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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF APPELLATE PROCEDURE 9.146 AND FLORIDA RULES OF JUVENILE PROCEDURE

CASE NO.: 16-

JOINT REPORT OF THE SELECT COMMITTEE ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS, THE APPELLATE COURT RULES COMMITTEE AND THE JUVENILE COURT RULES COMMITTEE

The Honorable Sandra Sue Robbins, Chair of the Select Committee on Claims of Ineffective Assistance of Counsel in Termination of Parental Rights Proceedings ("Select Committee"), the Honorable T. Kent Wetherell, II, Chair of the Appellate Court Rules Committee ("ACRC"), Robert William Mason, Chair of the Juvenile Court Rules Committee ("JCRC"), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this joint report. This report is filed at the Court's request pursuant to Florida Rule of Judicial Administration 2.140(f). Pursuant to that subdivision, these amendments have not been published for comment.

This joint report was initiated by September 9, 2015, and October 5, 2015, letters in which the Court formed the Select Committee. The Court asked the Select Committee to "creat[e] the permanent process for raising claims of ineffective assistance of counsel in termination of parental rights proceedings and develop[ ] the attendant proposed rules for adoption by the Court." (*See* Appendix F–2 & F–42.) The Select Committee included 4 JCRC members and 6 ACRC members. The Select Committee had members from the Florida Department of Children and Families; Office of the Attorney General; Legal Needs of Children Committee; Guardian Ad Litem; Florida Children First; Criminal Conflict and Civil Regional Counsel; as well as private criminal and civil practitioners. (*See* Appendix F– 41.)

The Select Committee provided draft rule amendments to both the Rules of

Juvenile Procedure and the Rules of Appellate Procedure for approval by the ACRC and JCRC.[1] The Select Committee drafted rules that were narrowly tailored to apply in cases with indigent parents who have court-appointed counsel. This was the Select Committee's understanding of the Court's direction based on the Committee's reading of the Court's letters and *J.B. v. Florida Department of Children and Families*, 170 So. 3d 780 (Fla. 2015) (hereinafter "*J.B.*").

The JCRC met on January 21, 2016, and thoroughly debated the Select Committee draft amendments. The JCRC had 4 members that were also members of the Select Committee, and all 4 as well as a fifth Select Committee member were present and participated in the discussion. The proposed rules were considered by the dependency subcommittee in a meeting the previous day. The JCRC was aware that the Select Committee had a minority view as to the scope of the amendments and that there had been significant discussion whether the rules should apply only to court-appointed counsel for indigent parents or whether the rules should apply to all counsel for parents. The Committee first debated the amendments as to substance only, without considering the narrow or broad application of the rules. All of the amendments were passed unanimously only in regard to the substantive language of the rules. Next, the Committee debated whether the scope should be limited to court-appointed counsel and rejected that view by a vote of 17-4-3 and instead favored broad application to all counsel for parents.

The ACRC met on January 22, 2016, and unanimously adopted the Select Committee's proposed amendments to Rule 9.146. However, the Committee also conducted an informal "straw poll" which indicated that 24 members of the ACRC would support a broad rule similar to those proposed by the JCRC.

Having approved conflicting amendments, the Committees reached out to the Court for clarification. In a letter dated February 3, 2016, the Chairs of the ACRC and the JCRC asked the Court for guidance on the best way to proceed. (*See* Appendix F–43 – F–44.) In its response, dated February 4, 2016, the Court asked the Committees to "present both sets of proposals, with complete explanations and votes of the committees and the Board of Governors for *each committee's preferred set of amendments*." (Emphasis added.) (*See* Appendix F–46.)

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[1] The Select Committee worked independently from the ACRC and JCRC. Minutes from the Select Committee's meetings were included in the agenda materials for the ACRC and JCRC to explain the process of the Select Committee. (*See* Appendix G–1 – G–32.)

For the purposes of this report we refer to the versions as the “broad” and “narrow” versions.

The rule and form amendments have been approved by the full Committees and, as required by Rule 2.140, reviewed and approved by The Florida Bar Board of Governors. The voting records of the Committees and the Board of Governors are attached as Appendix A. It must be noted that the Board of Governors questioned whether it would be appropriate to submit conflicting sets of rules to the Court. The Board was assured by the JCRC/Select Committee member who appeared that this concern was also raised by the Committees and to the Court. For this reason, given the direction within the February letter and to clarify for the Court, pertinent votes may be seen in Appendix A.

An explanation of the alternative versions of the proposed rules and the respective committees’ positions on each is provided below.

SELECT COMMITTEE

After vigorous debate by members of the Select Committee, which included representatives from the Juvenile Court Rules Committee, the Appellate Court Rules Committee, the Statewide Guardian ad Litem Office, the Department of Children and Families, Florida Children’s First, and the Legal Needs of Children Committee, the majority of the Select Committee concluded that a narrow rule allowing for an ineffective assistance of court-appointed counsel claim for indigent parents in termination of parental rights cases was most consistent with the Court’s opinion in *J.B.* The members of the majority voiced different reasons for their election to adopt a narrow rule. While there was a vote on whether to adopt a narrow or broad approach, after a majority voted in support of a narrow approach, there was no vote within the majority to determine whether there was a consensus on why a narrow approach should be adopted. (*See* Appendix G–1 – G–32.)

Some members of the majority of the Select Committee noted that the Court in *J.B.* specifically used the phrases “court-appointed” and “indigent” when laying out the details of the temporary procedure to vindicate ineffective assistance of counsel claims in termination of parental rights cases. *J.B.*, at 794–95. Although in parts, the language used in the opinion relates to the right to counsel as sometimes general, some members of the majority of the Select Committee believed it would not be appropriate to ignore the specific language the Court used when detailing the procedure to vindicate such claims, especially when the opinion explicitly refers to court-appointed counsel for indigent parents in the procedure itself.

Because the opinion in *J.B*. was limited to the issue of effective counsel when such counsel is court-appointed for indigent parents, some members of the majority concluded that proposing a process to address nonindigent parents or counsel who are not court-appointed exceeded the bounds of the Select Committee's purview. *See, generally, Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975) (citing *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204 (Fla. 1973); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, amended 272 So. 2d 513 (Fla. 1973)).

Other members of the majority of the Select Committee offered five alternative reasons to support a narrow approach. First, that the limitation of the right as applying to only indigent parents with court-appointed counsel is a sound one due to the different geneses of the rights to effective counsel in criminal and termination of parental rights cases. In *J.B.*, the Court draws this distinction in explaining how criminal ineffective assistance of counsel claims are derived from the Sixth Amendment whereas termination of parental rights ineffective assistance of counsel claims are derived from the due process clause. *See J.B.*, at 790–91. The reason this difference in derivation is significant is that in general, the rights involved in criminal cases implicate more serious deprivations of liberty than termination of parental rights cases—the right to parent versus the rights to move, associate, act, and live how one wants (and, in fact, the right to parent). *See N.S.H. v. Fla. Dep't of Child. & Fam. Servs.*, 843 So. 2d 898, 902 (Fla. 2003) ("Although we do not minimize the significant interests at stake in parental rights termination proceedings, the essential difference between termination proceedings and both criminal proceedings and civil commitment proceedings is that termination proceedings do not involve the risk of loss of *physical liberty.* Further, there are *two* interests that must be weighed in a termination proceeding: that of the parent and that of the child.") (emphasis in original).

Second, the differences between termination of parental rights proceedings and criminal proceedings mean that the rights may not apply to everyone the same. The different proceedings emphasize and attempt to balance different rights as important (and the burdens of proof related to those rights) based on the purposes of the respective proceedings. *See N.S.H.*, at 902. As applied to the right to effective counsel, in *J.B.*, the Court specifically rejected the criminal ineffective assistance of counsel standard for evaluating termination of parental rights ineffective assistance of counsel claims because termination of parental rights cases implicate the rights of others beyond the state and the claimant—the innocent children caught in the middle. Due to this, the Court reasoned that the standard of proof related to a successful ineffective assistance of counsel claim is much higher

in termination of parental rights cases than criminal cases due to the issues of permanency involved. *J.B.*, at 792. Moreover, parents who are able to retain their own counsel are often in a much better position to see their rights vindicated than those who are indigent and have to rely on the state and the court to provide an effective attorney to protect their rights because they, by definition, have more resources available to them.

Third, although parents have the constitutional rights to attorneys in termination of parental rights proceedings, the nature of the dependency process includes numerous opportunities for the trial court to review and remedy any issues regarding the effectiveness of privately-retained counsel that do not require the formal establishment of that right as a means to set aside a termination of parental rights order. Specifically, in contrast to almost every other area of law, there are numerous detailed evidentiary hearings that take place in dependency cases before parental rights can be terminated—shelter hearings, shelter reviews, arraignments, disposition and case plan acceptance hearings, judicial reviews, permanency reviews, advisory hearings, termination of parental rights pretrial hearings, and any motion hearings set during the case. Even in expedited termination of parental rights proceedings, there still must be at least a shelter hearing, an advisory hearing, and a termination of parental rights pretrial hearing before a trial to terminate the parents' rights. All of these hearings, conducted almost exclusively before the judge who will hear the termination of parental rights trial, afford parents with privately-retained counsel extensive opportunities to raise any issues they have with their attorneys. These hearings separately provide the trial court with that same set of opportunities to raise any potential issues even if the parents do not.

Beyond the obligations that attorneys have to zealously advocate for their clients, the trial courts have the concurrent obligation to ensure the fair administration of justice in the causes before them. *See McMann v. Richardson,* 397 U.S. 759, 771 (1970) and Florida Code of Judicial Conduct. At least two other courts have indicated such a duty is more important in cases involving court-appointed counsel than those involving parents with privately-retained counsel. *See In re Jonathan M.*, 764 A.2d 739, 753–54 (2001) ("[A] judge presiding over a proceeding wherein trial counsel had been woefully inadequate would not, consistent with judicial duty, sit idly by and permit the client to suffer the consequences. To be sure, the trial judge may be more inclined to vigilance in solemn proceedings, such as those terminating parental rights, wherein the indigent litigants have obtained court-appointed counsel.") and *see also In re S.G.*, 807 N.E. 2d 1246, 1250 (2004).

Fourth, *J.B.* did not establish an independent right to raise an ineffective assistance of counsel claim. Rather, *J.B.* held that along with an indigent parent's right to appointment of counsel there was an attendant right to have that counsel be effective and a means to vindicate that right. *J.B.*, at 785. As the right of appointment of counsel only extends to indigent parents, it follows that the right of *effective* counsel only extends to indigent parents. *See* §39.013(9)(a), Fla. Stat. (2015).

Fifth, the absence of a limitation on a parent's right to effective counsel in termination of parental rights cases threatens to expand that right to other areas of the law thereby diminishing the very importance of the right that is to be protected while simultaneously potentially interposing additional delays to permanency for children caught in the middle of these proceedings. *See State v. Garmise*, 382 So. 2d 769, 773 (Fla. 3d DCA 1980) *rev'd,* 398 So. 2d 819 (Fla. 1981) ("If such an expansion is recognized, there would seem no principled basis not to extend the exception as well to all civil litigants, which would necessarily swallow up what we conceive to be a salutory general practice.") The court in *Garmise* operated on the premise that "[t]he state has no such constitutional obligation with reference to any other litigant, criminal or civil, in our adversary system of justice," which would no longer be true given the holdings in *J.B.* and *In the Interest of D. B. and D.S.*, 385 So. 2d 83, 90–93 (Fla. 1980). In spite of this and even though the Court, in *S.B. v. Department of Children and Families*, 851 So. 2d 689, 694 (Fla. 2003), has said that the constitutional right to counsel in dependency proceedings is limited to cases that involve the possibility of termination of parental rights or criminal charges, the warning given in *Garmise* is a valid one in that there must be limitations on this right to avoid devaluing the right and the rights of others affected, especially the child's rights to timely permanency. The broad interpretation of *J.B.* would give future litigants an opportunity to have the Court reevaluate the *S.B.* decision because dependency proceedings from the beginning operate as if termination of parental rights is, in fact, possible—examples include notices required at shelter, summons, adjudicatory hearings, case plans, and judicial reviews beyond the termination of parental rights proceedings themselves. §§ 39.402(18), 39.506(3), 39.507(7)(c), 39.6011(2)(e), 39.602(4)(b), 39.701(2)(d)4, Fla. Stat. (2014). To open this door would be counter-productive to the Court's explicit framing of the relevant considerations before outlining the procedure to vindicate claims of ineffective assistance of counsel in termination of parental rights proceedings. *J.B.*, at 793 (Fla. 2015) ("Before we outline the temporary process for bringing ineffective assistance claims after the termination of parental rights, we first address an underlying concern as to any process developed for such claims. In discussing the appropriate standard for TPR

ineffective assistance of counsel claims, we highlighted the important interest that the child has in reaching permanency. Timely disposition of TPR ineffective assistance of counsel claims is essential in light of the harm to the child that results when permanency is unduly delayed.").

JUVENILE COURT RULES COMMITTEE

The Select Committee was formed to create a "permanent process" and to develop the "attendant rules" that would enable a parent to make a claim of ineffective assistance of counsel pursuant to *J.B.*

After considerable debate, the JCRC voted 17-4-3 that the Select Committee's proposed rules should have broader applicability. It was pointed out that the original letters from the Court made no mention of limiting the scope of the rules only to court-appointed counsel for indigent parents. Additionally, the JCRC discussed that although the factual basis for the litigation of *J.B.* involved court-appointed counsel for indigent parents, neither the specific holding, conclusion, or concurring opinion included this distinction, and instead used broad language. The JCRC was also swayed by the significant discussion of the Select Committee's minority view. (*See* Appendix G–33 – G–40.)

The *J.B.* case itself recognizes the right to an attorney all parents have in a termination of parental rights case; "…as the Supreme Court has recognized, '[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State (citation omitted).'" *J.B.*, at 789. Accordingly, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures" (citation omitted). *Id.*

There is no distinction made based upon income or how a parent may have gotten their attorney. Every parent is entitled to one under these circumstances. Although the *J.B.* case alternates between general language about an attorney's responsibilities and more specific language concerning indigent parents and their court-appointed attorneys, nothing in the general rules, the temporary procedures provided by the Court, nor the holding in the case itself restrict relief for ineffective counsel to only those parents who are indigent with court-appointed counsel.

If the argument by the majority of the Select Committee is true (that *J.B.* only provided relief for indigent parents with court-appointed counsel) it is not

only unclear from the case but it must be presumed that the Court specifically excluded classes of litigants similarly situated without explanation. The minority of the Select Committee believed this differentiation violates both the due process and equal protection provisions of the Florida Constitution.

As the Court noted in *J.B.*, termination of parental rights cases address the "fundamental constitutionally protected rights to procreate and to be a parent to their children." *Id.* (citing *D.M.T. v. T.M.H*, 129 So. 3d 320, 334 (Fla. 2013)). "It is the fundamental nature of that right that causes/requires the state to provide parents with fair procedures." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982)).

The minority of the Select Committee submitted that all parents, not just indigent parents with court-appointed counsel, have a constitutional right to fair proceedings. A proceeding in which a parent was represented by an attorney whose deficient performance prejudiced the outcome of the case did not receive a fair proceeding—regardless of whether the parent retained or was appointed the attorney. A rule that prevents all parents from challenging the effectiveness of their counsel does not provide due process.

Moreover, the differentiation proposed by the majority of the Select Committee violates Florida's equal protection clause. In *Florida Dep't of Children and Families v. Adoption of X.X.G.*, the Court said that while it may be permissible to have classes or groups, the classifications must, however, be "based on a real difference which is reasonably related to the subject and purpose of the regulation. ... The reason for the equal protection clause was to assure that there would be no second class citizens." 45 So. 3d 79, 91 (Fla. 3d DCA 2010) (citing *Osterndorf v. Turner*, 426 So. 2d 539, 545–46 (Fla.1982)).

Excluding retained counsel because they were not court-appointed creates a distinction without a difference as it applies to these rules. No other provision in Chapter 39, Florida Statutes, or the Rules of Juvenile Procedure differentiates between parents who have retained counsel versus appointed counsel. Excluding two classes of parents because of how they procured their lawyers violates the excluded parents' fundamental rights to adequate representation and to relief otherwise granted to people similarly situated to them but for how they obtained an attorney.

Accordingly, the JCRC urges the Court to reject the majority position of the Select Committee and include all parents who would otherwise qualify for relief

under the rules. It is illogical to assume that a parent has a fundamental right to parent, is absolutely guaranteed an attorney for termination of parental rights proceedings, but because the parent had means to hire an attorney, that parent would not be entitled to relief under the rules for ineffective assistance of counsel simply because that attorney was retained and not court-appointed. Basically, the minority of the Select Committee asserts a position that if reversed, and relief was only permitted for those that could afford it, would be unconstitutional on its face.

Finally, including all parents does nothing to thwart the process found in the rest of the proposed rules. All the same restrictions, deadlines, and procedures apply uniformly to everyone. *J.B.* makes it clear that time is of the essence because of the need to make permanent decisions in the best interest of the child. Arbitrarily leaving out any group of parents that would otherwise qualify for relief does nothing to address those logistical issues dealt with in the new proposed rules. Conversely, including all parents who might get relief from the rule does nothing to thwart the process as required by *J.B.* itself or the proposed rule.

Those provisions of the proposed rule that limit the availability of relief from ineffective assistance of counsel to those indigent parents who were appointed counsel could not have been intended by the Court because there is no reason to exclude anyone.

APPELLATE COURT RULES COMMITTEE

Unlike the JCRC, the ACRC did not undertake a review of the Select Committee's determination as to the proper scope of the proposed rule. Instead, the ACRC deferred to the Select Committee's determination on the scope of the rule and simply evaluated the amendments to Rule 9.146 (Appeal Proceedings in Juvenile Dependency and Termination of Parental Rights Cases and Cases Involving Families in Need of Services) proposed by the Select Committee to determine whether any additional changes were required from an appellate practice perspective. At its January meeting, the ACRC unanimously voted to approve the amendments to Rule 9.146, as proposed by the Select Committee. There were, however, a substantial number of ACRC members (24, according to a "straw poll" vote taken at the January meeting) who expressed support for the broader scope of the rule proposed by the JCRC, and after the Court asked the Committees to submit both alternatives, the ACRC voted 32-5-1 to approve alternative amendments to Rule 9.146 to correspond with the broader rules proposed by the JCRC. (*See* Appendix F–46.) The ACRC does not have a preferred alternative between the "broad" version of the rules favored by the JCRC and the "narrow" version of the

rules recommended by the Select Committee. (*See* Appendix G–41 – G–46.)

PROPOSED RULE AND FORM AMENDMENTS

The proposed rule and form amendments, as shown in Appendix B (full page (Narrow)), Appendix C (two-column (narrow)), Appendix D (full page (Broad)), and Appendix E (two-column (narrow)) are proposed for the following reasons:

RULE 8.510. ADVISORY HEARING AND PRETRIAL STATUS CONFERENCES

The JCRC proposes amending subdivision (a)(2)(A) of Florida Rule of Juvenile Procedure 8.510 to require that parents be advised of their right to effective counsel in termination of parental rights proceedings. In particular, the JCRC proposes adding "including the right to an effective attorney" in the middle of the sentence in subdivision (a)(2)(A).

RULE 8.517. WITHDRAWAL AND APPOINTMENT OF ATTORNEY

The JCRC proposes amending Florida Rule of Juvenile Procedure 8.517 to detail the requirements an attorney must follow to withdraw after an order terminating parental rights has been filed. Currently, subdivision (a) addresses the withdrawal of an attorney both after the entry of an order adjudicating a child dependent and after the entry of an order terminating parental rights. As the requirements for withdrawal are different, the JCRC proposes separating the requirements. In particular, the JCRC proposes amending subdivision (a) to address only withdrawal of an attorney after an order adjudicating a child dependent has been filed. The JCRC further proposes that subdivision (b) be renamed and strictly address the withdrawal of an attorney after an order terminating parental rights has been entered. The JCRC proposes that a parent's attorney certify that the attorney has advised the parent of the right to make a claim of ineffective assistance of counsel before the court allows the attorney to withdraw. This proposal is consistent with the requirement in *J.B.* that a parent's attorney advise the parent of the right to make a claim of ineffective assistance of counsel.

The JCRC proposes new subdivisions (c) and (d) to detail the appointment of appellate counsel and the service of an order appointing appellate counsel. The JCRC proposes a Committee Note to explain the reason behind these significant amendments. Further, the JCRC proposes substituting "counsel" with "attorney"

throughout the rule for consistency within the rules set.

RULE 8.525. ADJUDICATORY HEARINGS

The JCRC proposes amending Florida Rule of Juvenile Procedure 8.525 to detail the obligation the court has to advise a parent that they have a right to appeal the order terminating parental rights and a right to file a claim of ineffective assistance of counsel. The JCRC proposes renaming subdivision (i) as "Advisement of Right to Appeal and File Ineffective Assistance of Counsel Motion" and renumbering existing subdivision (i) as subdivision (j). The JCRC's proposed amendments to new subdivision (i) require that the court orally inform parents of their right to appeal and their right to file a claim of ineffective assistance of counsel. The organizational amendments to subdivision (j) further divide subdivision (j)(1) into (j)(1)(A)–(j)(1)(D). Proposed subdivision (j)(1)(A), (j)(1)(B), and (j)(1)(D) divide up the contents of existing subdivision (i)(1). Proposed new subdivision (j)(1)(C) requires that the order terminating parental rights include a statement informing parents of the right to appeal the order and the right to file a claim of ineffective assistance of counsel.

The JCRC's proposals are consistent with *J.B.*, which requires the court to orally advise the parent of the right to appeal and to file a motion claiming ineffective assistance of counsel at the conclusion of the termination of parental rights adjudicatory hearing. The court must also include in the order terminating parental rights a brief statement informing the parents of the right to effective assistance of counsel and a brief explanation of the procedure for filing a claim. The JCRC's proposed amendments incorporate these requirements.

RULE 8.530. PARENT'S MOTION CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL FOLLOWING ORDER TERMINATING PARENTAL RIGHTS

or

RULE 8.530. PARENT'S MOTION CLAIMING INEFFECTIVE ASSISTANCE OF COURT-APPOINTED COUNSEL FOLLOWING ORDER TERMINATING PARENTAL RIGHTS

The JCRC proposes a new rule to address the procedure for a parent to file a claim of ineffective assistance of counsel in a termination of parental rights proceeding. There are two proposed titles. If the Court finds the rule applies to all

attorneys, then the first option would be applicable; if the Court finds the rule only applies to court-appointed attorneys, the second option would be applicable.

Proposed subdivision (a) details the obligation of the court to advise the parents of their rights to appeal and to file a claim of ineffective assistance of counsel. Proposed subdivision (b) details the obligation of trial counsel to advise the parents of their rights to appeal and to file a claim of ineffective assistance of counsel. Proposed subdivision (c) details in which court a parent's motion claiming ineffective assistance of counsel should be filed. This subdivision also states that the trial court continues to have jurisdiction to consider a motion claiming ineffective assistance of counsel in a proceeding terminating parental rights.

Proposed subdivisions (d)(1) and (d)(2) detail at which times, during the proceedings, a parent is entitled to court-appointed counsel. Proposed subdivision (e) states that a motion claiming ineffective assistance of counsel must be filed within 20 days of the date the court entered the written order terminating parental rights. The Committee thoroughly discussed the amount of time a parent should be given to file a motion claiming ineffective assistance of counsel. In the end, the Committee approved the 20-day timeframe from the temporary procedure from *J.B.*, at 794.

Proposed subdivision (f) allows for rendition of the order terminating parental rights to be tolled for 50 days, or until the circuit court enters an order on the motion claiming ineffective assistance of counsel, whichever happens first. The 50-day time period includes the 20 days to file the motion, 5 days to summarily rule on the motion, 10 days if the court authorized the parent to file an amended motion, time for the hearing on the motion, and 5 days to enter the order from the hearing on the motion.

Proposed subdivisions (g)(1)–(g)(4) detail the requirements for the motion claiming ineffective assistance of counsel. Subdivisions (g)(1) and (g)(2) require that the motion be in writing and under oath with a statement that the facts included are true and correct. The motion should also contain the case name, case number, and the date the written order terminating parental rights was filed. As proposed, subdivision (g)(3) would require that the motion contain the current mailing address, any e-mail address, and the phone number of the parent filing the motion for the purposes of receiving orders. Proposed subdivision (g)(4) requires that the motion identify specific acts or omissions in the attorney's representation during the termination of parental rights proceedings that constituted a failure to provide reasonable, professional assistance. Additionally, the motion requires an

explanation of how the acts or omissions of the lawyer prejudiced the parent's case to such an extent that the result would have been different absent the deficient performance.

Proposed subdivision (h) allows the amendment of a timely-filed motion within 20 days from the date the court entered the written order terminating parental rights. As proposed, subdivision (i) requires the clerk to immediately provide these types of motions to the judge who entered the order terminating parental rights.

As proposed, subdivision (j) explains that no answer or responsive pleading is required from any other party in the proceeding. Proposed subdivision (k) requires the parent to serve the motion to all parties to the termination of parental rights proceeding as well as the attorney the parent claims provided ineffective assistance.

Proposed subdivision (*l*) details what happens upon the summary denial of a motion. As proposed, subdivision (*l*)(1) addresses untimely motions and subdivision (*l*)(2) addresses insufficient motions. As proposed, subdivision (m) allows for the entry of an amended order, if the motion is legally insufficient as alleged.

As proposed, subdivision (n) details the evidentiary hearing on the motion claiming ineffective assistance of counsel. Proposed subdivision (n)(1) discusses the scheduling of the hearing. Proposed subdivision (n)(2) addresses notice of the hearing and requires notice to be sent to the parties and participants in the termination of parental rights proceeding and to the attorney who is alleged to have provided ineffective assistance. The notice is required to state the issues to be determined and that the moving parent is required to present evidence at the hearing. Proposed subdivision (n)(3) addresses the record of the adjudicatory hearing in a termination of parental rights proceeding. As proposed, it allows the court to order an expedited record for review and allows for an electronic recording to be substituted for a transcript of the adjudicatory hearing. Proposed subdivision (n)(3) also addresses cases in which the judge conducting the motion hearing is different than the judge who presided at the termination of parental rights adjudicatory hearing. Proposed subdivision (n)(4) explains that the moving parent has the burden of presenting evidence and the burden of proving that the attorney's specific acts or omissions prejudiced the parent's case to such an extent that the result would have been different without the attorney's deficient performance. This proposed subdivision allows other parties to present evidence regarding the claims

raised in the motion claiming ineffective assistance of counsel.

As proposed, subdivisions (n)(5)(A)–(n)(5)(B) address the order from the evidentiary hearing. Proposed subdivision (n)(5)(A) details what occurs if the court determines that the attorney failed to provide reasonable and professional assistance, and that this failure effected the outcome of the termination of parental rights proceeding. The subdivision would require the order to include the reasons for granting the motion and that it vacates, without prejudice, the order terminating parental rights. As proposed, subdivision (n)(5)(B) details what occurs if the court denies the motion claiming ineffective assistance of counsel. The court's order is required to state the reasons for denial, should resolve all of the claims raised in the motion, and should be considered the final order for purposes of appeal.

Proposed subdivision (*o*) addresses the process when a court fails to enter an order. If within 50 days from the date the court entered the written order terminating parental rights, the court fails to issue an order granting or denying the motion, the motion shall be deemed denied with prejudice. The JCRC believes that this provision is necessary to expedite the process for the best interest of a child. The JCRC did not believe it was fair to a child for the trial court to not enter an order expeditiously. A similar "deemed denied" provision is in the temporary process. *J.B.*, at 795.

As proposed, subdivision (p) requires that the order be served on the parties, including the moving parent, within 48 hours of rendition of the order and shall include a dated certificate of service.

The JCRC proposes creating subdivision (q) to address successive motions. As proposed, the subdivision prohibits the filing of a second or successive motion claiming ineffective assistance of counsel.

Proposed subdivision (r) addresses appeals and states that any appeals of an order claiming ineffective assistance of counsel in a termination of parental rights proceeding will be governed by Florida Rule of Appellate Procedure 9.146 (Appeal Proceedings in Juvenile Dependency and Termination of Parental Rights Cases and Cases Involving Families in Need of Services).

FORM 8.983. ~~ADJUDICATION ORDER AND JUDGMENT OF INVOLUNTARY TERMINATION OF~~ORDER INVOLUNTARILY TERMINATING PARENTAL RIGHTS

The JCRC proposes amending the title of Form 8.983 to “Order Involuntarily Terminating Parental Rights” to make it clear that this form only addresses orders involuntarily terminating parental rights. In addition to the proposed title change, the JCRC proposes amending the notice provisions in the order to advise parents that they have a right to make a claim of ineffective assistance of counsel. The proposed notice provision gives an overview of the requirements and process for making a claim of ineffective assistance of counsel. This notice provision is consistent with the proposed amendments to Rule 8.525 (Adjudicatory Hearings).

The JCRC also proposes stylistic changes to the form to comply with the Court’s Guidelines for Rules Submissions, AOSC06-14.

FORM 8.9831. MOTION CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL AFTER ORDER TERMINATING PARENTAL RIGHTS

or

FORM 8.9831. MOTION CLAIMING INEFFECTIVE ASSISTANCE OF COURT-APPOINTED COUNSEL AFTER ORDER TERMINATING PARENTAL RIGHTS

The JCRC proposes new Form 8.9831 to provide an example of a motion claiming ineffective assistance of counsel after order terminating parental rights. The form provides a format for the moving parent to follow when drafting a motion claiming ineffective assistance of counsel in a termination of parental rights proceeding.

The proposed form will ensure that the format and language of the motions are consistent and comprehensible. The form will assist the parent to effectively prepare the motion. The proposed form prompts the parent to set forth the factual basis for making the claim of ineffective assistance of counsel pursuant to *J.B.* The JCRC hopes that the form will help expedite the resolution of the motion claiming ineffective assistance of counsel.

As with proposed Rule 8.530, two proposed rule titles are provided to address the broad or narrow views.

FORM 8.9832. ORDER ON MOTION CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL AFTER ORDER TERMINATING PARENTAL RIGHTS

or

FORM 8.9832. ORDER ON MOTION CLAIMING INEFFECTIVE ASSISTANCE OF COURT-APPOINTED COUNSEL AFTER ORDER TERMINATING PARENTAL RIGHTS

The JCRC proposes new Form 8.9832 to provide an example of an order ruling on a motion claiming ineffective assistance of counsel in a termination of parental rights proceeding. The form provides a format for a judge to follow when drafting an order on a motion claiming ineffective assistance of counsel in a termination of parental rights proceeding.

The form includes alternative findings and rulings based on the circumstances of the case. Pursuant to proposed Rule 8.530 (Parent's Motion Claiming Ineffective Assistance of [Court-Appointed] Counsel Following Order Terminating Parental Rights), the form allows the trial court to make findings that a motion is untimely, sufficient, or insufficient, or whether the evidence presented at a hearing supports the court vacating the order terminating parental rights due to ineffective assistance of counsel.

As with proposed Rule 8.530 and Form 8.9831, two proposed rule titles are provided to address the broad or narrow views.

FORM 8.984. ~~JUDGMENT OF VOLUNTARY TERMINATION OF~~ORDER TERMINATING PARENTAL RIGHTS (VOLUNTARY)

The JCRC proposes amending the title of Form 8.984 to "Order Terminating Parental Rights (Voluntary)" making the language consistent with the other rules and forms. In addition to the proposed title change, the JCRC proposes amending the notice provisions in the order to advise parents that they have a right to make a claim of ineffective assistance of counsel. The proposed notice provision gives an overview of the requirements and process for making a claim of ineffective assistance of counsel. This notice provision is consistent with the proposed

amendments to Rule 8.525 (Adjudicatory Hearings).

The JCRC also proposes stylistic changes to the form to comply with the Court's Guidelines for Rules Submissions, AOSC06-14.

RULE 9.146. APPEAL PROCEEDINGS IN JUVENILE DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS CASES AND CASES INVOLVING FAMILIES AND CHILDREN IN NEED OF SERVICES

The ACRC proposes amending Florida Rule of Appellate Procedure 9.146 to detail the process for appealing orders terminating parental rights. The ACRC proposes new subdivisions (i)(1)–(i)(4). Proposed subdivision (i)(1) addresses the applicability of subdivision (i) to appeals to the district courts of appeal of orders terminating parental rights involving claims of ineffective assistance of counsel.

The ACRC proposes subdivision (i)(2) to address rendition in these cases. As proposed, a motion claiming ineffective assistance of counsel will toll rendition of the order terminating parental rights until the lower tribunal enters a written order on the motion claiming ineffective assistance of counsel. The proposed amendments to Rule 8.530 (Parent's Motion Claiming Ineffective Assistance of [Court-Appointed] Counsel Following Order Terminating Parental Rights) provide that if a court fails to act within the 50 days, subdivisions 8.530(f) and (*o*) come into effect, ending the tolling of rendition and deeming the motion denied with prejudice. This subdivision is similar to the Court's temporary process in *J.B.*

Proposed subdivision (i)(3) is consistent with this Court's requirement in *J.B.* that "any appeal from an order denying a motion alleging the ineffective assistance of counsel will be raised and addressed within any appeal from the order terminating parental rights." *J.B.*, at 794.

As proposed, subdivisions (i)(4)(A)–(i)(4)(C) address when a parent may file a motion claiming ineffective assistance of counsel pursuant to Florida Rule of Juvenile Procedure 8.530 and the effect of the filing of such a motion on the parent's appeal of the order terminating parental rights.

The ACRC proposes subdivision (i)(4)(A) to make it clear that once the notice of a timely-filed, pending motion claiming ineffective assistance of counsel is received, the notice stays the appellate proceedings until the lower tribunal enters an order disposing of the motion, except as provided by proposed Rule 8.530.

The ACRC proposes subdivision (i)(4)(B) to address the supplemental record and transcripts of proceedings. It would require the court reporter to provide a transcript of the hearing on the motion claiming ineffective assistance of counsel within 20 days. The proposed subdivision also addresses the service of the transcript. As proposed, subdivision (i)(4)(C) addresses the duties of the clerk in the preparation and transmission of the supplemental record. It provides that the clerk shall electronically transmit the supplement to the court and serve the parties within 5 days of the filing of the order ruling on the motion.

The ACRC's proposed subdivisions (i)(4)(A)–(i)(4)(C) recognize the priority and expediency given to appeals under Rule 9.146 and this Court's admonishment in *J.B.* that ineffective assistance of counsel claims need to be timely processed. Presently, Rule 9.146(g)(2)(B)–(g)(2)(C) prescribes that a court reporter shall provide a transcript within 20 days of service of the designation to the reporter and the clerk shall transmit the record within 5 days of the filing of the transcript. Thus, the record of the proceedings prior to the filing of a motion alleging ineffective assistance are likely to be prepared and transmitted to the appellate court prior to expiration of the time limitation within which the trial court must act on the motion. Because any appeal from an order denying a motion alleging the ineffective assistance of counsel must be raised in the appeal from the order terminating parental rights, it will be necessary to supplement the already-prepared record with the proceedings related to the ineffective assistance of counsel motion. Subdivisions (i)(4)(B)–(i)(4)(C) provide the necessary mechanisms to supplement the record with the necessary filings to enable appellate review of the trial court's denial of the motion alleging ineffective assistance of counsel, while ensuring that the appeal is timely processed.

WHEREFORE, the Select Committee on Claims of Ineffective Assistance of Counsel in Termination of Parental Rights Proceedings, Appellate Court Rules Committee and the Juvenile Court Rules Committee respectfully request the Court adopt one set of the proposed rules and forms regarding claims of ineffective assistance of counsel in termination of parental rights proceedings as detailed within this joint report.

Respectfully submitted on March 31, 2016.

/s/ Hon. Sandra Sue Robbins
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CERTIFICATION OF COMPLIANCE

I certify that these rules were read against West's *Florida Rules of Court—State* (2016 Edition).

I certify that this report was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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