IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUDICIAL ADMINISTRATION, THE FLORIDA RULES OF JUVENILE PROCEDURE, AND THE FLORIDA RULES OF APPELLATE PROCEDURE – IMPLEMENTATION OF THE COMMISSION ON DISTRICT COURTS OF APPEAL PERFORMANCE AND ACCOUNTABILITY RECOMMENDATIONS.

CASE NO. SC08-1724

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 proposed by the petition in this cause:

DCF strongly supports efforts to speed up appeals in dependency and termination of parental rights (TPR) cases, as well as other cases involving families and children in need of services (hereinafter collectively referred to as "child protective" matters). To that end, DCF, which is a party to virtually every child protective appeal, provided representatives at each of the district workshops, as well as the statewide workshop, conducted by the Commission on District Court of Appeal Performance and Accountability (hereinafter "the Commission") when it studied this matter. So did other parties involved in such appeals. Thus, the Commission's report was the product of input from DCF, parents' attorneys, the Guardian Ad Litem Program, judges, clerks, court personnel, court reporters, and other interested parties.

After the Commission issued its Supplemental Report and Recommendations (hereinafter "the report"), the Florida Rules of Judicial Administration Committee, the Florida Juvenile Court Rules Committee, and the Florida Appellate Court Rules Committee undertook consideration of this subject. The committees have produced some proposals that are consistent with the Commission's recommendations and some that sharply conflict with them. While DCF agrees with many of the changes proposed by the committees, there are others that DCF contends

should be rejected or modified. DCF believes that many of its comments will address matters that may not have been given full consideration by the committees.[1]

RULE 2.535

The proposal before this court relating to this rule cuts the heart out of the Commission's recommendation regarding the preparation of transcripts, one of the most important recommendations in its report. It was generally accepted by all parties at the Commission's workshops that this is an area in which delay can most easily be greatly reduced in child protective appeals. Moreover, the court reporters indicated that they would have no problem giving transcripts in such cases their top priority as long as they had a rule upon which they could rely to do so. Without such a rule, they cannot justify to attorneys who order transcripts in other cases why a later order for a transcript in a child protective appeal should be addressed first. Thus, the Commission recommended:

> The Rules of Judicial Administration should include a provision requiring that transcription of hearings for appeal of dependency and parental termination orders, and any other similar proceedings needing the transcription of hearings, shall be given priority over the transcription of all other proceedings both in the trial and appellate court.

Report, p. 8.

In discussing this recommendation, the Commission stated:

> A rule requiring these proceedings to be given priority provides the court reporters with the ability to prioritize these transcripts in the face of demands for other transcripts or court appearances. By placing the priority in the rules, it shows the importance the Supreme Court places on expediting these appeals.

Report, p. 9.

---

[1] DCF was not represented on either the Judicial Administration Rules Committee or the Appellate Rules Committee, nor was it asked to participate in the committees' discussions of this matter.

Despite this clear and unambiguous recommendation, the proposal before this court only indicates that transcriptions in these cases "should, to the extent reasonably possible, be given priority consistent with rule 2.215(g)."

Rule 2.215(g) states:

> **Duty to Expedite Priority Cases.** Every judge has a duty to expedite priority cases to the extent reasonably possible. Priority cases are those cases that have been assigned a priority status or assigned an expedited disposition schedule by statute, rule of procedure, case law, or otherwise. Particular attention shall be given to all juvenile dependency and termination of parental rights cases, and to cases involving families and children in need of services.

The present proposal does nothing more than parrot Rule 2.215(g). It uses soft language subject to varying interpretations. It does not require that priority be given to transcripts in child protective cases, only that it "should" be given. Even that vague term is watered down by the phrase, "to the extent reasonably possible." Moreover, "priority" is not defined.

The adoption of this proposed amendment will therefore result in no change to the current situation. Court reporters will continue preparing transcripts in the order in which they receive designations because they will not be able to point to a rule to justify any other approach.

While DCF strongly believes that this rule should be amended to speed the process of preparing transcripts, it believes that the present proposal merely pays lip service to that concept. DCF suggests that this rule should be amended to state that when a court reporter receives a designation regarding a child protective case, that reporter is required to provide that transcript prior to beginning work[2] on any pending designation or other order for a transcript unless a court orders otherwise.[3] Such an approach would truly prioritize these appeals and eliminate a large

---

[2] DCF does not suggest that a court reporter working on a transcript should have to stop doing so merely because a designation in a child protective appeal comes in.

[3] DCF recognizes that there may be certain situations in which the facts of a case dictate that a transcript in some other type of proceeding should receive priority over even a child protective

portion of the delay in their consideration.[4] Moreover, it would not be unduly disruptive to other appeals because the number of child protective appeals is relatively small in comparison to the overall caseload of the district courts.

---

appeal. Ordinarily, however, that will not be the case, so the presumption should be that child protective appeals receive first priority and the burden should be on a party seeking to overcome that presumption to obtain a court order to that effect.

[4] It should also be realized that the Commission's recommendations were made with the overall goal of reducing delay in child protective appeals. Thus, the recommendations are interrelated. The fact that it was anticipated that a large part of the delay would be eliminated by requiring the faster production of transcripts played a role in deciding whether to make recommendations relating to other segments of the normal appellate time line. It was clear at the workshops that the savings in time arising from the quicker preparation of transcripts was a factor (though certainly not the only one) in determining, for instance, that there was not a need to reduce the time period for filing notices of appeal or for serving initial and answer briefs. If the balance that the Commission struck with these recommendations is upset by tinkering with one aspect of them, the overall goal may well be compromised.

DCF notes further that the balance the Commission struck was a well-conceived one with regard to transcripts and briefs. Reducing the time for briefs impacts on the quality of the briefs, while doing so for transcripts merely changes the order in which transcripts are performed. The same quality of transcript will be filed whether it is done sooner or later.

As to the time for the notice of appeal, DCF submits that this is an area in which the appellate timeframe for child protective appeals can be shortened significantly. DCF suggests reducing the time for filing a notice of appeal from 30 to 15, or at most, 20, days in these cases. This approach would not be unprecedented. The state is required to file notices of appeal within 15 days in criminal cases. Fla. R. App. P. 9.140(c)(3). Although the Commission recommended against shortening this time period, Report pp. 5-6, it recognized that the American Bar Association and the National Conference of Juvenile and Family Court Judges favored such an approach and that several states have employed it. It is not clear from the petition whether the committees considering manners to shorten the appellate timeframe in child protective cases discussed the possibility of reducing the time for filing a notice of appeal or not. In any event, DCF submits that this is an area in which a reduction of that timeframe can be easily achieved. With one exception, the various proposals before this court encourage or require all participants in the process—attorneys, judges, court reporters, clerks—to do what they have to do more expeditiously. The one exception is parents. The one essential thing parents have to do is decide whether to appeal or not. Given the restricted timeframes every other person involved has to deal with, there is no reason why the parents should not also have to move a bit faster in making their decisions. Fifteen days is not an unreasonable timeframe, especially because this a matter they can discuss with their attorneys prior to final judgments in terms of what to do if judgments prove to be unfavorable. All participants in the appellate process should do their parts to expedite child protective cases, and parents should not be an exception.

RULE 8.276

DCF agrees with the concept behind this proposed rule, the desire to direct attorneys to the proper appellate rule. It is concerned, however, that its adoption without some specific indication by this court that the rule is not intended to have any substantive effect could result in the rule being cited in support of some substantive argument in the future. Specifically, DCF fears that if there is a question as to whether some portion of Rule 9.146, as opposed to some other appellate rule, applies in a given situation, this rule might be offered as support of the position that the portion of Rule 9.146 is intended to apply.[5] It seems clear that it is not the intent of the present proposal to further either side of any such argument. If the proposal is adopted without comment by this court, however, that fact may be lost when future issues arise. Therefore, DCF suggests that in adopting this proposal, this court simply indicate that it does not intend for its adoption to have any substantive impact and or to either expand or contract the scope of Rule 9.146.

---

[5] DCF's concern is not merely theoretical, as it has dealt with such an argument in a recent case in which it appealed from an order finding a child not dependent. DCF took the position that because the appeal was being taken by a public body, the automatic stay provision of Fla. R. App. P. 9.310(b)(2) was applicable. The appellee parent argued that the automatic stay was not applicable in light of the fact that Fla. R. App. P. 9.146(c)(1) provides that a party seeking to stay an order pending appeal in a child protective case shall file a motion in the lower tribunal. The trial court agreed with the parent. On motion by DCF, the district court of appeal, in an unpublished order, reversed the trial court, apparently agreeing with DCF's contention that it was not a party *seeking* a stay because the stay was automatically implemented upon the filing of DCF's notice of appeal. Had the present proposal been in effect at the time this matter was litigated, the parent might have argued it provided additional support for the position that the provision in Rule 9.146 took priority over the provision relied upon by DCF. Other arguments might well arise in the future with regard to the question of whether Rule 9.146 or some other rule applies to a given situation. Indeed, given the fact that the district court's decision was not published in the case DCF has referred to above, the same issue might arise again.

RULE 8.330

This proposal, which seeks to establish a procedure for finding that allegations against a party in a dependency proceeding have not been sustained, is inconsistent with the law as it exists subsequent to this year's legislative session.

Ch. 2008-245, Laws of Florida, effective July 1, 2008, significantly changed the concept of dependency in Florida. It amended § 39.507(7), Fla. Stat., keeping the preexisting language as subsection (c), and adding the following new subsections:

> (a) For as long as a court maintains jurisdiction over a dependency case, only one order adjudicating each child in the case dependent shall be entered. This order establishes the legal status of the child for purposes of proceedings under this chapter and may be based on the conduct of one parent, both parents, or a legal custodian.
>
> (b) However, the court must determine whether each parent or legal custodian identified in the case abused, abandoned, or neglected the child in a subsequent evidentiary hearing. If the evidentiary hearing is conducted subsequent to the adjudication of the child, the court shall supplement the adjudicatory order, disposition order, and the case plan, as necessary. With the exception of proceedings pursuant to s. 39.811, the child's dependency status may not be retried or readjudicated.

This change in the law demonstrates that the proposed change to this rule should not be adopted. It makes clear that the charges in a petition for dependency are not charges *against a party*, but are charges that children are dependent, regardless of what any particular party may have done. Children will no longer be adjudicated dependent as to the mother or as to the father. They will simply be adjudicated dependent. Thus, parents contesting such petitions will be called upon to respond to contentions involving not only their own conduct, but, if at issue, also the conduct of the other parent. Given this change, the proposed amendments to this rule should be rejected.

DCF recognizes that subsection (b) of the new version of the statute does create a new form of judicial proceeding. It may therefore be appropriate to consider whether any changes to

the juvenile rules might be called for to establish proper procedures for hearings held pursuant to the subsection. DCF would suggest that the matter be referred back to the Juvenile Court Rules Committee for consideration of that question.

DCF additionally notes that the petition indicates on page four that the present subsection (g) of this rule is being deleted because its contents are being transferred to proposed Rule 8.332(a), (d), and (e). Review of proposed Rule 8.332 reveals, however, that while the present subsection (g)(1) has been transferred to proposed Rule 8.332(a), the proposed rule does not include a subsection (d) or (e). Presumably, this is simply a scrivener's error and those subsections are intended to be included and to consist of the wording set forth in the present subsections (g)(2) and (3). As the proposal now exists, however, that wording has apparently been inadvertently omitted from the rules and, if that is the case, the omission should be corrected.

RULE 9.130

This proposal reflects proposed changes to Rule 9.146 which seek to greatly expand the number of non-final orders from which appeals may be taken. In its discussion of Rule 9.146, *infra*, DCF takes the position that this extensive expansion of the number of appealable orders should not be approved. If this court agrees with DCF's position in this regard, the proposed change to this rule obviously should not be adopted either.[6]

---

[6] Should this court decide to approve the increased number of appealable orders proposed by the petition, DCF would suggest that the better approach would be to list those orders as part of Rule 9.130, not to place them in Rule 9.146. Doing so would be consistent with the fact that other appealable non-final orders relating to specific areas of the law are contained in Rule 9.130, not in specific rules relating to those areas of the law. *See* Rule 9.130(a)(3)(C)(iii) (orders determining "the right to immediate monetary relief or child custody in family law matters"); Rule 9.130(a)(3)(C)(v) (orders determining "that, as a matter of law, a party is not entitled to workers' compensation immunity"); Rule 9.130(a)(3)(C)(vii) (orders determining "that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim

RULE 9.146

Subsection (c)(1)

A final order is appealable, regardless of what any rule says. There is no need to enumerate such orders in the rules. They are not enumerated with regard to other areas of the law. Moreover, listing them creates confusion because, although the proposal uses the word "include," it implies that the orders listed are the only orders in child protective cases that are final. Depending on the circumstances, others may be as well. Further, the proposed rule establishes a fiat that the orders listed are by definition appealable, although there may exist arguments in particular cases that some order listed here is not actually final. For instance, suppose an order of dismissal under subsection (c)(1)(b), (e), or (g) dismisses a case without prejudice. "An order that dismisses an action 'without prejudice' may or may not be a final order depending on whether it unequivocally disposes of a case." *Hinote v. Ford Motor Co.*, 958 So. 2d 1009, 1010 (Fla. 1st DCA 2007). When there is an issue as to whether an order is final, the determination of that issue should be left to the appellate court to which an appeal is taken, not determined by a rule enacted in a vacuum without consideration of the facts of the particular case. This proposal should be rejected.[7]

---

arising under federal law"); Rule 9.130(a)(3)(C)(viii) (orders determining "that a governmental entity has taken action that has inordinately burdened real property within the meaning of section 70.001(6)(a), Florida Statutes").

[7] Should the proposal be adopted, DCF would suggest a stylistic change, which would be using capital letters to designate the list of appealable orders. Those orders, which are set forth within subsection (1) of section (c) of the rule, are designated in the proposal by lower case letters. Thus, the first order listed comprises subsection (c)(1)(a) of the rule. Generally, in the rules, however, sections are designated by lower case letters, subsections by Arabic numerals, and subsections within subsections by capital letters. *See, e.g.,* Rules 9.030, 9.040, 9.130, 9.140, 9.141, 9.142, 9.145, 9.180, 9.190, 9.200, 9.430. Under the general approach, the first order listed in the proposed rule would be subsection (c)(1)(A). Not only would utilizing upper case letters in this context be consistent with the other rules, but doing so would provide a clearer designation that would eliminate any possibility of subsections being confused with sections.

Subsection (c)(2)

This proposal seeks to dramatically expand the number of orders from which non-final appeals may be taken in child protective cases. Indeed, adoption of the proposal would create a situation in which more non-final orders would be appealable in such cases than in any other area of the law. DCF submits that the proposal is ill advised and should be rejected.

In support of its position, DCF initially notes that the Commission did not recommend this expansion. To the contrary, the Commission's report makes clear that such an approach would aggravate the problem of delay in resolving child protective cases. In fact, the present proposal ignores the Commission's recommendation to amend the rules to make clear that *only* the non-final orders that are presently listed in Rule 9.130 should be appealable. Specifically, the Commission stated:

> Rule 9.146(b) provides that "any parent … affected by an order of the lower tribunal … may appeal to the appropriate court within the time and in the manner prescribed by these rules." The Second District has held that this rule "provides no exception or expansion to the appeals permitted under rule 9.130." *In re R.B.*, 890 So. 2d 1288 (Fla. 2d DCA 2005). The Commission considers this to be the proper understanding of the rule. However, in order to assure that practitioners are not misled, *the rule should be amended to state that only non-final orders listed in Rule 9.130 are authorized appeals.*
>
> Rule 9.130 provides for the appeal of specific non-final orders, very few of which are the type which would emanate from a dependency or termination case. Even Rule 9.130(a)(3)(C)(ii), permitting appeals form orders determining the right to immediate monetary relief or child custody in family law matters, does not apply to dependency/termination cases, because family law is governed by a separate subset of rules and statutes from dependency and termination cases.
>
> *The Commission disfavors an expansion of Rule 9.130 to provide a list of specific orders to be appealed.* Generally, the list of non-final orders which may be appealed tends to get longer with time, thus increasing the possibility of delay on appeal as more orders can result in appeals.
>
> *If the primary goal is to avoid delay, then review of all non-final proceedings by petition for writ of certiorari, other than those specifically set forth in Rule 9.130, will be more expeditious than any appeal.* However, review by certiorari presently carries with it a different standard of review. We believe that this debate as to what types of orders should be appealed by way of non-final appeal, or whether to handle review of non-final orders by way of petition for

> certiorari, are issues more properly debated in the Juvenile Court Rules and Appellate Court Rules Committees, as those bodies have more experience with the nature of the orders. However, it is the Commission's position that the types of non-final orders which may be appealed should be very limited.

Report, pp. 13-14 (emphases added).

Despite the fact that the Commission expressed these sentiments, the petition seeks to make appealable a staggering total of nine categories of non-final orders. To truly appreciate just how big a change this would be, the proposal should be compared to Rule 9.130, which authorizes appeals in only 12 categories of non-final orders. Thus, the petition seeks to almost double the number of categories of appealable non-final orders in child protective cases.[8]

Such an approach would disrupt the lives of children, create delay in resolution of legal proceedings affecting them, and undermine the purposes of the Commission's recommendations. The importance of resolving child protective cases in as expeditious, efficient, and non-disruptive a manner as possible cannot be overstated. As noted in *S.B. v. Dept. of Children & Families*, 851 So. 2d 689, 693 (Fla. 2003), in such cases, "the health and safety of the child is of paramount concern, and the goal is to address the concern in the most economic, effective, obvious, and direct manner." *See also N.S.H. v. Florida Dept. of Children & Family Servs.*, 843 So. 2d 898, 903 (Fla. 1991) (finding that any potential benefits from utilizing the procedures outlined for criminal appeals in *Anders v. California*, 386 U.S. 738 (1967) "are outweighed by the delay in the disposition of the case and the consequent potential detriment to the child from

[8] Realistically, it does more than double the number because, as noted by the Commission in the above quoted passage, "very few" of the orders set forth in Rule 9.130 "are the type which would emanate from a dependency or termination case." Report, p. 13. Moreover, some of the categories of non-final orders included in the present proposal are so open-ended as to include all sorts of orders. For instance, proposed subsection (c)(2)(i) allows appeals from *any* order pertaining to a child who will turn 18 within 24 months of the order's rendition. Also, proposed subsection (c)(2)(a) allows appeals from *any* order rendered at the conclusion of a shelter hearing, not just an order determining whether to shelter a child.

any additional delay in finalizing the permanent placement of the child); *E.T. v. Dept. of Children & Families*, 930 So. 2d 721, (Fla. 4th DCA 2006), rev. dism., 957 So. 2d 559 (Fla. 2007), quoting *In re Adoption of T.M.F.*, 392 Pa. Super. 598, 573 A.2d 1035, 1043 (1980) ("[A] review which turns around a decree of termination, unless done within a narrowly constrained time frame may do incalculable damage to the child with only marginal or questionable benefit to the parent.").

The present proposal will greatly increase the number of appeals.[9] Cases will be constantly bouncing back and forth between the trial and appellate courts. There will be doubt and confusion with regard to whether trial court orders will remain in effect. Trial judges, attorneys, other professionals, parents, children, family members, foster families, and others will be uncertain as to the status of cases and placements. Delays will result, as trial courts will be reluctant to proceed while appeals are pending. The people directly affected will be nervous and unsettled as the process drags on. Reversals will cause disruptions in the lives of children, who will adapt to certain situations, only to have their lives upended after an appeal even in circumstances in which continuity might be more important than vindicating whatever legal point might be at issue. Such disruptions could occur repeatedly within the context of a single case. When trial courts do proceed while appeals are pending, and circumstances change while they are doing so (something that happens frequently in child protective cases), decisions

[9] This is true not just because of the increased number of categories, but also because some of the categories seem likely to lead to multiple appeals in individual cases. For instance, proposed subsection (c)(2)(b) authorizes appeals whenever a trial court requires or approves a change of placement into, out of, or within foster care. It is not uncommon for placements to be changed many times in a single proceeding. This proposal allows for appeals from each of those changes. Proposed subsection (c)(2)(c) allows appeals whenever a trial court denies a motion to amend a case plan. This too occurs frequently. What's more, such rulings often relate to minor matters that do not warrant appeal.

reversing previous orders may make little sense in light of the changed circumstances and force trial courts to take actions that are not in the best interest of the child.

It should also be realized that there is less reason to allow additional appeals in child protective cases than in other matters. In such cases, "there are two interests that must be weighed …: that of the parent and that of the child." *N.S.H. v. Dept. of Children & Family Servs.*, 843 So. 2d 998, 902 (Fla. 2003) (footnote omitted). Thus, a parent's right to the care, custody and companionship of his or her children "is not absolute but is subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail." *In the Interest of Camm*, 294 So. 2d 318, 320 (Fla. 1974) (citations omitted). Given this focus, the role of the trial judge differs from that in a traditional adversarial proceeding. He or she "is the fact finder, the sentinel of the child's best interest, and an involved participant in the process." *E.T.*, 930 So. 2d at 726. Because of the nature of child protective proceedings and the role of judges in such proceedings, extreme deference should be given to the exercise of their discretion. A proper balance with regard to that discretion is afforded by the present approach taken by the courts, which is to allow for certiorari review.[10] This approach provides a form of review which

[10] The petition points out that one member of the Appellate Court Rules Committee advocated that there were inconsistencies in the district courts with regard to the manner of review of non-final orders. It is not clear whether the Committee as a whole shared this concern. In any event, DCF submits that the concern is a very limited one and that, regardless of its scope, the district courts appear to be coming together in their approach. The cases cited by the Committee member deal with one specific area. They are decisions in which courts have reviewed certain orders entered *subsequent to* final orders pursuant to Fla. R. App. P. 9.130(a)(4), which allows for review of certain "non-final orders entered after final order on authorized motions." Any problems relating to this limited situation certainly cannot justify the broad present proposal, which seeks primarily to authorize many appeals from orders entered *prior to* final judgments. To the extent that the Committee may be attempting to address the situation regarding post-judgment orders, it is therefore shooting a mouse with an elephant gun. Moreover, any concerns regarding inconsistency are based on cases that for the most part appear to no longer be valid and that do not in any event establish a set of circumstances that needs to be addressed by rule. None of the cases in which review was undertaken under Rule 9.130(a)(4) analyze the jurisdictional

can correct errors that truly need correcting, while leaving the day to day supervision of the case where it belongs, in the hands of the trial judge who sees the people involved, has a feel for them, knows the full history of the case, and can best respond to situations as they develop. Moreover, it weeds out cases in which the interest of continuity in the child's life outweighs some error that may have occurred.[11]

While the interests of the children involved in child protective cases is certainly the most important factor to consider in assessing the present proposal, it should also be realized that other

---

question. Other subsequent cases that do undertake such an analysis have clarified the law. The Second District Court of Appeal in *In re J.T.*, 947 So. 2d 1212, 1217 (Fla. 2d DCA 2007), interpreted Rule 9.130(a)(4) to encompass only orders "directed to some aspect of true finality in the original order or judgment." The Fourth District indicated its agreement with the *J.T.* approach in *Guardian Ad Litem Program v. Dept. of Children & Families*, 972 So. 2d 871, 872 (Fla. 4th DCA 2007). The Fifth District has in turn relied upon the Fourth District's opinion, *R.J. v. Guardian Ad Litem Program*, ___ So. 2d ___, ___, 33 Fla. L. Weekly D2560, D2560 (Fla. 5th DCA Oct. 30, 2008), and has concluded that post-disposition dependency orders are reviewable by certiorari, not appeal. *C.B. v. Dept. of Children & Families*, 975 So. 2d 1158, 1160 (Fla. 5th DCA 2008). It thus appears that the district court decisions are harmonizing themselves. If any clarification is needed, and DCF submits that none is, this court should simply indicate its approval of *J.T.* and its progeny.

[11] The present approach of reviewing non-final orders by certiorari, in addition to being more expeditious than doing so by appeal, has the additional advantage of providing a consistent standard of review. The suggestion now before this court would create a situation in which the standard would depend on which side of an issue the party seeking review had been on in the trial court. Unlike most of the non-final orders presently appealable under Rule 9.130, which is phrased primarily to refer to orders that encompass rulings in favor of either party, the present proposal refers primarily to orders that rule in a certain manner. With the exception of proposed subsections (c)(2)(a) and (i), the proposals all make appealable orders denying, requiring, approving, or authorizing something, or committing a child. Should the trial court *grant* whatever is the subject of a particular subsection, or *refuse* to commit a child or to require, approve, or authorize whatever is indicated in a subsection, however, the order would not be appealable. Thus, parties seeking review if the court rules one way would have the benefit of the standard applicable to an appeal while parties seeking review if the court rules the other way on the same matter would have to deal with the stricter standard applicable to certiorari. Demonstrating an additional inconsistency is the fact that proposed subsection (c)(2)(i) allows for appeal of all non-final orders that pertain to a child who will turn 18 within 24 months of their rendition. Given that provision, the parties who would normally be relegated to certiorari review in the above situations will be able to appeal if the child fits into the age range contemplated by the proposed subsection.

public policy reasons also support DCF's position that drastic expansion of appeals suggested by the petition should be rejected. If approved, the caseloads of the district courts would be greatly increased as the new provisions would unquestionably spur the filing of many appeals from orders that presently are not reviewed. This increase would not only impact the courts themselves, but the caseloads of attorneys with DCF and the Regional Conflict Counsel offices, thus either slowing down the handling of those caseloads or creating the need to hire additional attorneys. Moreover, it would create more situations in which private attorneys are appointed at public expense. It should also be realized that if the present proposal is approved, this court will be taking the first step down a slippery slope. Arguments will be made that the categories of appealable non-final orders should also be expanded in other subject areas of the law. There will be no real way to justify increasing those categories with regard to child protective cases, but not in the other areas. Increasing appellate review of non-final orders in such a wholesale manner would be contrary to the principles upon which our appellate system is structured and would aggravate even further the burden on the district courts.

The petition here seeks to convert the field of child protective cases from one in which the appellate courts have a relatively limited involvement with non-final orders to one in which they will have greater involvement than in virtually any other area of the law. It offers a technical, overly legalistic approach to a field in which the judiciary's role has traditionally been protective in nature. The proposal flies in the face of the conclusions reached by the Commission after receiving input from all interested parties.[12] It does not serve the best interests

---

[12] Although the Commission's report did indicate that the question of what, if any, non-final appeals should be authorized is one "more properly debated" in the Appellate Court Rules Committee, implicit in the Commission's use of the word "debated" would seem to be the assumption that DCF would have the chance to advance its perspective to the Committee, just as it did at the Commission's workshops. As previously noted, it did not.

of the children that will be subjected to it if it is adopted. The system of handling the cases affecting those children should be as efficient and expeditious as possible. While the present system is not perfect, it is far better than the system that would be created by this proposal. DCF submits that proposed subsection (c)(2) should be rejected.[13]

Subsection (d)(2)

The petition seeks to amend the existing subsection (c)(2), which defines the type of order that is suspended pending appeal as "a termination of parental rights order with placement of the child" with an agency or DCF for the purpose of adoption. The proposal suggests changing the language to "a termination of parental rights order that places the child" in such a manner. In other words, under the Committee's approach, suspension would occur only when placement occurs in the same order as termination. The only explanation for this change is an indication on page nine of the petition that the language was "not clear." DCF feels that it should point out that the change being advocated for is more than a semantic one. It may bring about consequences that have not been anticipated. While it is not the normal procedure, there are sometimes cases in which a trial court terminates rights in one order, but places the child in another order. This proposal would mean that the termination order would not be suspended in such situations. The case could proceed and the child could be adopted, with the parent's appeal thereby being rendered moot. While such an approach might work to DCF's advantage in some future situations, DCF has not sought this change and it believes that it should in fairness make the potential impact of the change known so that this court can take it into account in assessing this matter.

[13] Proposed subsection (c)(2) designates the list of orders in the same manner as does proposed subsection (c)(1). Thus, the suggestion made in n. 7 for a stylistic change should the proposal be adopted is equally applicable here.

Subsection (h)(1)

This proposal limits the procedures for preparing the transcript and the record set forth in the other portions of section (h) to appeals of final orders to the district courts of appeal. Such a limitation would mean that the procedures of section (h) would not apply when an appeal of a trial court order comes to this court pursuant to Fla. R. App. P. 9.125, which allows district courts to certify in appropriate situation that cases require immediate resolution by this court. There is no reason why the same procedures should not apply in such cases. Moreover, the proposal really serves no purpose. The justification for the proposal set forth on page nine of the petition is to make clear that the procedures of section (h) do not apply to jurisdictional briefs in this court. The rule itself deals only with appeals, however, as reflected by its title, "APPEAL PROCEEDINGS IN JUVENILE DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS CASES AND CASES INVOLVING FAMILIES AND CHILDREN IN NEED OF SERVICES." Jurisdictional briefs are not filed in appeals. Thus, there is no need for this proposed subsection. Given that fact and the inappropriate limitation noted above, this proposal should not be adopted.

Subsection (h)(2)(C)

DCF strongly endorses the provision in this proposed subsection requiring the circuit court clerk to serve copies of the record on the parties. Presently, the clerks are not consistent in their approaches regarding the record. Some prepare the record in the manner contemplated by the proposal and utilized in criminal appeals. Others merely serve an index of the record as is done in civil appeals. Delay in child protective appeals frequently arises in cases in which appellate attorneys receive only an index. It must be remembered that these cases are ongoing, evolving matters. Thus, trial attorneys continue to deal with them while appeals are pending.

They often need the same documents that are needed by the appellate attorneys. Moreover, those documents are also needed by case workers and other personnel. It can therefore be very difficult for appellate attorneys to track down documents they need to review in order to properly handle appeals. This problem is especially acute, when, as if often the case for both DCF and parents' attorneys, the appellate attorney is in a different location, sometimes a different city, than the trial attorney. For parents' attorneys, additional problems can arise—including financial concerns—when, as is also often the case, the trial and appellate attorneys are from different firms, or one is from a firm and the other from the Regional Conflict Counsel office.

It should further be realized that the approach taken by a parent's attorney in appealing from a judgment in a child protective case is much more akin to an appeal in a criminal case than a civil one. Those attorneys comb through the record to find issues to present on behalf of their clients. In civil cases, clients usually make a cost-benefit analysis before undertaking an appeal and appellate attorneys therefore generally know what issues they will likely raise and can more readily identify the relevant documents they will need to review. For the above reasons, it is clear that the present proposal therefore establishes the far superior of the two processes currently being utilized as the appropriate one.

WHEREFORE, DCF respectfully submits the above comments to the amendments proposed by the petition in this cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Scott M. Dimond, Chair, Rules of Judicial Administration Committee, 2665 S. Bayshore Dr., Penthouse 2, Miami, FL 33133; David N. Silverstein, Chair, Juvenile Court Rules Committee, 501 E. Kennedy Blvd., Ste. 1100, Tampa, FL 33602-5242; John S. Mills, Chair, Appellate Court Rules Committee, 865 May St., Jacksonville, FL 32204-3310; and Judge Martha C. Warner,

Chair, Commission on District Court of Appeal Performance and Accountability, Fourth District Court of Appeal, 1525 Palm Beach Lakes Blvd., West Palm Beach, FL 33401, this 17th day of November, 2008.

Respectfully submitted,

____

ANTHONY C. MUSTO
Special Counsel
Florida Department of Children & Families
Florida Bar No. 207535
P. O. Box 2956
Hallandale Beach, FL 33008-2956
954-336-8575

JEFFREY DANA GILLEN
Statewide Appeals Director
Florida Department of Children & Families
Florida Bar No. 122084
111 S. Sapodilla Ave., Ste. 303
West Palm Beach, FL 33401