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 COURT OF APPEAL PERFORMANCE AND ACCOUNTABILITY RECOMMENDATIONS
_____/

Case No. SC08-1724

COMMENTS OF THE GUARDIAN AD LITEM PROGRAM

The Statewide Guardian ad Litem Program (GAL) supports all of the proposed amendments recommended in the *Report of the Appellate Court Rules, Juvenile Court Rules, and Rules of Judicial Administration Committees* ("Joint Report"). These comments are directed specifically to proposed Rules 9.130(a)(2), 9.146(c), and 9.146(d), Florida Rules of Appellate Procedure. Those proposals appear in the *Joint Report's* Appendix at pages D-24; D-32——D-33; and E-11——E-15.

I. INTRODUCTION

Following the Florida Legislature's creation of the Statewide Guardian ad Litem Office,[1] that office launched the first coordinated, statewide, and child-focused appellate practice in Florida. Anecdotal data collected by GAL over the past three years has consistently reflected as follows:

[1] § 39.8296, Fla. Stat. (2003).

1. Approximately 60% to 65% of all appellate cases arising from proceedings under chapter 39, Florida Statutes, are appeals from final orders terminating parental rights;
2. Approximately 14% to 17% of all appellate cases arising from proceedings under chapter 39, Florida Statutes, are appeals from final orders adjudicating dependency; and
3. Approximately 2% to 3% of all appellate cases arising from proceedings under chapter 39, Florida Statutes, are appeals from final permanency orders.

The remaining 15% to 24% of appellate cases filed in dependency and parental termination cases relate to other types of orders that do not "fit neatly into the traditional categories of final and non-final orders." *G.L.S. v. Dep't of Children & Fams.*, 724 So. 2d 1181, 1183 (Fla. 1998) (quoting *Moore v. Dep't of Health & Rehab. Servs.,* 664 So. 2d 1137, 1139 (Fla. 5th DCA 1995)).

In 2006, the Appellate Court Rules Committee (ACRC) proposed an amendment to Rule 9.130(a)(3)(C)(iii) that would have authorized appeals from non-final orders determining the right to custody in dependency cases. *See In re: Amendments*, 941 So. 2d 352. The GAL filed comments and orally argued in opposition to that proposal for two primary reasons. First, GAL contended, the proposal's wording would have authorized

unintended appeals. Second, GAL argued that the Court should not adopt rule amendments piecemeal but should, instead, adopt a comprehensive rule governing review of non-final orders after deliberate and reasoned study.

Ultimately, the Court deferred adoption of the rule proposed in 2006, noting that "[t]his matter currently is the subject of an ongoing study by the Court, and the Court will consider any proposed changes to this rule after that study has been completed." 941 So. 2d at 353. That time is now.

II. COMMENTS

The dependency rule-related work of the Commission on District Court of Appeal Performance and Accountability ("Commission") began in 2005, at the request of then-Chief Justice Pariente. In an October 25, 2005, memo, Chief Justice Pariente noted that "[o]ther states, such as Michigan, Utah, and Iowa, have successfully implemented changes in policy and reporting procedures to decrease time on appeal."[2] And Chief Justice Pariente advised that the Commission would "review the

[2] Iowa is a primary leader in this regard. That state was the first to implement a form-based appellate procedure that guides inexperienced appellate attorneys through the appellate process. *See* Appx. 2. Utah and Arkansas have since adopted the Iowa model. GAL believes a similar procedure will work in Florida and encourages the Court to charge the Appellate Court Rules Committee with the task of evaluating, debating, and proposing similar procedures.

overall time on appeal for cases involving children to determine if any further improvements can be made." *See* Appx. 1.

In light of that beginning, and recognizing that the average 10 month life of an appeal does not comport with the concept of child time, GAL submits the Court's decision concerning the proposed rules should turn on its evaluation of whether the proposed rules accomplish the basic goals of eliminating delay and removing roadblocks to finality. *Compare Report of the District Court of Appeal Performance and Accountability Commission* 5 (2006) *with In re D.T.*, 56 P.3d 840, 843 (Kan. App. 2002) (delay of 10 months "fails to recognize that the courts must strive to decide these cases in 'child time,' rather than 'adult time.'").

A. Identifying Appealable Final and Non-Final Orders in Rules 9.130(a)(2) and 9.146(c) Eliminates Confusion and the Delay It Causes.

The proposed amendments to Rule 9.130(a)(2) and Rule 9.146(c) find their genesis in GAL's work following *In re: Amendments*, 941 So. 2d 352. Counsel for GAL submitted memoranda to both the Commission and the ACRC outlining the various considerations and case law that converge to create the need for the proposed rules. *Study of Delay in Dependency/Parental Termination Appeals Supplemental Report and Recommendations* Appendix F (June 2007) ("Study of Delay"); *Joint Report* at F-38–F-40.

1. Specifically Identifying Which Orders Are Final Eliminates Confusion and Indirectly Furthers Expedited Decision Making in Appellate Cases Involving Non-Final Orders.

The idea of specifically identifying final orders in dependency and parental termination cases arose from both experience and case law. As the Court has previously observed, dependency orders do not "fit neatly into the traditional categories of final and non-final orders." *G.L.S*, 724 So. 2d at 1183. That observation is borne out by GAL experience, for although 15 to 24 percent of GAL's appellate cases involve non-final orders, rare is the notice of appeal that correctly identifies a non-final order as non-final.[3] Rarer still are timely petitions for writ of certiorari filed by parents' counsel.

Although a forceful argument supports the notion that the Court should not adopt rules of procedure because of noncompliance with existing rules, the reality is that attorneys handling appellate cases in dependency and parental termination cases are often inexperienced appellate attorneys. Fluency in the rules of appellate procedure and in the nuances between direct appeal and certiorari does not exist among most attorneys providing representation in dependency cases.

[3] Clerks' offices often overlook misnomers in Notices of Appeal, which causes non-final appeals to take the longer course of final appeals.

Ignoring this reality does nothing to accomplish the overarching goal of expediting appellate review. Conversely, a list of clearly delineated final orders works no harm while accomplishing the laudable goal of eliminating confusion and redirecting practitioners to the applicable procedures for obtaining expedited review of non-final orders.

Defining the limited number of orders deemed final for purposes of appellate review advances the goal of expedited review in a second manner as well. The district courts of appeal generally agree that adjudication orders, disposition orders, and permanency orders are each final in nature. Uncertainty remains, however, as to whether other dependency orders are final in nature. For instance, the Fourth and Fifth District Courts of Appeal have reviewed shelter orders as final orders. *See, e.g., M.L. v. Dep't of Children & Fams.*, 942 So.2d 977 (Fla. 4th DCA 2006); *L.M.C. v. Dep't of Children & Fams.*, 935 So. 2d 47 (Fla. 5th DCA 2006). But those decisions are plainly inconsistent with the ACRC's belief that shelter orders are non-final, as evidenced by the ACRC's 2006 proposal to amend Rule 9.130(a)(3)(C)(iii). *In re: Amendments*, 941 So. 2d 352. Moreover, reviewing shelter orders as final orders guarantees that the appellate process will consume more time than the expedited procedures for review of non-final orders. That result

is the antithesis of the very purpose the Commission convened to study ways to expedite appellate review.

In short, the proposal to amend Rule 9.146(c)(1) to list appealable final orders promotes the basic objective of expediting appellate review, and it does so in a manner entirely consistent with existing rules of appellate procedure. Both Rule 9.140, relating to appeal proceedings in criminal cases, and Rule 9.145, relating to appeal proceedings in juvenile delinquency cases, contain lists of appealable orders. No reasoned distinction warrants different treatment of appellate proceedings in dependency and parental termination cases, especially given underlying goal of deciding cases according to the child's perception of time.

2. Permitting Appeals of Specified Non-Final Orders Expedites Permanency and Advances the Objective of Expedited Decision Making.

Much of the preceding analysis applies equally to the proposal to amend Rule 9.146(c)(2) to permit direct appeal of specified non-final orders, among them shelter orders and orders requiring or approving changes of placement into, out of, or within foster care. *See Joint Report* at Appx. D-32. GAL incorporates its prior analysis by reference.

GAL also again directs the Court's attention to the memoranda its counsel provided to the Commission and to the ACRC. *Study of Delay* at Appx. F; *Joint Report* at F-38——F-40.

Those memoranda discuss the wide-ranging non-final orders the First, Fourth, and Fifth District Courts of Appeal have previously reviewed by direct appeal through present Rule 9.130(a)(4). Given the breadth of the review that has heretofore been exercised, the proposed list of appealable non-final orders marks curtailment, rather than enlargement, of orders reviewable by direct appeal. Moreover, the proposed amendment resolves the inter-district conflict between the second district on the one hand and the first, fourth, and fifth districts on the other.[4]

The list of non-final orders included within proposed Rule 9.146(c)(2) is, admittedly, not exhaustive. The proposal represents thoughtful consideration of those non-final orders most likely to have significant or long-term effect on dependent children and their parents, especially older youth whose liberty interests are impacted or whose ability to successfully transition to independence is impacted by a non-final order. Such orders should be reviewable not only as a matter of right but also on the most expedited track available. To conclude otherwise eviscerates the concept of expedited appellate review

[4] *Compare In re J.T. (Dep't of Children & Fam. Servs. v. Heart of Adoptions, Inc.)*, 947 So. 2d 1212, 1217 (Fla. 2d DCA 2007) *with Guardian ad Litem Program v. Dep't of Children & Fams.*, 936 So. 2d 1183 (Fla. 5th DCA 2006); *Dep't of Children & Fams. v. T.L.*, 854 So. 2d 819 (Fla. 4th DCA 2003); *A.B. v. Dep't of Children & Fams.*, 834 So. 2d 350 (Fla. 4th DCA 2003); *Ayo v. Dep't of Children & Fam. Servs.*, 788 So. 2d 397 (Fla. 1st DCA 2001); *Coy v. Dep't of Health & Rehab. Servs.*, 623 So. 2d 792 (Fla. 5th DCA 1993).

and leaves families – and particularly children and youth – in the state of limbo, where the ultimate outcome is as likely to be determined by default as it is by reasoned judicial review.

The ACRC's Family Law Subcommittee reviewed and debated the list of non-final orders appearing at proposed Rule 9.146(c)(2) over the course of several meetings. The subcommittee eventually passed the proposed amendment to the full ACRC with only a single dissent. The full ACRC, in turn, reviewed the extensive work product of the subcommittee and approved the proposed amendment by an overwhelming majority of 41 to 2. Although the Commission chose to leave determination of "what types of orders should be appealed by way of non-final appeal" to the ACRC and the Juvenile Court Rules Committee (JCRC), *Study of Delay* at 15, the JCRC elected not to devote substantive consideration to the issue and, instead, passed only cursory judgment after the ACRC's work was complete.[5]

This procedural history is significant because it reflects the careful and deliberate consideration of proposed Rule 9.146(c)(2) by many members of the ACRC, including the district

[5] Members of the ACRC Family Law Subcommittee were aware of the work of the JCRC and participated in one or more conference calls between members of the JCRC. Likewise, the JCRC was aware of the work of the ACRC's Family Law Subcommittee, and David Silverstein, Chair of the JCRC, participated in at least one conference call of the ACRC's Family Law Subcommittee. Mr. Silverstein represents the Department of Children and Family Services through the Attorney General's office in Hillsborough County.

court judges who serve on the ACRC. The Court should not casually cast aside the ACRC's lengthy and purposeful deliberations merely because some who have not devoted significant study to the issue may oppose the proposed amendment.

GAL has proactively studied and advocated for an approach akin to the proposed rule for several years. Interested parties have had just as much time, particularly after the Court's 2006 *In re: Amendments* decision and during and after the work of the Commission, to put forward alternative proposals. Because the Court is committed to providing children and youth meaningful access to courts, it should conclude that the time has come to make a decision, and it should defer to the proposed rule overwhelmingly recommended by the full ACRC.

3. Non-Final Shelter Orders Should Be Reviewed on an Expedited Basis as Appealable Non-Final Orders.

Proposed Rule 9.146(c)(2)(a), which will permit direct appeal of non-final shelter orders, represents resubmission of the ACRC's 2006 proposal to amend Rule 9.130(a)(3)(C)(iii). The comprehensive approach proposed by the ACRC with regard to appellate review of specified non-final orders, together with the other proposals whose effect will speed up the decision making process, convinces GAL that shelter orders should be

appealable as a matter of right through the expedited procedures that govern review of non-final orders.

Although parents will almost always be the appellant in appeals from shelter proceedings, the fact remains that children, even abused children, are often traumatized by removal from parental custody. Reuniting families at the earliest appropriate time serves the best interest of children and should be the goal of courts when children have been improperly removed from parental custody.

Because proposed Rule 9.146(c)(2)(a) provides for expedited review of the propriety of state action in disrupting a family unit, GAL supports the proposal.

4. The Equal Protection Clauses of the United States and Florida Constitutions Require Review of Non-Final Orders Requiring or Approving Changes of a Child's Placement.

Perhaps the single most important non-final order to a child is a non-final order moving the child from one home to another, whether into, out of, or within foster care. Orders disrupting long-term foster care placements can cause or exacerbate attachment disorders or other emotional trauma of long-term, often lifelong, effect. This life-altering impact exponentially increases the need to make certain that such orders are legally sound and, therefore, provides the basis for proposed Rule 9.146(c)(2)(b).

A case illustrating the need for the proposed rule was before the Court two years ago. *T.D. v. Florida Department of Children and Families*, 930 So. 2d 611 (Fla. 2006) involved a child who was improperly removed from a long-term, pre-adoptive foster care placement. *See I.B. v. Dep't of Children & Fams.*, 876 So. 2d 581 (Fla. 5th DCA 2004) (underlying case). The machinations of ordinary appellate review took so long that, by the time appellate review ended, the child had spent years in the subsequent placement. Returning the child to the first placement caused enormous, unnecessary emotional trauma to the child, so much so that the child ended up back in the second placement – a placement into which he never should have moved in the first instance.

Default outcomes like those in *T.D.* are wholly inconsistent with the Court's stated intent to expedite appellate review of dependency cases. Outcomes by default serve neither justice nor the best interests of children, yet, the lack of a clear right to review by direct appeal has facilitated similar outcomes in untold cases.

In addition to the basic unfairness of denying dependent children appellate review of right when their long-term living arrangements are disrupted by the state, the absence of an immediate appeal of right denies dependent children equal access to appellate courts.

Rule 9.130(a)(3)(C)(iii) authorizes direct appeal of non-final orders that determine the right to child custody in "family law matters." A prior version of the rule spoke in terms of "domestic relations matters." Under that prior version, and absent constitutional analysis, the Court determined that dependency proceedings did not fall within traditional meaning of "domestic relations matters." *Dep't of Health & Rehab. Servs. v. Honeycutt*, 609 So. 2d 596, 597 (Fla. 1992).

Under today's broader label "family court matters," orders changing a dependent child's placement into, out of, and within foster care may already be appealable. Although no district court has directly reached this result, dependency cases are "family law matters" and are part of unified family courts. *Cf. In re J.T. (Dep't of Children & Fam. Servs. v. Heart of Adoptions, Inc.)*, 947 So. 2d 1212, 1216 (Fla. 2d DCA 2007); *but see Guardian ad Litem Program v. Dep't of Children & Fams.*, 972 So. 2d 871 (Fla. 4th DCA 2007) (applying *Honeycutt* to the current version of the rule).

If the Court concludes that orders changing a dependent child's placement are appealable under the current wording of Rule 9.130(a)(3)(C)(iii), then proposed Rule 9.146(c)(2)(b) is duplicative but appropriately placed with other appealable non-final dependency orders. If, however, the Court determines that Honeycutt remains viable and declines to adopt proposed Rule

9.146(c)(2)(b), an equal protection issue arises. "The heart of an equal protection argument is that the State has adopted a classification that affects two or more similarly situated groups in an unequal fashion." *B.S. v. State*, 862 So. 2d 15, 17 (Fla. 2d DCA 2003).

If the Florida Rules of Appellate Procedure permit direct appeal of "custody"[6] orders affecting non-dependent children but deny direct appeal of "custody" orders affecting dependent children, the state impermissibly discriminates against dependent children by treating their best interests substantially different from the best interests of children who have not been removed from parental custody. *See* U.S. Const. amend. XIV, § 1; Art. 1, § 2, Fla. Const.

The disparate treatment of dependent children is easily discernable. A custody determination concerning a non-dependent child turns on the child's best interest, just as a custody determination concerning a dependent child turns on the child's best interest. *Compare Rahall v. Cheaib-Rahall*, 937 So. 2d

[6] The general term "custody" encompasses a dependent child's placement. "[C]ustody means 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). "Primary physical residence" is the equivalent of "custody." *Id.* "Legal custody" on the other hand is specifically defined by section 39.01(34), Florida Statutes (2008), as a "legal status" vesting the legal custodian with the rights and duties toward the child.

1223, 1224 (Fla. 2d DCA 2006) with § 39.522(1), Fla. Stat. (2008). Therefore, the best interests of dependent children are treated differently, and with less reverence, when rules of appellate procedure are adopted or interpreted to permit consideration of a non-dependent child's best interests on direct appeal but to preclude direct appeals on the same subject by dependent children. Equal protection "[o]bviously...includes a right of equal access to the courts...." *Ramsey v. State*, 965 So. 2d 854, 855 (Fla. 2d DCA 2007).

To pass constitutional muster, procedural rules closing appellate courts' doors to dependent children must pass intermediate scrutiny.

> While foster children are not an inherently suspect class, like the recognized sensitive classes, they comprise a discrete group of persons who, in the vast majority of cases, lack responsibility for and control over their status, and the power to change it....

Nancy M. v. Scanlon, 666 F. Supp. 723, 727 (E.D. Pa. 1987). Under intermediate scrutiny, the Court's duty is to evaluate the justification for the differential treatment and to "determine whether the proffered justification is 'exceedingly persuasive.'" *U.S. v. Virginia*, 518 U.S. 515, 532-533, 116 S.Ct. 2264, 2275 (1996). "The burden of justification is demanding and it rests entirely on the State." *Id.* at 533.

The State must show "at least that the [challenged] classification serves 'important governmental objectives and

that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" [Citations omitted.] The justification must be genuine, not hypothesized or invented post hoc in response to litigation. *Id.*

GAL submits that the Court should eliminate the disparity that exists within the rules of appellate procedure by abandoning *Honeycutt* and approving proposed Rule 9.146(c)(2)(b). Without doing either or both, the current rules unconstitutionally discriminate against dependent children by providing fewer protections for their best interests than are extended to the best interests of children who are privileged to live in the custody and control of their parents. Indeed, because courts have a duty to protect the best interests of dependent children, those children should receive more, not less, consideration than children living with fit parents.[7]

There is no legitimate state interest, much less an important governmental objective, in denying equal access to courts to the very children the state has undertaken the duty to protect.

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues

[7] *See Buckner v. Fam. Servs. of Central Fla., Inc.*, 876 So. 2d 1285, 1291 n.3 (Fla. 5th DCA 2004) ("While DCF may be right, an issue we cannot determine based on the record before us, it may also be wrong. S.H. deserves the opportunity to contest DCF's judgment regarding her fate, if appropriate.").

> must be kept free of unreasoned distinctions than can only impede open and equal access to the courts.

Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S.Ct. 1497, 1501, 16 L.Ed.2d 577 (1966); *see also In re Maricopa County, Juvenile Action No. J-73355*, 110 Ariz. 207, 516 P.2d 580 (1973) ("To deny the right to seek a delayed appeal to one and to grant it to another merely because of age is an 'unreasoned distinction' that 'can only impede open and equal access to the courts.'") (citation omitted).

B. Proposed Rule 9.146(d) Should Be Approved, and a Court Commentary Should Be Added to Clarify that the Specific Stay Provisions of Rule 9.146(d) Control the General Stay Provisions of Rule 9.310.

In none of the appellate proceedings GAL has prosecuted has it advocated that it, as a state agency, is entitled to an automatic stay under the general provisions of Rule 9.310(b)(2). GAL believes that "the welfare and best interest of the child" must control all stay determinations, which is what the express language of present Rule 9.146(c) and proposed Rule 9.146(d)(1) expressly say.

The Department of Children and Family Services, in contrast, has argued that it is entitled to an automatic stay under Rule 9.310(b)(2), although it has also opposed stay requests filed by GAL in some cases.

These incongruent positions should be considered in conjunction with evaluation of the ACRC's proposed amendment to

Rule 9.146(d). Because rules of statutory construction apply to the construction of procedural rules, *CPI Mfg. Co., Inc. v. Industrias St. Jack's, S.A. De C.V.*, 870 So. 2d 89, 92-93 (Fla. 3d DCA 2003), GAL submits the Court should adopt proposed Rule 9.146(d), along with a Court Commentary clarifying that the specific provisions of that rule control all stay requests in appellate proceedings involving dependent and allegedly dependent children. The best interests of children and youth should not be subjected to rote application of a procedural rule merely because of the status of the petitioner or appellant as a state agency.

III. CONCLUSION

For each of the reasons expressed in this Comment as well as in the voluminous supporting materials filed with the Joint Report, the proposed rules should be adopted in their entirety. Court Commentary should also be added where the Court deems it appropriate to do so.

Respectfully Submitted,

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