IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA
JUVENILE RULESOF PROCEDURE. CASE NO. SC08-1612

COMMENTS OF THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES

The Florida Department of Children and Families (DCF) hereby files the following comments on the amendments adopted by this court in its opinion of September 25, 2008:

INTENT

The Fast-Track Report in Response to 2008 Legislative Changes filed by the Juvenile Court Rules Committee, which gave rise to the amendments in this cause, indicated that the reason for the language added to Rule 8.225(c) was "to conform to amendments to Section 39.502(17), Florida Statutes, by section 9 of HB 7077 (Chapter 2008-245, Laws of Florida)." Report, p. 1.

This court's opinion adopting the amendments and calling for comments also reflected that the amendments are a response to this legislation, as well as to other recent enactments of the Florida legislature. *In re Amendments to Florida Rules of Juvenile Procedure*, 992 So. 2d 242, 243 (Fla. 2008).

The legislation cited in the report and by this court added a reference to "the foster or preadoptive parents" to the list of persons who must receive reasonable notice of proceedings and hearings. The amendment, however, in addition to adding a reference consistent with the legislation, also requires notice to "[a]ny … relative caregivers."

The new reference to "relative caregivers" is therefore not a response to action by the Florida legislature. Rather, it appears to be an effort to include language that will allow for federal funding pursuant to 42 U.S.C. § 629h(b)(1) and 42 U.S.C. § 675(5)(G), which mandate

that states must have a case review system and a rule requiring notice to such caregivers as a condition for such funding.[1]

DCF recognizes the importance of complying with the federal requirements and has no objection to the inclusion of the language necessary to do so. It suggests, however, that the amendment should be accompanied by language making the intent of the change clear.

In this respect, DCF initially notes that without such an explanation, individuals receiving notice pursuant to the rule could argue that the right to notice constitutes a recognition of party status. In enacting 42 U.S.C. § 675(5)(G), Congress anticipated and provided a response to such an argument, as it included in that provision language stating that "this subparagraph shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to such a proceeding solely on the basis of such notice and right to be heard." Without an indication that the amendment here arises from the federal requirements, no one arguing or interpreting the intent of the rule in the future will know to take this aid to construction into account. DCF therefore suggests that this court should either provide such an indication in an opinion ratifying the adoption of the amendments, or that it add language similar to that of the federal statute to the rule.

Second, it should be realized that the federal statutes cited above do not define "relative caregiver." It is possible that the term may be defined in the future, either by legislation or by the federal courts in interpreting the provision. Clearly, if the intent of adding the term to the Florida rule is to comply with federal law, the definition of the term as used in the rule should be

[1] 42 U.S.C. § 629h(b)(1) uses the actual term "relative caregivers," but, in a clause providing aid in construing the provision (which will be discussed subsequently in a different context) refers to any "relative providing care for the child." 42 U.S.C. § 675(5)(G) uses just the phrase "relative providing care for the child." It thus appears that Congress meant for these references to have the same meaning.

identical to whatever definition might be found as a matter of federal law. Yet, without an indication as to the purpose of the amendment, attorneys and judges in the Florida courts trying to define the term will naturally look to Chapter 39 of the Florida Statutes, which defines both "relative," § 39.01(64), and "caregiver." § 39.01(10).[2] DCF therefore submits that this court should provide an indication—either in an opinion or in the rule itself—that the term "relative caregivers" is intended to be interpreted consistent with the federal provisions.

72 HOURS NOTICE

The amendment to Rule 8.225(c)(3) requires that all foster or preadoptive parents must be provided with at least 72 hours notice of proceedings or hearings. Such an absolute approach is unwise because circumstances can occur in which events require immediate judicial intervention and in which waiting 72 hours after an event triggering such a need would therefore not be in the best interest of the child(ren) involved. Moreover, it would create a situation in which foster or preadoptive parents would have greater rights than parents, who are not encompassed by the language of the amendment.

DCF recognizes that in most situations, 72 hours notice can and should be provided for everyone involved in a proceeding. The rule should be sufficient flexible to allow for less notice in those cases that demand a court to act more expeditiously, however. DCF would therefore suggest that the language of the amendment be preceded by the words, "Unless extraordinary circumstances require otherwise," and that the amendment be followed by, "If extraordinary

[2] Although not relevant to the issues presently before this court, DCF notes that in defining "caregiver," § 39.01(10), Fla. Stat. (2008) makes reference to any "other person responsible for a child's welfare as defined in subsection (46)." What had been subsection (46), however, was renumbered as subsection (47), effective July 1, 2008, as the result of the adoption of a new subsection (14) in the same legislation that made the changes which led to the present amendments, Ch. 2008-245, Laws of Fla. It appears that the legislature inadvertently neglected to change the reference in subsection (10) to reflect the renumbering. DCF points this out in the event that this court might wish to call this matter to the legislature's attention in its opinion.

circumstances require that a matter be considered with less than 72 hours notice, as much notice as reasonably possible of a hearing or proceeding shall be given."

DCF also recognizes that the amendment tracks the language of the legislature's recent amendment to § 39.502(17), Fla. Stat. This fact does not prevent this court from utilizing the approach suggested by DCF because the specific time frame for notice of a hearing is a procedural, rather than substantive, matter. While substantive matters are within the legislature's domain, this court has the exclusive authority to regulate matters of practice and procedure. *Haven Fed. Savings & Loan Assn. v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991). Drawing the distinction between those two concepts, this court stated:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So. 2d 236 (Fla. 1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. *Adams v. Wright*, 403 So. 2d 391 (Fla. 1981). On the other hand, practice and procedure "encompasses the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. *Skinner v. City of Eustis*, 147 Fla. 22, 2 So. 2d 116 (1941).

Id.

There can be no question that the right to "reasonable" notice is a component of due process. *Fla. Pub. Serv. Comm. v. Triple "A" Enterprises, Inc.*, 387 So. 940, 943 (Fla. 1980). Assuming the reasonableness requirement is met, however, a specific time frame for notice relates to "the course, form, manner, means, method, mode, order, process or steps" involved in litigation. It is part of the "machinery of the judicial process" or of "the method of conducting

litigation." It is therefore procedural and within the authority of this court to regulate. Given that fact, this court is not required to blindly apply the inflexible dictates of the statute.

The revision suggested by DCF recognizes that the approach taken by the legislature is indeed a feasible and appropriate one in the vast majority of cases. It leaves room for courts to also act, however, in the unusual situations in which circumstances relating to a child require attention in less than 72 hours. That room may make a great deal of difference with regard to matters critical to a child's well-being or future. The need for the leeway proposed by DCF is acute and the rule should allow for it.

WHEREFORE, DCF respectfully submits the above comments to the amendments adopted by this court in its opinion of September 25, 2008.

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to David N. Silverstein, Chair, Juvenile Court Rules Committee, 501 E. Kennedy Blvd., Ste. 1100, Tampa, FL 33602-5242, this ____day of November, 2008.

Respectfully submitted,

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