IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUVENILE PROCEDURE (THREE-YEAR CYCLE)

Case No. SC09-141

COMMENTS OF THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES

The Florida Department of Children and Families (DCF) hereby submits the following comments to the three-year cycle report filed by the Florida Rules of Juvenile Procedure Committee (the Committee) in this cause and states the following:

I

THIS COURT SHOULD ESTABLISH A FAIR PROCEDURE TO ALLOW PARENTS TO ASSERT CONSTITUTIONAL VIOLATIONS BASED ON ACTS OR OMISSIONS OF COUNSEL IN TERMINATION OF PARENTAL RIGHTS (TPR) CASES

The three-year cycle report recognizes that this court, in *E.T. v. State*, 957 So. 2d 559, 559 (Fla. 2007), referred "the issue of ineffective assistance of counsel claims in termination of parental rights cases" to the Committee, as well as to the Florida Appellate Court Rules Committee. The Committee has declined to make any proposal regarding this matter, however, stating on page two of its report, "After considerable study and discussion, the Juvenile Court Rules Committee voted 18-2-3 that a rule on this issue was not within the scope and purview of the committee because it was a substantive, rather than procedural issue."

DCF is sympathetic to the Committee's difficulties in dealing with this matter, but it respectfully disagrees with the Committee's approach. It believes that there is an urgent need for an appropriate procedure to properly deal with claimed constitutional violations based on the acts or omissions of counsel. Such claims are being made throughout the state and the circuit and district courts need guidance in how to handle them. The uncertainty in this regard is translating into uncertainty with respect to children's futures. Immediate action is needed to

provide a common sense solution to the problem. While there does exist a substantive question with regard to the nature of the right involved, that fact should not stand in the way of adopting rules that can apply regardless of how the substantive issue is determined. In light of the fact that this court referred this matter to the committees almost two years ago,[1] and the fact the committees have declined to set forth any proposals for an appropriate procedure, DCF is submitting its own proposal. Specifically, DCF asks this court to amend Florida Rules of Juvenile Procedure 8.235 and 8.515 and Florida Rule of Appellate Procedure 9.146 in the manner that will be discussed below. Doing so, DCF submits, will establish a fair procedure for consideration of motions for post-termination relief in termination of parental rights cases that will promote finality and serve the best interests of both children and parents.

A OVERVIEW OF PROPOSED AMENDMENTS

The amendments being proposed by DCF are set forth in the attached Appendix. They include two new provisions, Florida Rule of Juvenile Procedure 8.235(e) and Florida Rule of Appellate Procedure 9.146(h), as well as the addition of language to existing Florida Rule of Juvenile Procedure 8.515(a)(2).

Briefly synopsized, the proposed amendments allow parents who believe that their constitutional rights have been violated due to the acts or omissions of counsel, to seek relief in the trial court prior to the time for the filing of their initial brief (or, if no appeal is taken, the time for filing a notice of appeal). The amendments require expedited consideration of motions for such relief, resulting in a ruling from the trial court within 30 days of the filing of a motion. They further call for disposition of parents' claims by appellate courts within the direct appeal

[1] *E.T.* was decided on April 26, 2007.

process, and, in doing so, provide finality for the children involved by eliminating any need to allow collateral attacks after appeals.

The new provisions are, with certain modifications, based to a large extent on the procedures established by Florida Rule of Criminal Procedure 3.800, with regard to the timeframe, and by Florida Rule of Criminal Procedure 3.850, with regard to the manner in which motions for relief should be addressed.

B BACKGROUND AND THE NEED FOR THESE AMENDMENTS

Over the past several years, numerous parents whose parental rights have been terminated have sought to assert claims that their constitutional rights were violated by the acts or omissions of their trial counsel. Generally, these assertions have arisen in the context of claiming ineffective assistance of counsel under the Sixth Amendment right to counsel. In response, DCF has taken the position that because the right to counsel in termination cases arises from due process, rather than the Sixth Amendment, an ineffective assistance argument is inappropriate, but that parents may assert that the acts or omission of counsel deprived them of due process.[2]

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[2] DCF does not ask that this court determine in this proceeding which framework is the appropriate one to apply. In order to give this court a basic idea of the reasoning behind DCF's belief that the issue is a due process one, however, DCF would point out that the right to counsel in criminal matters comes from the Sixth Amendment to the United States Constitution, and, in Florida, from Article I, § 16, of the Florida Constitution. The right to counsel in a TPR proceeding, on the other hand, is governed by due process considerations. *In the Interest of D.B.*, 385 So. 2d 83, 89 (Fla. 1980). "The extent of procedural due process protections varies with the character of the interest and nature of the proceeding involved." *Id.*, citing *Morrissey v. Brewer*, 408 U.S. 471 (1972).

The Sixth Amendment right to counsel and the right to due process are very different. "The liberty interest at stake in criminal cases is simply not equivalent to that involved in custody cases involving children." *E.T.*, 930 So. 2d at 726. It is the loss of physical liberty in criminal cases that stands as the essential difference between them and TPR proceedings. *N.S.H. v. Dept. of Children & Families,* 843 So. 2d 898, 902 (Fla. 2003).

In addition, in the TPR context, a parent's interests must be balanced against those of the child(ren) and it is the child(ren)'s interests that must be given the highest priority. *In the Interest of Camm*, 294 So. 2d 318, 320 (Fla. 1974). Indeed, "as between the parent and the child

This court has not addressed the nature of the right involved. It was presented with the issue when the Fourth District Court of Appeal, in *E.T. v. State*, 930 So. 2d 721, 729 (Fla. 4th DCA 2006), certified the following question: "Does Florida recognize a claim of ineffective representation of a parent(s) in a proceeding for the termination of parental rights?" Because the children in that case had already been adopted by the time this court considered the matter, however, this court determined the matter to be moot, declined to answer the question, discharged jurisdiction, and dismissed the case. *E.T.*, 957 So. 2d at 559. Also unanswered was a second question certified by the Fourth District in *E.T.*: "If so, what procedure must be followed to pursue a claim of ineffective assistance of counsel?" 930 So. 2d at 729. It was when *E.T.* was dismissed that this court, as noted above, referred this issue to the committees.

More recently, the Fifth District, in *L.H. v. Dept. of Children & Families*, 995 So. 2d 583, 585 (Fla. 5th DCA 2008), certified the same questions that had been certified in *E.T.* In doing so, the court "recognize[d] that trial and appellate courts continue to struggle with this issue" and "urge[d] the Florida Supreme Court and the Juvenile and Appellate Rules Committees to provide guidance on this important issue."

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the ultimate welfare of the child must be controlling." *Padgett v. Dept. of Health & Rehab. Servs.*, 577 So. 2d 565, 570 (Fla. 1991), quoting *State ex rel. Sparks v. Reeves*, 97 So. 2d 18, 20 (Fla. 1957).

Because of the overriding concern for the interests of children, the right to counsel guaranteed by due process is not as broad it is in criminal matters. Thus, this court has found that there is no right to collaterally challenge the effectiveness of counsel in dependency proceedings. *S.B. v. Dept. of Children & Families*, 851 So. 2d 689, 694 (Fla. 2003). It has also concluded that the procedures outlined in *Anders v. California*, 386 U.S. 738 (1967), for criminal appeals do not apply to TPR appeals. *N.S.H.*, 843 So. 2d at 903. Moreover, one justice on this court has recognized that the flexibility provided by due process may be the critical distinction in deciding which right applies, pointing out that "it may be argued that the Sixth Amendment right to counsel may be somewhat distinguished from the right to counsel in dependency proceedings flowing from due process considerations, in that the extent of the protections may vary with the character of the interest and nature of the proceeding involved." *N.S.H.*, 843 So. 2d at 904, Lewis, J., concurring.

The Fifth District also certified a related question on this subject in *A.G. v. Dept. of Children & Families*, 1 So. 3d 345 (Fla. 5th DCA 2009), asking whether a parent may challenge a termination by habeas corpus on the basis that the parent was denied effective assistance of counsel.

In both *L.H.* and *A.G.*, this court denied review, *L.H. v. Fla. Dept. of Children & Families*, SC08-2353, 2009 WL 236121 (Fla. Feb. 2, 2009); *Fla. Dept. of Children & Families v. L.H.*, SC08-2356, 2009 WL 236125 (Fla. Feb. 2, 2009); *Fla. Dept. of Children & Families v. A.G.*, SC09-198, 2009 WL 528682 (Fla. Mar. 2, 2009), so the issues presented by this line of authority are not presently before this court.

Despite the crying need for a clearly defined procedure, no proposals for such a procedure have reached this court. Rather, consideration of possible changes to the rules has apparently been deferred in light of the substantive question involved. *See,* in addition to the above quoted language from the Committee's report, Appellate Court Rules Committee, Minutes for January 18, 2008, 18-27; Juvenile Court Rules Committee, Minutes for January 17, 2008, 3-4.

While the question of whether an ineffective assistance of counsel or a due process analysis applies is clearly substantive, DCF submits that there is no reason why the creation of an appropriate rule should wait for resolution of that question. The need for a rule is equally acute regardless of what substantive conclusion might be reached. As the Fifth District noted, trial and appellate courts are struggling with the issue. *L.H.*, 995 So. 2d at 585.[3] Because no proposals

[3] DCF notes that the issue is coming up frequently throughout the state. The cases cited above are far from the only ones in which it has been raised. The Second District, in *T.R. v. Dept. of Children & Family Servs.*¸ 33 Fla. L. Weekly D2757 (Fla. 2d DCA Dec. 3, 2008), affirmed a termination of parental rights in the face of an ineffectiveness claim, noting that the record did not contain sufficient information to enable the court to determine the merits of the claim, but

have been presented to this court, DCF is submitting as part of these comments what it believes is an appropriate rule that will provide a fair framework for consideration of parents' claims under either a due process or ineffective assistance analysis.

C THE BASIC PRINCIPLES UNDERLYING THE PROPOSED AMENDMENTS

In formulating the proposed amendments, DCF began by focusing on one basic concept, the need for expeditious resolutions of termination of parental rights (TPR) matters. As stated in *In re Adoption of T.M.F.*, 392 Pa. Super. 598, 613, 573 A.2d 1035, 1043 (1990), and quoted by the Fourth District in *E.T.*, 930 So. 2d at 726-727:

> Improper or inadequate action by counsel [in criminal cases] may be rectified in part or in toto months or years after a final judgment of sentence with beneficial results for the appellant, whereas 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.

Even the United States Supreme Court, in *Lehman v. Lycoming County Children's Services,* 458 U.S. 502, 513 (1982), recognized that "[t]he state's interest in finality is unusually strong in child-custody disputes." After noting that delays due to litigation may lessen children's chances for adoption, *id.*, the Court went on to state, *id.* at 513-514:

> It is undisputed that children require secure, stable, long term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home" under the care of his parents or foster parents, especially when such uncertainty is prolonged.

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making clear that its decision "should not be interpreted as resolving the question of whether an ineffectiveness of counsel claim may, in fact, be brought in a direct appeal in a termination case." Moreover, from reviewing only the files of the undersigned counsel, DCF can inform this court that the issue has been raised in two appeals in which district courts did not address it in an opinion, in two appeals that are still pending, and, in the form of requests for belated appeals, in three cases in circuit courts.

Pointing to these sentiments, the court in *T.M.F.* stated, 392 Pa. Super. at 614, 573 A.2d at 1043:

> The Supreme Court recognizes a psychological determinate in child custody proceedings having to do with the child's sense of time, which is measured by a different and faster clock than an adults [sic], and the fact is that children evolve, grow, acquire new attachments and have differing needs which cannot be sublimated to the niceties of legal proceedings and the sometime dubious vagaries of the attacks on a decree.

See also S.B., 851 So. 2d at 693 (citations omitted) ("In fact, 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."); *N.S.H.*, 843 So. 2d at 903 ("We conclude that … any potential benefits from the *Anders* procedure in the context of termination of parental rights proceedings are outweighed by the delay in the disposition of the case and the consequent potential detriment to the child from any additional delay in finalizing he permanent placement of the child.")

Given the critical importance of reaching finality, ending uncertainty, and resolving legal proceedings as quickly as possible in cases that will determine children's futures, DCF came to the conclusion that the most appropriate procedure would be one that would consider and dispose of all claims in the context and timeframe of a direct appeal.

DCF recognized, however, as it has argued in litigating cases, that this goal could not be realistically achieved by having issues, whether couched as ineffective assistance or due process (IAC/DP) claims, raised for the first time before appellate courts.

It is well settled that in criminal cases, "[t]he general rule is that the adequacy of a lawyer's representation may not be raised for the first time on direct appeal … because there usually is insufficient opportunity to develop the record pertaining to the merits of these claims." *Baker v. State*, 937 So. 2d 297, 299 (Fla. 4th DCA 2006) (citations omitted). Thus, the courts of this state have consistently declined to consider such contentions on direct appeal, *see, e.g.,*

Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001); *Smokes v. State*, 940 So. 2d 607, 607 (Fla. 4th DCA 2006); *Blanco v. State*, 933 So. 2d 1152, 1152 (Fla. 3d DCA 2006); *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002), "but only by collateral challenge." *Wuornos v. State*, 676 So. 2d 972, 974 (Fla. 1996).

Clearly, the same need exists to develop a record in TPR cases as it does in criminal matters. Thus, attempts to assert ineffectiveness on direct appeal in such cases have been properly rejected by the appellate courts of this state. *See T.R.; L.H.*

DCF therefore determined that the most appropriate procedure would be one that would require an IAC/DP issue to be raised in the trial court at a time when the court's ruling (if adverse to a parent) could be considered by the appellate court at the same time it considered that parent's direct appeal. Such a procedure is presently in place in the criminal context with regard to motions to correct sentencing error.[4] DCF therefore used that procedure as a framework for the development of a rule that would accomplish the above goals in the TPR context.[5]

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[4] Criminal defendants may file motions to correct sentencing errors in trial courts within the time for filing notices of appeal. Fla. R. Crim. P. 3.800(b)(1). Doing so stays rendition of the order at issue. Fla. R. Crim. P. 3.800(b)(1)(A). Defendants whose appeals are pending may serve such motions at any time before their first brief is served. Fla. R. Crim. P. 3.800(b)(2). At the same time, those defendants file in the appellate court notices of pending motions to correct sentencing error. *Id.* Those notices automatically extend the time for filing briefs until ten days after the clerk submits a supplemental record, *id.*, containing the motion, any response, any resulting order, and any amended sentence. Fla. R. App. P. 9.140(f)(6)(A). The trial court is required to hold a calendar call within 20 days of the filing of a motion to correct sentencing error, to set any necessary evidentiary hearing within 20 days of the date of the calendar call, and to rule on the motion within 60 days of its filing. Fla. R. Crim. P. 3.800(b)(1)(B) and (b)(2)(B). The failure to rule within that timeframe constitutes a denial of the motion. Fla. R. Crim. P. 3.800(b)(1)(B) and (b)(2)(B). The supplemental record must be transmitted within five days of the filing of the trial court's order or the expiration of the 60-day period. Fla. R. App. P. 9.140(f)(6)(A).

[5] Both the Fourth District in *E.T.,* 930 So. 2d at 728, and the Fifth District in *L.H.,* 995 So. 2d at 584, indicated the belief that there is presently no procedure available to assert claims of constitutional deprivations arising from the acts or omissions of counsel. DCF respectfully disagrees, although it recognizes that the existing procedure is flawed in that it provides for an extremely limited, and, in many situations, insufficient, timeframe. That procedure is the use of

In doing so, DCF recognized that a parent's IAC/DP claim will almost always be more akin to the type of claim a criminal defendant would make in a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850 than the type that would arise in a motion to correct sentencing error. DCF therefore drafted the proposed amendments to graft the process for the consideration of Rule 3.850 motions[6] onto the framework used for Rule 3.800 motions.[7]

Florida Rule of Juvenile Procedure 8.265, which allows for the filing of a motion for rehearing within 10 days of the entry of an order. The rule specifically allows parties to assert that they did not receive a fair hearing, Rule 8.265(a)(2), thus encompassing claims made under either a due process or ineffectiveness rationale.

Requiring parents to raise claims in a motion for rehearing has definite advantages. The most obvious is that the procedure resolves issues expeditiously and allows denials of relief to be reviewed within the context of appeals from orders of termination, rather than in additional, collateral, proceedings. It also allows retrials, when warranted, to begin as soon as possible. It alleviates concerns that requiring claims to be raised in the trial court will cause unacceptable delays. More than any other reasonable approach, it provides prompt and final determinations in cases that so badly need such an approach.

But, the expeditious nature of the procedure is also its disadvantage. Often, it is simply unrealistic to expect a party to be prepared to bring a claim within the 10-day period allowed by the rule. Many times the deficiencies in the performance of counsel do not become apparent until review of the transcript is undertaken. Moreover, trial attorneys often do not recognize deficiencies that appellate lawyers later note, "making a claim of ineffectiveness unlikely" in such situations. *E.T.*, 930 So. 2d at 728. Further, trial attorneys who do recognize the need within the 10 days "are not likely to raise their own ineffectiveness," *E.T.*, 930 So. 2d at 730, Stevenson, C.J., concurring in part and dissenting in part, and may well have ethical concerns with doing so, especially when, as would often be the case, they would be witnesses at hearings.

While the 10-day period may not be as Draconian as it seems—it runs from the entry of an order, not an oral pronouncement, which often puts parents on notice of a result weeks or even months before an order is entered, and its start can be delayed when appropriate by a request to delay such entry—it seems clear that the present procedure unduly limits the opportunity to raise IAC/DP issues. In light of this fact, DCF believes that a more equitable procedure should be adopted, one that properly meets both the need for finality and expeditious consideration of claims and the need for parents to have a reasonable chance to assert them.

[6] Rule 3.850(d) states, in pertinent part: "On the filing of a rule 3.850 motion, the clerk shall forward the motion and file to the court. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion shall be denied without a hearing. In those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the movant is entitled to no relief shall be attached to the order."

[7] DCF did not feel that a proposal based entirely on Rule 3.850 would be appropriate. As noted above, one of the most basic goals of the proposed amendments is to develop a procedure that

D THE PROPOSED AMENDMENTS

1 Rule 8.235(e)

In light of the foregoing, DCF proposes creating a new Florida Rule of Juvenile Procedure 8.235(e), which would authorize the filing of a motion for post-termination relief. The proposal avoids any indication as to the nature of the right involved. Instead of referring to either "ineffective assistance of counsel" or "due process," it refers to motions asserting that "a parent's constitutional rights were violated as the result of the acts or omissions of counsel."

The proposed rule incorporates Rule 3.850's requirements that the motion be under oath, Fla. R. Crim. P. 3.850(c), and that it set forth "the nature of the relief sought as well as a brief statement of the facts (and other conditions) relied on in support of the motion." *See* Fla. R. Crim. P. 3.850(c)(5) and (6). Because the proposed motion will deal only with IAC/DP issues, as opposed to Rule 3.850, which also deals with other claims, a requirement has been added calling for the motion to also set forth the specific acts or omissions that are alleged to have caused the violation.

The bulk of the proposed rule tracks verbatim the language of Rule 3.800, the primary difference being that the time periods of the proposed rule are shorter. In recognition of the

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will resolve claims within the timeframe for a direct appeal. Rule 3.850 motions are collateral attacks which occur after appeals are decided and which usually lead to a second appeal. Moreover, they can be filed for up to two years after judgments and sentences become final in noncapital cases and for up to one year when a death sentence has been imposed. Fla. R. Crim. P. 3.850(b). Similar concerns also demonstrate that habeas corpus is not a suitable vehicle for asserting IAP/DP claims either. As noted in *E.T.*, 930 So. 2d at 728, "[t]he perils inherent in the use of habeas corpus petitions, such as unlimited time to file the petition, the lack of any identified rules, the proper burden of proof, and the proper parties to such a petition, lead us to conclude that any attack on the effectiveness of counsel must come in the form of a direct appeal or a post-trial motion authorized by the rules."

critical need for expeditious determinations, the time periods are basically cut in half,[8] with a ruling from the trial court having to occur within 30 days of the filing of the motion.[9] Consistent with the important goal of minimizing delay, the proposed rule also eliminates the portion of Rule 3.800(b)(1)(B) that allows for the filing of a motion for rehearing.

Subdivision (e)(1)(C) of the proposed rule incorporates Rule 3.850's procedure for the initial consideration of motions, as outlined in n. 6, *supra.*[10] Subdivision (e)(2)(A) establishes a presumption that motions filed pending appeal will be handled by a parent's appellate counsel. This change from the presumption of Rule 3.800(b)(2)(A) that trial counsel will handle motions to correct sentencing error is based on the concerns discussed in n. 5, *supra*, with regard to attorneys handling issues involving their own acts or omissions. The proposed rule also eliminates the provisions of Rule 3.800(b) and (b)(2)(A) regarding motions being made by the state. This change recognizes the lack of such provisions in Rule 3.850 and the differences between the primarily legal issues likely to arise in Rule 3.800 motions and the more factually based IAC/DP issues.

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[8] The only time period not cut precisely in half is the period for filing a response. It has been reduced from 15 days to seven days.

[9] This court has held that upon a showing of good cause prior to its expiration, the time period applicable to rulings on motions to correct sentencing errors can be extended. *Davis v. State*, 887 So. 2d 1286 (Fla. 2004). This court's conclusion was based on the fact that Florida Rule of Criminal Procedure 3.050 allows courts upon such showings to extend the time for acts required or allowed under the rules. *Id.* at 1288. Because Florida Rule of Juvenile Procedure 8.240(b) contains language similar to that of Rule 3.050 (subject to certain limitations set forth in subdivision (d) of the rule), it would seem that in the unusual situations in which the matter simply cannot be dealt with in 30 days, that time limit could be extended.

[10] Subdivision (e)(2)(B) does make one change to this procedure. It allows trial courts, when denying motions without hearings in cases in which appeals are pending, to give record references instead of attaching portions of files and records to orders. The basis for this change is the fact that the reason for the requirement to attach such portions is to have them before the appellate court when it reviews a denial of a Rule 3.850 motion. In appeals from denials of motions for post-termination relief in cases in which appeals are pending, the portions at issue will already be before the appellate courts, which can simply look to the page numbers referenced in the trial court's order.

2 Rule 9.146(h)

DCF further suggests creating a new Florida Rule of Appellate Procedure 9.146(h), which would provide the procedures for getting the necessary documents and transcripts relating to motions for post-termination relief to the appellate courts. This proposed rule has been taken virtually verbatim from Rule 9.140(f)(6), which accomplishes the same goal in criminal cases with regard to motions to correct sentencing errors. The proposed rule substitutes the appropriate rule number for motions for post-termination relief; refers to "any amended or new order of termination," rather than "any amended sentence," among the items to be included in the supplemental record; reflects the shorter 30-day period for rulings; requires the court reporter to deliver the transcript within 10, rather than 15, days; and refers to transcripts necessary to review "the post-termination issue," rather than "the sentencing issue."

3 Rule 8.515(a)(2)

DCF's proposed amendment to this existing rule is designed to deal with the problems discussed in n. 5, *supra*, inherent in attorneys assessing and asserting (or not asserting) issues relating to their own acts or omissions. It avoids any potential problems in the vast majority of cases by establishing a general requirement of appointing for appellate purposes an attorney other than trial counsel.[11] It does give the court the discretion, however, to appoint trial counsel

[11] It does not appear that anything in the statutory provisions relating to the offices of criminal conflict and civil regional counsel (OCCRC) would preclude this approach. § 27.511(6)(a), Fla. Stat. (2008) requires that, absent conflicts, those offices should be appointed to represent parents in proceedings under chapter 39 of the Florida Statutes, which of course includes TPR matters. Neither that provision, nor § 27.511(6)(b), Fla. Stat. (2008), which calls for OCCRC to be appointed when constitutional principles or general law provide for court appointments in civil proceedings, requires the appointment of OCCRC for appeals, however. The lack of such a requirement stands in stark contrast to § 27.511(5)(f), Fla. Stat. (2008), which calls for the appointment of OCCRC to represent persons appealing in criminal and delinquency cases, as well as certain commitment proceedings. It is well settled that "[u]nder the canon of statutory construction *expressio unis est exclusio alterius*, the mention of one thing implies the exclusion

should it choose to do so upon an appropriate waiver of any conflict and of any potential claims of constitutional violations not raised on appeal by such counsel. DCF recognizes that a rule prohibiting parents from having trial counsel continue representation on appeal if such counsel is privately retained or willing to work without compensation would be problematic. The proposal, therefore, addresses those situations (which it expects to be few and far between) by requiring the court to advise such parents that continued representation will constitute a waiver of the sort noted above.

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of another." *State v. Hearns*, 961 So. 2d 211, 219 (Fla. 2007) (citation omitted). Thus, "[w]hen the legislature includes particular language in one section of a statute but not in another section of the same statute, the omitted language is presumed to have been excluded intentionally." *L.K. v. Dept. of Juv. Justice*, 917 So. 2d 919, 921 (Fla. 1st DCA 2005), citing *Beach v. Great Western Bank*, 692 So. 2d 146 (Fla. 1997), affirmed, 523 U.S. 410 (1997). *See also Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) (citations omitted) ("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded." Applying these principles here means that because the legislature specifically required appointment on appeal in the section of the statute dealing with certain types of cases, but did not mandate such appointment in the section dealing with TPR proceedings, there is no impediment to appointing different counsel when a parent was represented at trial by OCCRC. Moreover, even if such a requirement were said to exist, it would not preclude the adoption of the proposed rule because the establishment of a procedure for post-termination relief that calls for appellate counsel to assess whether an IAC/DP issue should be raised, as is suggested by the other rules proposed by DCF, creates an inherent conflict of the sort that would call for OCCRC to decline an appointment in a case in which it represented a parent at trial. Finally, if this court has any concerns regarding this matter, it need not address them at this time. Rather, it can simply alter DCF's proposed amendment by adding the words, "Except when required to do so by law," before the language DCF suggests adding to the existing rule. Such an approach would direct courts to follow any legal requirements they might find to exist, allow any question as to whether there exists a requirement to appoint OCCRC for TPR appeals to be resolved in a case in which it is at issue, and enable attorneys to move to withdraw or decline appointments when they perceive conflicts due to possible IAC/DP issues.

II

OTHER ASPECTS OF THE THREE-YEAR CYCLE REPORT

A RULE 8.225

The Committee's proposal to amend this rule should be rejected. It seeks to strike that portion of the existing rule that allows for service on out-of-state residents by forms of mail that request return receipts. The Committee has indicated on page 18 of its report its belief that this provision discriminates against parents who can be served in this manner, because such an approach cannot be used with regard to state residents.

In response, DCF initially notes the Committee's recommendation ignores the practical considerations involved. Other forms of service are simply much more feasible in the state than they are elsewhere. Second, the point of service is to notify the person of the proceeding. If that goal is achieved, it should not matter that the same form of service cannot be used for someone else. Third, the Committee's proposal does not eliminate inconsistency in the manner by which service can be achieved. It retains Rule 8.225(a)(4)(A)(ii), which allows for service in "a manner prescribed by the law of the place in which service is made for service of process in that place in an action in any of its courts of general jurisdiction." Thus, if the amendment proposed by the Committee is adopted, service by mail will be allowed when parents are in jurisdictions which allow for such service, but not when they are in those that do not. Finally, if it is merely the inconsistency that troubles the Committee, the problem can be solved in a better way by simply allowing service by mail for both in-state and out-of-state residents.

B RULES 8.235 AND 8.310

The proposed changes to these rules are based on the assumption that allegations in dependency cases are brought "against" parents. While that may have been an arguable position

at the time the Committee adopted the present proposals, it is clear that the proposals are inconsistent with the law as it has existed since last 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.
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> (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 changes to these rules should not be adopted. It makes clear that the allegations in a petition for dependency are not allegations *against a party*, but are allegations that children are dependent, regardless of what any particular party may have done or failed to do. 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 these rules, as written, should be rejected.[12] DCF notes, however, that

[12] It should be noted that a proposal to amend Rule 8.330, based on the same rationale, is presently pending before this court in case no. SC08-1724, 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. DCF has filed comments in that case similar to those being filed here.

if it is the intent of the Committee to simply provide a mechanism for the dismissal of particular allegations, without reference to those allegations being against one parent or another, such a concept might well be an appropriate matter to be addressed in these, or other, rules.

DCF also 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 Committee for consideration of that question.

C RULE 8.257

Presently, this rule requires a movant filing exceptions to a magistrate's report to provide transcripts of relevant proceedings. The proposed change would allow such a movant to substitute for such transcripts either an electronic recording or a stipulation by the parties of the evidence considered by the magistrate.

DCF supports the concept of allowing the use of a stipulation instead of a transcript when a party files exceptions to a magistrate's report and recommendations. DCF does not believe, however, that a rule referring to a stipulation "of the evidence considered" by the magistrate, as the Committee proposes, is appropriate. The evidence considered is certainly an important part of most stipulations, but often other factors, such as arguments made by the parties, oral findings by the magistrate, and evidentiary rulings, may be of great significance as well. DCF therefore submits that any rule that allows for the use of a stipulation should call for one that sets forth all matters relevant to the determination of exceptions.

DCF opposes allowing parties to utilize electronic recordings in lieu of transcripts. Such recordings would require the judge and opposing counsel to wade through an entire proceeding

to find relevant portions. The amount of time devoted to such an exercise could be considerable. In addition, the approach urged by the Committee would create situations in which one side hears something one way and the other hears it another way. It would also create situations in which trial judges would rule based on recordings, but appellate judges later considering the cases would be looking at transcripts, which might or might not be consistent with the trial judges' interpretations of the recordings.[13] Further, the term "electronic recording" is very broad. A recording could be made electronically in a format that requires equipment not easily available to opposing counsel. The portion of the proposal relating to electronic recordings should be rejected.[14]

D RULE 8.265

DCF opposes the suggestion to have the failure to rule on a motion for rehearing within 10 days constitute an automatic denial of the motion. It believes that the adoption of this proposal would lead in many cases to unnecessary delay in resolving the futures of children.

As a practical matter, many motions will be deemed denied on this basis if this amendment is adopted. Unless attorneys take steps to bring motions before judges, the motions will often not even reach those judges within the 10 days. In considering this fact, it should be remembered that the grounds for rehearing under the rule include several that are very factually

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[13] In this regard, DCF notes, as did the minority of the Committee, that an electronic recording is not a "transcript," as contemplated by Fla. R. Jud. Admin. 2.535(e), which requires a "printed" and "bound" transcript and states that transcripts "shall be uniform in and for all courts throughout the state." *Moorman v. Hatfield*, 958 So. 2d 396, 400 (Fla. 2d DCA 2007), rev. den., 965 So. 2d 824 (Fla. 2007), Altenbernd, J., concurring..

[14] DCF notes that the proposed amendment includes an additional change that is not discussed by the Committee in its report. Presently, the rule requires only the submission of a transcript of "relevant" proceedings. Rule 8.257(e); (g); (g)(1). The version being proposed by the Committee eliminates the use of the word "relevant." Proposed Rule 8.257(e); (g)(1)(C); (g)(2). Regardless of what action this court might take with regard to the Committee's suggestion regarding electronic recordings, DCF does not believe that this change should be adopted. There seems to be no reason for it. It will increase costs and it provides no apparent benefit.

based. For instance, motions may be based on the existence of new and material evidence, Rule 8.265(a)(4); on the fact that a party did not receive a fair hearing, Rule 8.265(a)(2), a claim that, as noted above, may well deal with acts or omissions of counsel; and on the alleged absence of a necessary party from a proceeding. Rule 8.265(a)(3). If a motion predicated on factual assertions is deemed denied without an actual ruling, those allegations will stand unaddressed in the record when the case goes up on appeal. As a result, allegations that might not be accurate, or that might be placed in a different context by the presentation of other evidence, may well lead to reversals for hearings. Such hearings will delay finality and will likely lead to second appeals, further delaying finality.

It should also be considered with regard to this proposal that the problem the Committee seeks to address is not as acute as it is portrayed. Motions for rehearing do not have to be filed during the 10-day period after an order. Rather, they can be filed anytime after a court announces a judgment, something that generally occurs well before an actual order, up until the expiration of the 10-day period. Thus, in most instances, the difficulties discussed by the Committee can be avoided by the expeditious filing of a motion.[15] Moreover, in the small number of cases in which the time factor works an injustice, parties can seek relinquishment of jurisdiction from appellate courts to allow for consideration of motions for rehearing. *See Murphy v. Courtesy Ford, L.L.C.,* 944 So. 2d 1131, 1133 (Fla. 3d DCA 2006); *Tiller v. Straub Capital Corp.*, 800 So. 2d 364, 364 (Fla. 4th DCA 2001); *Gaines v. Sayne*, 727 So. 2d 351, 353 (Fla. 2d DCA 1999).

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[15] The fact that motions can precede orders by significant periods of time also demonstrates that the adoption of the proposed amendment would create a real anomaly. Motions filed prior to the filing of orders may well end up being deemed denied before the orders to which they are directed are even entered.

WHEREFORE, DCF respectfully submits the foregoing comments to the Three-Year Cycle Report filed by the Florida Juvenile Court Rules Committee.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to David N. Silverstein, Chair, Florida Juvenile Court Rules Committee, 501 E. Kennedy Blvd., Ste. 1100, Tampa, FL 33602-5242, this 31st day of March, 2009.

Respectfully submitted,

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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
Children's Legal Services
P. O. Box 4732
111 S. Sapodilla Avenue, Suite 303
West Palm Beach, FL 33401
561-650-6906