IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUVENILE PROCEDURE **CASE NO.: SC08-1236**

RESPONSE TO COMMENTS OF THE STATEWIDE GUARDIAN AD LITEM OFFICE AND THE JUVENILE RULES COMMITTEE

Circuit Judge Nikki Ann Clark, as Chair of the 2006-2008 Steering Committee on Families and Children in the Court ("Steering Committee"), submits this Response to the comments filed by the Statewide Guardian ad Litem Office ("GAL") and the Juvenile Rules Committee ("JRC") in this case.[1] In their respective comments to the Petition of the Steering Committee on Families and Children in the Court to Amend the Florida Rules of Juvenile Procedure ("Petition"), both the GAL and the JRC raise a number of points to consider regarding the proposed amendment to Florida Rule of Juvenile Procedure 8.255.

The GAL filed a response to the proposed amendment to rule 8.255 that makes several important points, including whether the rule should be limited only to children 16 years of age or older; that as parties to the dependency case, children already have the right to be present at hearings; the population overlap between children who are in foster care, youth who are 16 years of age, and those who have

[1] Although the term of the Steering Committee expired on June 30, 2008, this response is being submitted per the court's publication notice, which anticipated that a response by the Chair would be filed well after the Steering Committee's term had already concluded.

a goal of another planned permanent living arrangement ("APPLA")[2]; the distinction between "good cause" and "best interests" language; and the organizational structure of the rule proposal. Among other things, the JRC proposes rewording the amendment proposal to make it more inclusive of children in out-of-home care; recommends lowering the age threshold in the rule to 13 years of age; questions the consequences of a child's failure to appear under the rule; cautions against making substantive law in the rule proposal; and questions the "good cause" standard in the proposed rule amendment.

The Steering Committee agrees with both the GAL and JRC to the extent that they suggest simply rewording the proposed amendment in order to accomplish goals more effectively. The Steering Committee's proposed rule does not intend to exclude youth from the amendment's coverage that are in need of independent living services and are 16 years of age. The Steering Committee does not disagree that the organizational structure of the amendment may be able to be improved upon. However, the Steering Committee respectfully disagrees with a number of other points raised in the GAL's and JRC's comments.

[2] As noted in the Steering Committee's rule petition, another planned permanent living arrangement (APPLA) is a permanency goal permitted if the court finds: that reunification is not in the best interests of the child; that a more permanent placement, such as adoption, permanent guardianship, or placement with a fit and willing relative, is not in the best interest of the child; the Department documents reasons why the placement will endure and how the proposed arrangement will be more stable and secure than ordinary foster care; the child's health, safety, and well-being will not be jeopardized by such an arrangement; and there are compelling reasons that APPLA is the appropriate permanency goal. § 39.6241(a)-(d), Fla. Stat. (2007).

Regarding lowering the rule's age threshold to 13 years old, the Steering Committee is constrained to disagree with both the GAL and the JRC. The Steering Committee considered very carefully whether to include children younger than age 16 in the purview of the proposed rule amendment and was mindful of the potential fiscal impact of a broader rule on the Department of Children and Families, community-based care providers, and foster parents, who would be required to transport the children to hearings. Moreover, the amendment proposal implements the legislature's substantive language in section 39.701(6)(a), Florida Statutes, that requires the court to hold a judicial review hearing within 90 days of a youth's 17th birthday and targets that same population. Although Steering Committee members agree with the idea of including children younger than 16 within the rule's scope, lowering the age of mandatory attendance at hearings goes beyond the procedural implementation of section 39.701(6)(a)'s requirement.

The Steering Committee was quite mindful of ensuring that its proposal remain procedural and not substantive. Although the amendment necessarily will increase the cost and inconvenience to the Department, community-based care provider, or caretaker to transport the child to court, the amendment is narrowly tailored to those youth who are the subject of the provision in section 39.701(6)(a), Florida Statutes. The proposal remains procedural because it does not go beyond the statutory dictates and compel the presence in court of children not covered by

section 39.701(6)(a). To the contrary, the JRC's recommendation to lower the rule's threshold to 13 years of age would create a new substantive right beyond the statutory provision. Of course the younger children maintain a right to attend all hearings.

The Steering Committee concurs with the GAL that children, regardless of age, are parties to dependency proceedings and have the right to attend hearings. See § 39.01(51), Fla. Stat. (2008). Accordingly, Steering Committee's proposed amendment balances that provision with the targeted age group currently specified in section 39.701(6)(a), Florida Statutes to ensure that the statutes target population is able to "address the court" as anticipated by the statute. The same definition of party in chapter 39 that includes children also expressly provides that "the presence of the child may be excused by order of the court when presence would not be in the child's best interest. . . ." § 39.01(51), Fla. Stat. (2008). Thus, not only does section 39.01(51), Florida Statutes fail to mandate explicitly the presence of all children in court regardless of age, but it expressly provides for their nonattendance. In contrast, section 39.701(6)(a) provides in part that "the child shall be given the opportunity to *address the court* with any information relevant to the child's best interests, particularly as it relates to independent living transition services." § 39.701(6)(a), Fla. Stat. (2008)(emphasis supplied). Therefore, youth attendance at the judicial review hearing referred to in section 39.701(6)(a) is

specifically envisioned by the statute. The Steering Committee's proposed rule amendment includes children who are 16 years old, among other requirements[3], because the hearing under section 39.701(6)(a) is being held within 90 days of a youth's 17th birthday. The youth to whom that section refers are "aging out" of foster care imminently and the rule amendment is proposed to ensure that the statute's target population is able to "address the court" consistent with the statutory mandate. Although children are parties to dependency cases, per the statutory definition, the rule proposal cannot mandate the presence of children as young as 13 without significantly departing from the statutory requirement.

Regarding the potential consequences for the failure of a child to appear under the proposed amendment, existing statutory procedures are adequate to address this issue. Even without the amendment, many youth who are already entitled to address the court do not appear. The amendment is not designed to punish children who do not attend court, nor those responsible for transporting children to court. Nor is the amendment intended to constitute cause for continuances due to a child's failure to appear. The proposal is intended to ensure that youth imminently aging out of foster care are able to address the court in a manner contemplated by statute. By limiting the amendment's applicability to children 16 years of age or older, the pragmatic and fiscal problems of

[3] The proposed rule refers to "any child who is placed in licensed foster care or who is in foster care with 'another planned permanent living arrangement' goal and who is at least 16 years of age…" Petition at 2, 12, 14.

transportation should be ameliorated, at least to the extent that such is possible given the realities and pragmatic difficulties concomitant with foster youth attending court hearings.

Finally, both the GAL and JRC comments refer to the distinction between the "good cause" standard set forth in the proposed amendment and the "best interest" standard in section 39.01(50), Florida Statutes. Unfortunately, the phrase "best interest" of the child is easily overused even to the point of statements such as, "Presence of this child at the judicial review is not in the child's best interest" and other conclusory declarations. Most importantly, section 39.701(6)(a), Florida Statutes, the law being implemented by the proposed amendment, notably lacks the "best interest" standard for waiving a child's presence in court. The "good cause" standard in the proposed amendment is a recognition that a circumstance may arise when a child's presence in court is either not feasible or advisable. For example, a young person's repeated demonstration of an inability to conform his/her conduct to that which is required to maintain the court's decorum may constitute good cause. The Steering Committee did not presume to know precisely what circumstances would or would not meet the "good cause" standard.[4] The provision contemplates a demonstration of the "good cause" after which the court can excuse

[4] The Steering Committee has already noted that "there is no 'magic' age above which all children may be presumed to be mature enough to attend court proceedings but below which they are not. Children in dependency cases have endured a wide range of abuse, neglect, or abandonment; have resided in a variety of placements; are of different ages; have different emotional needs and maturity levels; and require different services. Each child is unique." Petition at 4-5.

the child's presence. The "good cause" standard avoids a potentially rote finding of "best interest" but still averts the harshness of a blanket mandate of youth appearance in court without the possibility of an exception. Indeed the Steering Committee is cautious that a "good cause" standard not be overused to exclude youth from hearings since the very reason for the proposal is to facilitate youth attendance, not inhibit it.

The Steering Committee therefore acknowledges the concerns raised by the GAL and JRC. As noted above, the Steering Committee has no objection to a rephrasing of the proposed rule amendment to clarify its intent in a manner that effectuates section 39.701(6)(a), Florida Statutes. For the reasons stated herein, the Steering Committee is unable to agree to extend the proposal's requirements to include all children who are age 13 or older.

Respectfully submitted,

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Nikki Ann Clark, Circuit Judge

CERTIFICATE

I hereby certify that a copy of the foregoing document was provided by mail to: Dennis W. Moore, Statewide Guardian ad Litem Office, The Holland Building, 600 South Calhoun Street, Suite 274, Tallahassee, Florida 32399-0979; and David Silverstein, Chair of Juvenile Rules Committee, 501 E. Kennedy Blvd., Suite 1100, Tampa, Florida 33602-5242; this ___ day of October, 2008.

_____
Nikki Ann Clark, Circuit Judge
Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32302

CERTIFICATE

I hereby certify that the foregoing document utilizes computer-generated Times New Roman 14-point font, this ___ day of October, 2008.

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Nikki Ann Clark, Circuit Judge