has anecdotally witnessed the continued filing of direct appeals from nonfinal orders and only a handful of petitions for writ of certiorari in that district. [5] GAL data currently reflects 104 cases in the second district. Seventy-four (74) are appeals from final orders terminating parental rights; 17 are appeals from final orders adjudicating children dependent; and 13 seek review of other types of orders. Only two of the GAL's open cases in the second district were initiated by the filing of a petition for a writ of certiorari; one was initiated by a petition for writ of prohibition.

According to the committee, the third district dismisses direct appeals filed from nonfinal orders in dependency and termination of parental rights

[5] The GAL filed a direct appeal to the second district on September 7, 2006, in order to afford the second district an opportunity to address the application of rule 9.130(a)(4) in dependency and termination of parental rights cases.

cases, a practice consistent with the GAL's anecdotal experience in that district. *Committee Supplement* at 3. GAL data reflects that, as of September 15, 2006, the Guardian ad Litem Program is party to 52 open cases in the third district. Fifty-one (51) of those cases involve appeals from final orders terminating parental rights, adjudicating children dependent, and of adoption. One case was filed as a petition for writ of prohibition.

Because the number of certiorari petitions reported by the committee do not accurately reflect the number of nonfinal orders reviewed by the district courts and because the third district does not currently entertain direct appeals from nonfinal orders in dependency and termination of parental rights cases there is little basis for the committee's ultimate conclusion that "...it is unlikely that the proposed rule revision would result in a major increase in filings in those courts." *Committee Supplement* at 4. To the contrary, the proposed amendment would work a complete reversal of policy in the third district[6] (and

[6] That nonfinal orders beyond shelter orders would expressly become subject to direct appeal in districts not already applying rule 9.130(a)(4) is evident from the face of the proposed revision. The amendment applies to all "child custody" orders in dependency and termination of parental rights cases. This vague language implicates a number of orders ranging from placement orders to visitation orders to pre-termination of parental rights permanency hearing orders. This is because "custody" is a general term meaning "...merely the safekeeping of something within the personal care and control of the custodian" connoting "certain rights and duties as to matters requiring immediate, moment-to-moment decisions." *Holland v. Holland*, 458 So. 2d 81, 83 (Fla. 5th DCA 1984). "Legal

perhaps the second district) and would make an entirely new subset of orders – shelter orders – directly appealable in every district.

More significant than the likely increase in the number of appeals filed, the proposed amendment will likely have a deleterious effect on the achievement of timely permanency. Existing rules of appellate procedure do not differentiate between civil cases generally and the unique circumstances and special needs of the children involved in dependency and termination of parental rights cases. Although Florida Rule of Appellate Procedure 9.146(g) directs that dependency and termination of parental rights matters be expedited, the rules contain no special procedures or mandatory timeframes to make expediting a reality. As a result, appeals are already delaying permanency by 10 months in most cases and longer in many more. *See Report of the District Court of Appeal Performance and Accountability Commission on Delay in Child Dependency/Termination of Parental Rights Appeals* 5 and App. B (attached).

The GAL does not suggest that review of shelter and other nonfinal orders should be unavailable to parents and children. The GAL simply contends that existing rules permit such review and that, if the existing rules governing appeals and original proceedings under rules 9.100 and 9.130(a)(4) are

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custody," on the other hand, is specifically defined by section 39.01(34), Florida Statutes (2006) as a "legal status" vesting the legal custodian with rights and duties toward the child.

enforced, review under existing rules will be more timely than review under expanded rules that do not mandate consistent practices and inflexible timeframes.

In short, expanding the scope of permitted appeals without first addressing the issue of delay through specific, concrete procedures and timeframes governing the filing of appeals, the appointment of counsel, the production of transcripts, and the submission of arguments, will not improve outcomes for parents and will harm the children by further delaying the achievement of permanency. Delay on appeal also thwarts federal and state legislative intent making time "a right of the child" and expediting permanency. § 39.0136(1), Fla. Stat. (2006); Ch. 2006-86, Laws of Fla.; *Comparison of Florida's Permanency Provisions for Foster Children to Federal Requirements*, Fla. Senate Interim Project Report 2006-104 (Sept. 2005), http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-104cf.pdf (last visited Sept. 7, 2006); 65 Fed. Reg. 4020, 4021 (Jan. 25, 2000) ("To promote permanency, ASFA shortens the time frames for conducting permanency hearings, creates a new requirement for States to make reasonable efforts to finalize a permanent placement, and establishes time frames for filing petitions to terminate the parental rights for certain children in foster care.").

III. CONCLUSION

The supplemental data supplied by the committee does not support adoption of the proposed amendment of rule 9.130(a)(3)(C)(iii). At best, the data merely reflects different practices among the district courts and a failure by many parties to adhere to existing procedures and timeframes contained in the Florida Rules of Appellate Procedure.

In light of the *Report of the District Court of Appeal Performance & Accountability Commission on Delay in Child Dependency/Termination of Parental Rights Appeals* and the experience of the GAL over the past year, the GAL respectfully submits that the Court should not adopt the proposed amendment to rule 9.130(a)(3)(C)(iii). The GAL further submits that the time has come for a comprehensive set of new rules designed to specifically address the unique nature and time sensitivity of dependency and termination of parental rights cases.

[Signature appears on following page.]

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Statewide Guardian ad Litem Office's Response to the Appellate Court Rules Committee's Supplement to Response to Comments on Proposed Rule 9.130(a)(3)(c)(iii) was served by U.S. Mail this _____ day of September 2006 as follows:

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