

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE
RULES OF JUVENILE PROCEDURE
Fla.R.Juv.P. 8.255

Case No. SC10-2010

**UNIVERSITY OF MIAMI SCHOOL OF LAW CHILDREN & YOUTH LAW
CLINIC, FLORIDA'S CHILDREN FIRST, FLORIDA YOUTH SHINE, AND
LEGAL AID SERVICE OF BROWARD COUNTY COMMENTS
REGARDING PROPOSED AMENDMENT TO RULE 8.255**

I was only six when I went into foster care. I remember vividly just sitting outside the courthouse . . . my birth mother crying. And then suddenly, I was living somewhere else, in some house I didn't know. No one told me anything. For five years, no one told me anything.

--Luis, now 27¹

I. Introduction

It is imperative that this Court act swiftly to ensure that children in the dependency system routinely attend court hearings. Every day, across the state, children are left in the dark while courtrooms are filled with a number of adults (mostly strangers) who discuss how the child is doing, what has happened to the child in the past and most importantly, what they think should happen to the child in the future. Then courts make crucial decisions without seeing or hearing the person most affected. This Court must work to end the routine exclusion of

¹Gloria Hochman, et al., *Foster Care: Voices From The Inside*, 2 (2004), <http://pewfostercare.org/research/voices/>.

children from the forum where their fates are decided.

This Comment is submitted by the University of Miami School of Law's Children & Youth Law Clinic, Florida's Children First, Florida Youth SHINE, and the Legal Aid Service of Broward County, Inc. (hereinafter "Commenters").

The Commenters assert that the revision to Rule 8.255 proposed by the Juvenile Rules Committee does not go far enough to protect the rights of children. We urge the Court to adopt language that more forcefully articulates the responsibility of the dependency system to assure the presence of children in court, although at a minimum, adoption of the proposed rule will greatly advance the current standard of practice in our dependency courts.

A. Statements of Interest.

The University of Miami School of Law's Children & Youth Law Clinic ("CYLC") is an in-house, live-client clinic established in 1995 by the Law School. Faculty and legal interns in the CYLC represent foster care children and former foster youth in a variety of legal proceedings, including dependency, health care, mental health, disability, independent living, education, immigration and other general civil legal matters. The CYLC also participates in law reform advocacy with the goal of ensuring that dependent children have a voice in court proceedings.

Florida's Children First, Inc. ("FCF"), is a statewide legal aid program that

fighters for the legal rights of at-risk children. FCF's goals include advancing children's legal rights consistent with their medical, educational, and social needs through significant improvements in all systems affecting children's lives. FCF has advocated for greater participation of children in the proceedings that affect their lives since its inception. In 2008, FCF began substantial efforts to increase children's participation in dependency proceedings in collaboration with the American Bar Association's Center for Children in the Law. FCF assisted the A.B.A. in its production of the manual "Hearing Your Voice" and undertook to conduct a substantial number of trainings on the topic of children's participation in court proceedings. FCF serves as the adult support organization for Florida Youth SHINE.

Florida Youth SHINE (Striving High for Independence aNd Empowerment) ("FYS") is a youth-run, peer-driven organization working to change the culture of Florida's foster care system. Membership is open to 13-26 year-olds in Florida who are currently or were formerly in state care. Florida Youth SHINE is made up of the leading youth advocates who identify the challenges and successes and strive to educate the public to create a better child welfare system. With chapters in eight circuits across the state, FYS members speak with the voice of experience. FYS has identified youth involvement in court (and representation of counsel) among its priority issues. Children want to know what is happening in their case

and they want to have a say in their lives.

Legal Aid Service of Broward County's ("LASBC") mission is to provide high quality free legal advice, representation, and education to the disadvantaged of Broward County, to improve the living conditions of the low-income community, and to encourage self-sufficiency. LASBC submits these Comments on behalf of Dependency Law Project, one of three components of LASBC's Children's Advocacy Project. The Dependency Law Project provides legal representation to dependent children in foster care who are victims of abuse, neglect or abandonment. The goal of the Project is to give voice to the children's express wishes and to ensure that their rights and entitlements to benefits and services are enforced by dependency courts consistent with state and federal law.

B. The Current Situation.

Under the existing Rule 8.255, the court may excuse the presence of children if their "mental or physical condition or age" is such that the court appearance is not in their best interest. As a practical matter, many courts never conduct an inquiry to determine whether the child's appearance should be excused. With the exception of seventeen year olds who are about to "age-out" of care -- for whom there are mandatory hearings -- the absence of children from court proceedings occurs without mention.

Over the last two years, Florida's Children First has conducted numerous trainings across the state on the topic of involving children in court proceedings. Cumulatively, FCF has interacted with more than eight hundred attorneys, judges, guardians ad litem, child protective investigators, case workers and other child welfare participants in these trainings. When asked, few participants have reported that they routinely bring children to court. Although many participants have expressed concern for the well-being of the child in the face of difficult proceedings, the vast majority of reasons provided to explain why children are not brought to court have nothing to do with the child's best interests. The primary concern involves logistics –transportation, conflict with school activities, and the difficulty of managing behavior when children are forced to wait for long periods in settings that are not child-friendly. In several trainings, caseworkers actually admitted that they feared that having the child present would result in exposure of the caseworker's shortcomings or failure to accurately report facts.²

²The responses obtained at the trainings conducted by FCF throughout our state are not by any means unique to Florida. In a study of dependency proceedings conducted by Home at Last, a national outreach and education partnership headed by the Children's Law Center of Los Angeles, an overwhelming majority of youth respondents reported that they attended court only some of the time (73%), followed by never (29%), most of the time (20%) and always (18%). *Home at Last, My Voice, My Life, My Future, Foster Youth Participation in Court: A National Survey* (2006), at 10. www.fostercarehomeatlast.org. In another survey of youth participation in court proceedings in three states with reputations for inclusiveness (New York, California and Oregon), children were found to be routinely excluded from the

We do not make light of the fears and concerns about bringing children to court, but there are appropriate ways to deal with all of them. Just as we do not let children forgo medical care because of school or transportation problems, we should not allow logistical concerns to override the importance of the child's presence in court. It takes work to prepare children for court, get them there, support them, and help them to deal with the outcomes. But as we demonstrate below, the outcomes for children, judges and the integrity of the dependency system as a whole are well worth the effort.

II. Rule Analysis and Recommendations

The Commenters commend the Juvenile Court Rules Committee for significantly advancing the rights of dependent children through its proposed amendments to Rule 8.255. While we support the proposed amended rule as an improvement over the status quo, we believe that the proposal can be further improved with our suggested revisions.

A. Right to be Present at *All* Hearings.

The Commenters support the sentence in the Committee's proposed amendment at paragraph (b)(1) clarifying that children have a right to attend *all*

court hearings, "often discouraged from attending by social workers or by the court proceedings themselves, which are made inaccessible through highly technical and unapproachable language coupled with esoteric procedures." Jaclyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 166 (2008).

hearings.³ The current language stating children have the right to be present at “the hearing” is not clear, as there are multiple hearings. There is no rational basis to create a rule distinguishing among hearing types. Thus the presumption should begin with the child’s right to attend all hearings, unless and until a specific determination is made about a particular child attending a particular hearing. The presumption may be overcome, but *only* after the court makes an individualized determination that the child may be excused from the specific hearing.⁴ Reasonable grounds for excluding children include situations in which: the child has clearly stated that he does not want to attend the hearing; the child is hospitalized or incarcerated; or the child would be traumatized by attending the specific hearing.

The child’s young age, without further inquiry, should not be sufficient basis for excluding the child. We do not assert that all young children must attend all

³The importance of the child attending all hearings is underscored by the comment to Standard D-5 of the American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, which notes that “[a] child has the right to meaningful participation in the case, which generally includes the child’s presence at court hearings. Further the child’s presence underscores for the judge that the child is a real party in interest in the case.”

⁴The comment to A.B.A. Standard D-5 similarly recommends that “[a] decision to exclude the child from the hearing should be based on a *particularized determination* that the child does not want to attend, is too young to sit through the hearing, would be severely traumatized by such attendance, or for other good reason would be better served by nonattendance.” *Id.* (emphasis added).

hearings, but they must be routinely seen by the court – preferably accompanied by their caregiver.

B. Responsibility for Transporting Child to Court.

Recommendation: Add a sentence at the end of (b)(1) that states:

“Counsel for the department is responsible for making sure that the child has transportation to all hearings.”

A rule mandating children’s presence is meaningless unless steps are taken to enforce and promote their attendance. We therefore urge the addition of language that would assign responsibility to ensure that the child is transported to the hearing. The American Bar Association recommends making the child’s attorney responsible for ensuring that the state/custodian transports the child. *See* American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, D-5 comment. In Florida, however, not every child in care has an attorney or even a guardian ad litem.

Accordingly, we recommend that counsel for the State (currently the Department of Children and Families, Children’s Legal Services or its contractors) be assigned the responsibility of ensuring that the child is transported to court. Without a clear designation as to who is responsible for ensuring the child’s presence, all participants can point fingers at each other and disclaim responsibility.

C. Court’s Duty of Inquiry When Child is Not Present.

Recommendation: Between the two sentences in (b)(2) add:

“If the child has the ability to convey express wishes concerning attendance at the hearing, the court must initiate an effort to locate the child for purposes of conferring by telephone to obtain the child’s position. Telephone contact may be excused if the child’s position was directly conveyed to any person present at the hearing, or presented in writing.”

The proposed amendment requires the court to ascertain why the child is not present and to then determine whether it is in the best interest of the child to proceed without the child being present. It does not provide any guidance as to the factors that the court should consider in reaching the best interest determination. Of greatest concern is the omission of any attempt to ascertain the child’s position on attending the hearing. If the court does not know whether the child wants to be present for the hearing, it cannot determine whether it would be in the child’s best interest to proceed in the child’s absence from the hearing.

D. Excusal of the Child’s Presence.

Recommendation: After the sentences in (b)(3) add:

“A child may only be excused from a judicial review if the child is hospitalized or incarcerated, in which case, the court shall attempt to include the child via electronic means. If the child requests to attend a proceeding for which the court has excused the child’s attendance, the court must allow the child to appear and address the court prior to being excluded from the proceedings, and must re-consider whether to excuse the child from all or part of the proceedings.”

At a minimum, dependency courts should have face-to-face contact with

children at the time of their judicial review hearings. Until the court hears directly from a child who wishes to attend a hearing, it cannot ascertain with certainty that the child's best interest is served by excluding the child from the proceeding. The opinions of well-intentioned adults cannot replace a direct conversation between the child and the judge about the child's desire to attend the hearing. In the FCF trainings, adults reported concerns that the children will be harmed by hearing about the bad things their parents done, or might say in court. Children reported, on the other hand, that they have seen and heard worse when they were living with their parents.

There is no one-size-fits-all standard in this realm, each child is unique, and the same child may have different feelings about coming to court at different points in his or her life or for different types of hearings. If a child cares enough about attending a hearing to specifically ask to be present, chances are excellent that the child has information and opinions that should help inform the court's decision. The Commenters therefore urge the Court to include a requirement that children who have expressed an interest in attending a hearing be heard directly before they are excluded from it.

III. Social Science Research, Jurisprudence and Common Sense Support the Inclusion of Children in the Court Proceedings That Affect Their Lives.

The Commenters urge the Court to consider the rights at stake, the long-

lasting effect of judicial determinations and the added value that the child's presence brings to judicial decision-making as it considers the proposed rule. Children are indispensable to dependency proceedings – and under Florida law, they have legal status as parties. §39.01(51), Fla. Stat. The child's interest in the outcome of a dependency case is the greatest of all the parties, because the dependency proceeding is about each child's right to live in an environment free of physical and environmental violence, and to protection from abuse, neglect, and death. *Padgett v. Dept. of HRS*, 577 So.2d 565, 570 (Fla. 1991). There is no other civil proceeding in which courts are asked to make life-altering determinations in which the critical party to the proceeding is routinely excluded.

A. Dependency Court Decisions Profoundly Impact Children's Rights.

Starting with the decision to remove children from their parents, and continuing throughout the case, judicial determinations can have a profound impact on children. Court hearings are held to review placement; safety and protection from harm; substantial compliance with the case plan; adequacy of services provided to the child's custodian to address the needs of the child; the child's visitation with relatives; number of placements; educational disruptions; medical, psychological and educational records; and progress toward permanency. Hearings occur at least every six months. §39.701, Fla. Stat.

The consequences of judicial determinations are of constitutional magnitude.

Courts have recognized that children have a substantive due process right to protect the liberty interests at stake in the outcome of a dependency proceeding. *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987). Children also have fundamental interests in their health, safety, and family integrity all of which are at stake in dependency proceedings. *Kenny A. v. Perdue*, 356 F.Supp.2d 1352, 1360 (N.D. Ga. 2005).⁵ A child may determine that while his or her parents may not be perfect, they still are far better than what the state has to offer, and thus the child might seek to be reunified with that parent. Even in those cases where a child's parents have abused, abandoned or neglected the child, the child retains a right to maintain family relationships with siblings, relatives and other caring individuals. Absent the intervention of the state in removing a child from his or her home – and most likely school and community – that child would have the right to express personal choices about the persons with whom he or she associates.

Privacy rights of children in foster care are often challenged to the extreme. Foster children have no means to protest the fact that they may be put in a bedroom with many other children, depriving them a private place to think—to do homework, to dream of a scientific advance, or to create an artistic marvel.

⁵As one commentary has noted: “Severing ties to one’s family, being forced to relocate, or being forced to remain in a home where one’s safety is in danger all seem like fundamental liberty issues.” Jaclyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 167 (2008).

Additionally, dependent children often have property interests at stake. They are frequently at-risk of losing personal property. Possessions often get left behind during abrupt moves and items such as clothing, money, photographs, books, toys and other possessions are commonly stolen in residential placements that do not provide adequate protection for children's property. Many children are eligible for monetary support via government benefits like Social Security, proceeds from insurance, and child support. The court cannot take measures to protect a child's property interests if it does not know what the child has lost or believes should be made available.

In the Legislative Findings and Declaration of Intent for Goals for Dependent Children, §39.4085(2), Fla. Stat., the Florida Legislature established that one of the goals for children in shelter or foster care is to "To enjoy individual dignity, liberty, pursuit of happiness, and the protection of their civil and legal rights as persons in the custody of the state." As a person in the custody of the state, the child should be present in court when decisions are made regarding the child's family relationships, physical safety, education, health and home placement.

Without the presence in the courtroom of the person whose life will be ultimately affected by a judge's decision, it is difficult to be sure that the court is fully apprised of the facts and easy to lose sight of the consequences of the court's

decisions. Moreover, decisions made in the child's absence will understandably be met with frustration and resistance.

B. Children's Presence in their Court Proceedings Improves the Quality of Decisions by Allowing Judges to See and Hear from the Party Most Affected by their Decisions.

Judges can choose to exclude young people from court proceedings, but by doing so they send a message that youth have no meaningful role in the process. Judges are, however, also able to empower young people by providing them with the opportunity to attend and actively participate in court proceedings that affect them.

The Honorable William G. Jones, *Making Youth a Meaningful Part of the Court Process*, JUV. & FAM. JUST. TODAY, Fall 2006, 20.

As the quotation from Judge Jones⁶ illustrates, many judges prefer that children attend their hearings because it provides the court with an invaluable opportunity to see the child in person, rather than simply relying on a piece of paper that does not truly convey all of the child's complex, nuanced and full-bodied humanity. "Nothing can substitute for personally observing and engaging a child," explains Judge Jones. *Id.* Judges are only given a short window of time to make decisions drastically affecting these children's lives. Thus, it makes logical sense that dependency judges prefer to hear from children in person, since they are

⁶Former Chief District Court Judge in Charlotte, N.C., and consultant for National Resource Center for Legal and Judicial Issues at the A.B.A. Center on Children and the Law and for the National Council of Juvenile and Family Court Judges.

the best-situated party to provide compelling insight into their wishes, needs, and progress. Miriam Aroni Krinsky, *The Effect of Youth Presence in Dependency Court Proceedings*, JUV. & FAM. JUST. TODAY, Fall 2006, at 16 (“...their decision making is informed by a one-on-one personal interaction that gives life to an otherwise sterile report and file.”)

This Court has already carefully considered the value of having children present in the courtroom (versus an electronic appearance) in delinquency proceedings. *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 796 So.2d 470 (Fla. 2001). Although the Commenters do not request a ban on the use of technology to allow children to occasionally appear by phone or via video-conference, as this Court has noted there is great value to the child’s in-person appearance before the judge in a delinquency hearing:

We strongly believe that the measure of a society can be found not in the words spoken about its youth, but in the actions and methods utilized in its relationships with its youth....At a time such as this, a great deal of information is exchanged not only by the spoken word, but also by personal contact and observations inherent in the personal interaction generated by personal appearance, qualities missing when an event is perceived only through the limitations of the lens of a camera or television monitor.

Id. at 474.

The Commenters assert that direct contact with and observation of the child is just as important and applicable in the dependency hearing context, if not more so, because the child’s fundamental rights are also at stake. Moreover, the court

benefits not only from personally interacting with older children, but in observing younger or non-verbal children as well. At the most basic level, “If the youth is very young and cannot speak to the judge, being present in court will bring the case to life and help show the case is about a human being with wants, needs, desires, and hopes that should be considered.” Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 CHILD LAW PRACTICE 145, December 2006, at 150).

Another important and practical purpose of children’s presence at court proceedings is that it provides a direct observation as to whether children are being properly cared for by their caregivers. The court can see whether a chubby baby has become an emaciated toddler, a child with a physical disability has outgrown a wheelchair, or a shy and frightened 5-year-old has blossomed and thrived while in out-of-home care. Rilya Wilson’s disappearance would not have gone undetected for over a year if she were required to attend court hearings in her case. *Rilya Wilson’s Accused Caregiver Nears Trial on Murder Charge*, THE MIAMI HERALD, January 16, 2010, <http://www.miamiherald.com/2010/01/16/1429923/rilya-wilsons-accused-caregiver.html>. While this example may be extreme, Rilya’s case is not the first one in which a child’s severe neglect by an out-of-home caregiver went unnoticed by the court for a long period of time, in part due to the child’s

routine absence over the course of many months from the courtroom.⁷ These incidents demonstrate the critical importance of children attending their hearings as an effective tool for detecting abuse and neglect of children in state care.

Not only does the court benefit from the child's presence, but the parties to the proceedings that are charged with asserting the best interest of the child – the guardian ad litem, attorney for DCF – as well as the child's counsel, will better to be able to advocate for children if they are present and able to give input immediately prior to and during the hearing.

By attending court, children have an opportunity to meet with their lawyers at a time when the issues to be resolved among the parties or by the court are most sharply presented. ... In this context, children can develop and express their positions with the benefit of good information about the position of other parties, which are frequently not articulated until the day of the court hearing.

Emily Buss, *You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1757-1758 (1996). The entire

⁷For example, Judge Richard Fitzgerald of Louisville, Kentucky describes a horrific experience where a 9-year-old medically-fragile child with developmental disabilities and other special needs was being neglected while in state care. This child did not receive the services that he needed and, weighing only 16 pounds, was starving as a result of the court and child welfare agency's lack of supervision over his caregiver. The Kentucky legislature changed its dependency court procedures as a result of this incident. THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE, AND WELL-BEING FOR CHILDREN IN FOSTER CARE* at 42 (2004), <http://pewfostercare.org/research/docs/FinalReport.pdf>. The Commenters urge the Court to act now, *before* more incidents like this one and Rilya Wilson's occur.

decision-making process is demystified for the child who attends the hearing, because the child can meet the judge and see the how decisions are made, thus gaining a far more concrete understanding of the complex legal concepts and events as they take place in the courtroom.

Although Florida's children seldom have their own counsel, the fact that issues are not crystallized until the time of the hearing is universal. Discussions among counsel and parties immediately prior to a hearing frequently refine or resolve issues in ways that even the best preparation cannot predict. Thus, if the child is not present to be consulted in those conversations, the child's position cannot be known by those claiming to assert it. No one knows the child's circumstances as well as the child, and even well-intentioned individuals who purport to speak for a child's desires cannot know how a pre-hearing change in position will affect what the child wants.

C. Participation Vindicates the Child's Need to Hear and Be Heard – Even in the Face of Emotionally Charged or Disturbing Information.

Physically attending hearings has two additional benefits for children. First it removes the layers of filters that separate the child from the reality of what happened in court. Often, children learn about what happened in court from a non-lawyer GAL, therapist, caseworker, or caregiver – who may or may not have been personally present in court. Reality is intentionally or negligently distorted through the conveyance of information. John's story, attached to this Comment,

provides a prime example. John, a Florida Youth Shine participant from Fort Meyers who came into care as an older teen, was told by his caseworker that he could not be adopted by his foster family because the court refused to accept his mother's surrender of parental rights. John did not have court-appointed counsel and did not attend any of the court hearings because, as he puts it, "I didn't get invited to the court room...and no contact was made between me and [my] Judge." Appendix A. John was left feeling as if he "had no voice in this proceeding at all." *Id.* Because he was kept in the dark about the court's ruling on his mother's surrender of her rights, which prevented John from being adopted by his foster family, John predictably struggled with frustration, disappointment and sadness.

John's story is not unique. Numerous youth who were formerly in state care report that they fundamentally misunderstood what was happening in their cases because they were not present to hear what happened. Parents would tell their children that the caseworker or judge was unreasonably keeping them apart when in fact the parents were failing to make any efforts on a case plan. Decisions that appeared unfair or irrational when presented to the child after the hearing (without explanation) suddenly made sense when the rest of the facts presented during the hearing were made known.

The Commenters do not suggest that this lack of understanding will magically be resolved simply by bringing the child to the hearing. In order for the

child's presence in court to be meaningful and effective, the child must be appropriately prepared, accompanied by a trusted person and appropriately debriefed.

Physical presence at hearings also promotes children's well-being by allowing them to be heard. Therapeutic jurisprudence functions in the child welfare context by giving the child a sense that his or her voice was genuinely heard and taken seriously, which gives him a sense of validation.⁸ In turn, the child is more accepting of the final outcome, whether favorable or not, because the child recognizes that direct involvement in the court proceeding made a difference in the judge's decision, thus empowering the child. This sense of participation in the process can also initiate the healing process and help the child take more responsibility for his future. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda, and Juveniles*, 71

⁸Therapeutic jurisprudence has been relied on by this Court in several rule proceedings implicating children's due process and dignitary interests. *See, e.g., M.W. v. Davis*, 756 So. 2d 90, 107 (Fla. 2001) (Pariente, J.) (noting the psychological benefits to juveniles from being afforded procedural protections prior to being placed in psychiatric treatment facilities); *Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 894 So. 2d 1206, 1210-11 (Fla. 2001) (Pariente, C.J.) (expressly applying the principles of therapeutic jurisprudence in the Court's adoption of a rule of juvenile procedure requiring the court to consider the child's views before ordering him or her into residential treatment); *In Re Amendments to the Florida Rules of Juvenile Procedure*, 26 So. 3d 552, 556 (Fla. 2009) (finding the indiscriminate shackling of children in Florida courtrooms "repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice.").

U. CIN. L. REV. 89, 94-95 (2002).⁹

One popular justification for excluding children from their court proceedings is that the information discussed in court is too disturbing and will be traumatic for the child. However, children report that being present during their hearings has a contrary effect because it allows them to heal and move on from the abuse and neglect that they have suffered. Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L. J. 1302, 1303. It is important to remember that children in dependency proceedings are there because they *already* experienced firsthand the traumatic events that led to the court's involvement.¹⁰ "They have already been exposed to and survived the harsh realities of their lives that will be discussed in court." The Honorable William G. Jones, *Making Youth a Meaningful Part of the Court Process*, JUV. & FAM. JUST. TODAY, Fall 2006, 20.

⁹Professor Ronner refers to the "3 V's": voice, validation, and voluntary participation. *Id.* While her focus is on *voluntary* participation, rather than court-mandated participation, the Commenters believe that the proposed rule in effect is calling for the child's voluntary participation because the child is not required to speak during the hearing, and he can always waive this right if he does not wish to appear at the hearing. See Catherine J. Ross, *A Place at the Table: Creating Presence and Voice for Teenagers in Dependency Proceedings*, 6 NEV. L. REV. 1362, 1371 (2006).

¹⁰Rather than completely excluding children from their court proceedings, the child may be removed from the courtroom when the subject matter of the testimony is inappropriate or harmful for the child. *Id.* See also A.B.A. Standards, D-5.

Requiring the child's presence at court proceedings recognizes the potentially therapeutic value of attending these hearings and of exposing the child to realities of the situation. Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 CHILD LAW PRACTICE 145, 151. Participation in court also helps the child move on and accept the court's decision, which plays a crucial role in promoting a successful and stable life for the child as he transitions into adulthood. Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L. J. at 1303.

In a survey conducted by Home at Last, an outreach project to promote the recommendations of the Pew Commission on Children in Foster Care¹¹, the majority of children who appeared at least periodically in their court proceedings reported that they found it helpful.¹² Miriam Aroni Krinsky, *The Effect of Youth*

¹¹THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE, AND WELL-BEING FOR CHILDREN IN FOSTER CARE 10 (2004), <http://pewfostercare.org/research/docs/FinalReport.pdf>

¹²The children who reported negative experiences explained that they felt ignored, were bored, or felt they had to miss important activities to appear in court, such as school. However, the courts can take steps to ensure that the experience of attending hearings is positive for youths. *See, e.g.*, Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 CHILD LAW PRACTICE at 153 (scheduling hearings around school hours, try to hear these cases first so children can return to school, or establish specific times for the hearings so children don't have to wait for their cases to be called); Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in*

Presence in Dependency Court Proceedings, JUV. & FAM. JUST. TODAY at 16.

Additionally, a majority of current and former foster children surveyed reported that they would like to attend their hearings. The respondents explained that simply being heard by the decision-maker empowered them and gave them a sense of control over the outcome in their cases. Furthermore, the individuals surveyed said that they valued the opportunity to ask their attorney questions about what was happening and to make direct questions to the judge about the ruling and the justifications behind his decision. *Id.*

D. A Strengthened Rule that Provides for Children’s Attendance in Dependency Proceedings Will Bring Florida in Line with National Standards and International Norms.

Congress saw the need for child involvement in court proceedings when it enacted the Adoption and Safe Families Act in 1997. It required that children be afforded procedural safeguards “to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child.” 42 U.S.C. §675(5)(C)(iii). Florida law provides that a dependent child has the right to participate in the

Court Proceedings, 6 NEV. L. J. at 1304 (conduct hearings in developmentally appropriate language).

development of the permanency case plan (§39.6011(1)(a), Fla. Stat.), to participate in and to express his preferences regarding permanency goals at the permanency hearing (§39.621(5)(a)), and to attend the six-month judicial review hearings (§39.701(2)(a), (5)(f), and (7)(a)).

The nation's leading thinkers on the well-being of children in state care all advocate increased participation by children in their dependency hearings. *See, e.g.,* Recommendations from the A.B.A. Youth at Risk Planning Conference. 45 FAM. CT. REV. 366 (2007). The Conference explicitly proposes that all states enact statutes mandating children's presence at court proceedings, including requirements for notice, appropriate judicial inquiries, and court findings if a child is not present. *Id.* The proposed amendment to the rule would follow the Conference's recommendations by requiring children be present at their hearings, rather than deferring to the discretion of the court to decide whether attending the hearing would be in the child's best interests.

The Conference recommendations also suggest that lawyers, judges, and social workers take steps to ensure that the child's presence is beneficial to the child and that it accomplishes the goal of making the child's voice better heard in court proceedings. *Id.* For instance, proceedings should be conducted in child-friendly language so the children better understand what is happening and can ask questions, encouraging them to have meaningful input in the process. In addition,

children should be included in discussions with their attorneys concerning what may happen in court, the consequences of a judge's decisions, and the resolution of the familial problems which led to the court's involvement. *Id.*

The A.B.A. Youth at Risk Planning Conference Recommendations are based largely on the Pew Commission of Foster Care, and the United Nations Convention on the Rights of the Child. *Id.* The goal of the Pew Commission on Foster Care was to improve outcomes for foster youth.¹³ THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE, AND WELL-BEING FOR CHILDREN IN FOSTER CARE at 10 (2004), <http://pewfostercare.org/research/docs/FinalReport.pdf>. To accomplish this goal, one of the guiding principles of the Commission's work was to give children and their families an informed voice in the decisions that affect their lives, including an

¹³The Pew Commission on Foster Care was established in May 2003 through a grant from the Pew Charitable Trusts to the Georgetown University Public Policy Institute. The Commission consisted of leading child welfare experts, heads of state and local child welfare agencies, prominent judges, social workers, foster and adoptive parents, and former foster youth. The Commission's recommendations are widely regarded and have been referenced in numerous scholarly works and commentaries on the subject. *See, e.g.,* Catherine J. Ross, *A Place at the Table: Creating Presence and Voice for Teenagers in Dependency Proceedings*, 6 NEV. L.J. 1362 (2006); Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L.J. 1302 (2006); Miriam Aroni Krinsky, *The Effect of Youth Presence in Dependency Court Proceedings*, JUV. AND FAM. JUST. TODAY, Fall 2006, at 16; Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 A.B.A. CHILD LAW PRACTICE 10, December 2006, at 145.

opportunity to participate in their court proceedings. *Id.* at 12. This principle is based on the notion that to make the dependency courts more effective, the children who will be most impacted by the court’s decisions should have an opportunity to be heard by the judge or hearing officer. *Id.* at 35. The Pew Commission’s final recommendations included a provision that children directly participate in their court proceedings because this benefits the children and improves the quality of judge’s decisions.¹⁴ *Id.* at 42.

¹⁴The Pew Commission recommendations urge states to go further than federal law under the Chafee Foster Care Independence Act, Public Law 106-169, 113 Stat. 1822 (1999), [42 U.S.C. 677(3)(H)], and the Adoption and Safe Families Act, Public Law 105-89, 111 Stat. 2115 (1997), [42 U.S.C. 1305 note], which do not specifically provide for children’s presence at their court proceedings.

The Chafee Act requires current and transitioning foster care adolescents to be actively involved in case planning, although not necessarily in court proceedings. *See* 42 U.S.C. §675(5)(C)(iii) (“procedural safeguards shall be applied to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child.”). The Adoption and Safe Families Act provides that administrative case reviews be “open” to parents and also requires that foster parents, pre-adoptive parents or relatives providing care for a child have an opportunity to be heard in court. 42 U.S.C. 1305 note.

Although federal law provides little guidance about children’s participation in their court proceedings, the Commenters agree with the Pew Commission’s view that state laws should take the federal laws a step further and explicitly mandate that the children themselves have a right to be present at all hearings directly impacting their lives. This Court has an opportunity to do this in adopting a strengthened rule of court that allows children’s meaningful participation in court hearings.

Under international law, the United Nations Convention on the Rights of the Child provides that children must be given the right to voice their views, if able to do so, in any judicial and administrative hearing affecting the child. U.N. Office of the High Commissioner for Human Rights, Convention on the Rights of the Child at Article XII, September 2, 1990, <http://www.unhcr.ch/html/menu2/6/crc/treaties/crc.htm>. This right may be exercised either directly or through representation, and the Convention acknowledges that some children are not mature or old enough to voice their views. *Id.* Nevertheless, the Convention illustrates the widely recognized and fundamental principle or norm of international law that children must play a role in the legal proceedings that affect their lives.¹⁵

¹⁵The United States and Somalia are the only countries in the United Nations that have not yet ratified the Convention, which was adopted and opened for signature in 1989. *Path to the Convention on the Rights of the Child*, http://www.unicef.org/crc/index_30197.html. See also Howard Davidson, *A Model Child Protection Legal Reform Instrument: The Convention on the Rights of the Child and its Consistency with United States Law*, 5 GEO. J. FIGHTING POVERTY 185 (1998); Susan Kilbourne, *Placing the Convention on the Rights of the Child in an American Context*, HUMAN RIGHTS, Spring 1999, at 27, contents available at <http://www.abanet.org/irr/hr/hrsp99toc.html>.

Although the U.S. has not ratified the Convention, almost eighty percent of states fully comply with the Article 12 mandate that children's voices be heard in child protective proceedings. Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966 (2006).

IV. Conclusion

The direct experience of the Commenters comports with the views of child welfare experts from the A.B.A., Pew Commission, and United Nations Convention on the Rights of the Child cited above. We know, first hand, the immense value of having children present in dependency proceedings. We therefore urge the Court to adopt a rule that reflects the understanding that having children attend their hearings will significantly benefit the courts and the children themselves. We ask the court to strengthen the rule proposed by the Juvenile Court Rules Committee even further with the language that we have proposed. Our proposed additions to the rule amendment will improve the efficiency and effectiveness of the dependency courts, while simultaneously empowering the children whose rights and interests are at stake to be involved in the process impacting their lives.

As one former foster child has written:

Listen to us. Find out what our style is. Talk to other people that know us if we say it's okay. Check with us about things. Remember the motto, "Nothing About Me Without Me!" Don't make choices or make fun of us. Know that we have thoughts, feelings and ideas just like you. Trust us. Be fair. Return our calls.

Sara Erstad-Landis, *What I Would Like to Say To Lawyers*, YOUTH LAW NEWS, Jan./Feb. 1999, at 18. Sara's advice to lawyers should be heeded by all of us concerned about making sure that children have a meaningful opportunity to be

heard in our dependency courts.

The proposed rule, with the Commenters' suggested revisions, should be adopted in Florida with all deliberate speed.¹⁶

¹⁶The Commenters' suggested revisions to the Committee's proposal directly follow (words with double underscore are the Commenters' revisions to the proposed Rule amendment).

PROPOSED REVISIONS TO RULE AMENDMENT

RULE 8.255. GENERAL PROVISIONS FOR HEARINGS₂

(a) **Presence of Counsel.** The department must be represented by an attorney at every stage of these proceedings.

(b) **Presence of Child.**

(1) The child has a right to be present at the all hearings. Counsel for the department is responsible for making sure that the child has transportation to all hearings. The court may proceed in the absence of the excuse the child's presence at a hearing unless if the court finds that the child's mental or physical condition or age is such that a court appearance is not in the best interest of the child.

(2) If a child is not present at a hearing, the court shall inquire and determine the reason for the absence of the child. If the child has the ability to convey express wishes concerning attendance at the hearing, the court must initiate an effort to locate the child for purposes of conferring by telephone to obtain the child's position. Telephone contact may be excused if the child's position was directly conveyed to any person present at the hearing, or presented in writing." The court shall determine whether it is in the best interest of the child to conduct the hearing without the presence of the child or to continue the hearing to provide the child an opportunity to be present at the hearing.

(3) Any party may file a motion to require or excuse the presence of the child. A child may only be excused from a judicial review if the child is hospitalized or incarcerated, in which case, the court shall attempt to include the child via electronic means. If the child requests to attend a proceeding for which the court has excused the child's attendance, the court must allow the child to appear and address the court prior to being excluded from the proceedings, and must re-consider whether to excuse the child from all or part of the proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ day of December, 2010, to Juvenile Court Rules Committee Chairperson William W. Booth, Esq., Legal Aid Society of Palm Beach County, 423 Fern Street, Suite 200, West Palm Beach, Florida, 33401-5839.

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