

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE FLORIDA
RULES OF JUVENILE PROCEDURE**

CASE NO:

**TWO-YEAR CYCLE REPORT OF THE
JUVENILE COURT RULES COMMITTEE**

Jennifer A. Parker, Chair, Juvenile Court Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this two-year cycle report of the Juvenile Court Rules Committee under *Fla. R. Jud. Admin.* 2.130(c). As required by *Rule* 2.130(c)(3), the proposed amendments have been reviewed by the Board of Governors of The Florida Bar. The voting records for the committee and the Board of Governors are included on the attached table of contents.

As required by *Rule* 2.130(c)(2), the proposals were published in the October 1, 2003, Florida Bar *News*, and posted on The Florida Bar's website, with a request for comments. Comments were received from two groups and are included in Appendix J. The committee's responses are included in the body of this report.

The text of the proposed amendments in the two-column format is attached to this report. A diskette with the full page format is also provided.

Rule 8.165: Subdivision (a) of this rule has been amended to require that a child be given a meaningful opportunity to confer with an attorney before waiving counsel. Subdivision (b)(3) has been added to require that when a child is entering a plea or being tried on a delinquent act, a written waiver of counsel be submitted in the presence of a parent, legal custodian, responsible adult relative, or an attorney assigned by the court to assist the child. That person must also verify that the child's decision to waive counsel has been discussed and appears to be knowing and voluntary.

Majority Report

The amendments to *Fla. R. Juv. P.* 8.165 were recommended to the Juvenile Court Rules Committee as part of the final report of the Florida Bar Commission

on the Legal Needs of Children. (See Appendix A.) The commission's report contained many recommendations; this was the only one specifically addressed to the Florida Rules of Juvenile Procedure. The commission endorsed this change unanimously.

The commission was concerned with the large number of children who waive their right to an attorney, thus making the "right to an attorney" in delinquency proceedings in Florida illusory. The right to counsel in delinquency proceedings was established by the United States Supreme Court in *In re Gault*, 387 U.S. 1 (1970). It is embodied in section 985.203(1), Florida Statutes. It is the Court's, and through its delegation to it, the Juvenile Court Rules Committee's responsibility to determine what procedures should be in place to ensure that a juvenile's constitutional right to counsel is implemented.

The appellate courts of Florida have made it clear that it is difficult, if not impossible, for a child to knowingly and intelligently waive the right to counsel. See, e.g., *State v. B.P.*, 810 So. 2d 918 (Fla. 2002); *State v. T.G.*, 800 So. 2d 204 (Fla. 2001); *M.Q. v. State*, 818 So. 2d 615 (Fla. 5th DCA 2002); *T.M. v. State*, 811 So. 2d 837 (Fla. 4th DCA 2002). It is hoped that the procedures in this rule will reduce the errors found in these cases and avoid the need for many of these appeals.

The majority of the Juvenile Court Rules Committee concluded that the appropriate procedure to protect a child's right to counsel is to require an opportunity for the child to confer with an attorney before the child's waiver of counsel.

Minority Report

A minority of the committee believes that the proposed amendment to *Rule* 8.165 is inappropriate, because it addresses a substantive right as opposed to a procedural right. A child's right to counsel is a substantive right created for the protection of the child. The additional rights provided by this rule amendment should be statutorily authorized by the legislature before a rule is adopted.

"Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law." *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). Adoption of this proposed amendment would violate the separation of powers. For a rule of procedure to mandate the appointment of a lawyer where one is not statutorily authorized, or held to be constitutionally required, is to create

a new substantive right to counsel by court rule.

“Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer.” *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969). It also “includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and property.” *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring). “Procedural law encompasses the course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights.” *Id.*

The term “right” connotes the capacity of asserting a legally enforceable claim. Legal rights have been classified as substantive and remedial. “Substantive rights are those existing for their own sake and constituting the normal legal order of society, *i.e.*, the rights of life, liberty, property and reputation. Remedial rights arise for the purpose of protecting or enforcing substantive rights.” *State v. Garcia*, 229 So. 2d at 238.

Section 985.203(1), Florida Statutes, states that a child is entitled to representation by legal counsel at all stages of any delinquency proceedings. The proposed rule amendment provides for an “automatic” right to counsel, in that such counsel shall be provided unless it is waived. The proposed rule amendment goes even further to require that a child speak with an attorney even if the child has waived that right. This rule amendment would better serve its purpose of providing or allowing for the waiver of counsel if enacted as an amendment to section 985.203(1), Florida Statutes, rather than as an amendment to the Florida Rules of Juvenile Procedure. The right to counsel has not been held to be constitutionally required and adoption of this proposed amendment as a rule would, in fact, be creating a substantive right to counsel that has not been constitutionally required.

The language in the proposed rule also raises some additional concerns. Because there is no guidance or definition of “meaningful consultation,” the trial court would be placed in the difficult position of interpreting the phrase.

Comments Received

The Committee on Families and Children in the Court made several comments concerning this rule. (See Appendix J.) The Juvenile Court Rules Committee considered these comments at their January 15, 2004, meeting, voted

19-0-0 to submit the rule as originally proposed, and responds as follows:

1. Concern that the use of public defenders for these pre-plea conferences would be improper. The committee directs the Court's attention to the comments received from the Florida Public Defenders Association. (See Appendix J.) It is the committee's understanding that the Public Defender's Association has agreed to provide the representation required by this rule.

2. Possibility that procedure may interfere with the parent's wish not to provide representation. The right to counsel is the right of the child, not the parent. See *Rule* 8.165(a); § 985.203, Fla. Stat.

3. Inference that judges are not properly performing this function. The committee directs the court to case law cited above in the majority report showing the problems created by waivers of counsel by children.

4. Concern that the rule change is substantive rather than procedural. The committee responds that, as stated above, the constitutional right to counsel has been established by a series of cases beginning with *In re Gault*, 387 U.S. 1 (1970).

5. The propriety of requiring parents to obtain counsel for the child against their wishes. The right to counsel is the child's. *Rule* 8.165(a). See also § 985.203, Fla. Stat. (court may order parent to obtain counsel for nonindigent child).

6. Concern about the procedure to be used by the court. It is the committee's belief that preserving the child's rights outweighs any inconvenience. The committee also believes that trial courts will be able to fashion a specific procedure to accommodate the requirements of this rule.

Rules 8.203 and 8.603; Form 8.911. These rules and forms have been amended to change the name of the referenced act to the Uniform Child Custody Jurisdiction and Enforcement Act. This amendment conforms the rules and forms to repeal of sections 61.1302 *et seq.*, Florida Statutes, and creation of sections 61.501, *et seq.*, Florida Statutes, by Chapter 2002-65, Laws of Florida. (See Appendix B.)

Rule 8.240. This amendment adds a new subdivision (d) to create a procedure for a motion for continuance, extension, or waiver of time. Subdivision (b) has also been amended to add a cross-reference to new subdivision (d). This amendment

conforms the rule to amendments to section 39.013(10), in section 1 of Chapter 2002-216, Laws of Florida. (See Appendix C.) Editorial changes have also been made to this rule.

Rule 8.245. Subdivision (g)(2)(B) has been amended to allow the clerk, the court, or any attorney of record to issue subpoenas for taking depositions. This amendment conforms this rule to *Rule 8.225(a)(2)* and *Fla. R. Civ. P. 1.410(a)*. (See Appendix D.) Editorial changes have also been made.

Rule 8.255. Subdivision (i) has been deleted because of the creation of *Rule 8.257, General Masters*. Editorial changes have also been made.

Rule 8.257. A new rule has been created governing the use of general masters in juvenile dependency proceedings. This rule was requested by this Court in *Amendments to Florida Rules of Juvenile Procedure*, 827 So. 2d 219 (Fla. 2002). (See Appendix E.)

The rule is patterned after *Fla. Fam. L. R. P. 12.490*. (See Appendix E.) It creates procedures for referral to a general master, consent by the parties to the referral, orders of referral, hearings before the master, the master's report, exceptions to the report, and creation of a record. However, changes have been made to the family law rule to adapt it to juvenile dependency proceedings. The changes are as follows:

1. In subdivisions (b)(2) and (b)(3), the extension of time to object until a responsive pleading has been filed was deleted. Answers are not required in dependency proceedings. See § 39.505, Fla. Stat.; *Rule 8.325(a)*.
2. In subdivision (b)(3), the reference to *Fla. Fam. L. R. P. Form 12.920(b)* has been deleted.
3. The cross-reference in subdivision (b)(3)(A) has been changed.
4. In subdivision (b)(3)(B), the requirement that the order of referral contain the name of the master has been deleted. In many programs, there are multiple masters. By referring the case to the general master program rather than to a specific master, a new order of referral will not have to be obtained if the master to whom the case is assigned is changed.

5. In subdivision (b)(3)(B), the requirement that the referral advise the party whether a court reporter must be provided by the party was eliminated. In most master programs, electronic recording devices are available in hearing rooms. There is no requirement that a party provide a court reporter.

6. In subdivision (e) and (f), material has been rearranged. The notice regarding filing exceptions and the requirement for a transcript have also been moved from the notice of hearing to the master's report. The committee felt that this was the more appropriate place for the information. The remedy is now on the document the party may wish to object to, rather than on a notice of hearing that may have already been discarded.

7. The cross-reference in subdivision (e)(2) has been changed.

8. Although the content of subdivision (g) is the same as *Rule* 12.490(g), the material has been arranged differently.

The committee voted 19-0-0 to submit the rule as originally proposed and has no response to the comments on this rule filed by the Committee on Families and Children in the Court.

Rule 8.290. Subdivision (c) has been amended to delete “unless waived by all parties and approved by the court.” The amendment requires dependency mediations to comply with statutory time requirements for dependency proceedings. See, *e.g.*, § 39.601(7), Fla. Stat. (case plan expires no later than 12 months after child was removed from the home); § 39.701(8)(f), Fla. Stat. (requiring judicial review to plan for child’s permanency “[n]o later than 12 months after the date that the child was placed in shelter care”). Mediation proceedings are not listed as an exception to the time requirements in section 39.013(10), Florida Statutes. Editorial changes have also been made to the rule.

The Committee on Families and Children in the Court recommended that domestic violence be considered in dependency mediation cases. The Committee recognizes a difference in cases that involve domestic violence and that this may carry over into differences in mediation issues. The rules committee will address this issue in the next cycle.

Rule 8.300. The committee’s original proposal for this rule was to amend subdivision (a) to list persons who may take a child into custody. The amendment

was intended to conform the rule to section 39.401(1)(b), Florida Statutes. The Committee on Families and Children in the Court believed that the amendment as written was in conflict with the statute. The Juvenile Court Rules Committee believed that the statute was subject to interpretation. The committee voted by 21-0-0 to revise the amendment to this rule to take out the original change and also delete “by any person,” so that subdivision (a) reads: “An affidavit or verified petition may be filed alleging factors. . . .” The committee’s intention remains to conform the rule to the statute.

Subdivision (c)(5) has been amended to specify that an order to take a child into custody order that the child be held in a suitable place pending transfer of physical custody to the Department of Children and Family Services. If a child is taken into custody by court order, there is no statutory requirement to return immediately to court for another order to detain the child. See § 39.401(2)(b), Fla. Stat.

Rule 8.305. Subdivision (b)(9) has been amended to clarify that if a shelter hearing is conducted by a judge other than one assigned to hear dependency cases, a judge assigned to hear dependency cases must review the child’s status within two working days. The previous version of the rule stated “juvenile court judge.” This could include a judge assigned to hear delinquency cases. See § 39.402(12), Fla. Stat.

Subdivision (c) has been amended to clarify that findings need only be made in an order granting shelter care. The previous rule could be interpreted to require findings if the order denied shelter care. See § 39.402(8)(h), Fla. Stat.

Rule 8.315. The second sentence of subdivision (a) has been amended to read: “If an admission or consent is entered and no denial is entered by any other parent or legal custodian. . . .” The amendment provides for situations in which one parent or legal custodian admits dependency but another does not. If any parent or legal custodian denies the allegations of the petition, it is a denial of due process to move to disposition without an adjudicatory hearing. See §§ 39.506(1)–(2), Fla. Stat.

The Committee on Families and Children in the Court raised a concern that a child’s permanency could be delayed by requiring pleas or adjudications for both parents. The Juvenile Rules Committee voted by 21-0-0 to leave the proposal as originally made. However, the committee recognizes some confusion on the law in this area and will revisit the issue in the next cycle.

Sentence three of subdivision (a) has been amended to delete “or grant a continuance as provided by law.” Continuances at arraignment are not authorized by statute. See §§ 39.506(1)–(2), 39.507(1)(a), Fla. Stat. If a continuance of the adjudicatory hearing set at arraignment is required, it should be requested at a later time.

The Committee on Families and Children in the Court questioned the Juvenile Rules Committee’s intention in proposing this amendment. As they suggested, the change was intended to put all language regarding continuances in one place: *Rule 8.240*.

Editorial changes have also been made.

Rule 8.325. Subdivision (d), Stipulations, has been deleted. This provision was originally included in the rule to cover “Walker” plans and other plans and stipulations. These are no longer found in the dependency statutes. The Committee Note has been deleted because it is no longer relevant. Editorial changes have also been made.

The Committee on Families and Children in the Court stated that they were unclear as to the reason for this amendment. The Juvenile Court Rules Committee voted 21-0-0 to retain the amendment and explanation as originally proposed.

Rule 8.400. New subdivisions (b)(2) and (b)(3) have been added to clarify the procedure for amending a case plan. The court in *M.W. v. Davis*, 756 So. 2d 90, 107 (Fla. 2000) (see Appendix F), noted the lack of guidance regarding the type of evidence required to amend a case plan. The added language provides that guidance. See also §§ 39.601(9)(f), 39.603(2), 39.701(8), Fla. Stat. Editorial changes have been made.

The Committee on Families and Children in the Court was concerned that the rule amendment created a new requirement in the case plan approval process. The Juvenile Court Rules Committee voted 21-0-0 to leave the proposed amendment unchanged for the reasons stated above.

Rule 8.410. Subdivision (b)(4) has been amended to clarify the court’s findings when a case plan has a goal of reunification.

Subdivision (c) has been amended to refer to “goals for permanency” rather

than goals for return of the child. Not all case plans have a goal of reunification. See §§ 39.601(3)(a), (3)(l), Fla. Stat. (case plan to describe “permanency goal” for child).

Rule 8.415. Subdivision (f)(6) has been amended to remove a provision allowing commitment of a child to a licensed child-placing agency for adoption. After a termination of parental rights, the child is committed to the Department of Children and Family Services, which may then place the child with a licensed child-placing agency. This amendment conforms the rule to section 39.812(1), Florida Statutes, as amended by section 5, Chapter 2001-3, Laws of Florida. (See Appendix G.) See also §§ 39.811(2), (4), Fla. Stat.

Editorial changes have also been made.

Rule 8.500. Subdivision (a)(2) has been amended to delete “licensed child-placing agency” from the list of those who may file a petition to terminate parental rights. This amendment conforms the rule to section 39.802(1), Florida Statutes, as amended by section 2 of Chapter 2001-3, Laws of Florida. (See Appendix G.)

The Committee Note has been deleted because it is no longer relevant. Editorial changes have also been made.

Rule 8.505. Subdivision (a)(5) has been amended to require notice of termination of parental rights pending adoption proceedings to grandparents as provided by law. This change amends the rule to conform to section 63.0425(1), Florida Statutes, as amended by section 6 of Chapter 2003-58, Laws of Florida. (See Appendix H.) Grandparents are no longer entitled to priority consideration in an adoption proceeding, but must receive notice.

Subdivision (c) has been amended to clarify that service is only required for parties whose identities are known. This amendment conforms the subdivision to sections 39.803(1) and (4), Florida Statutes.

Subdivision (d) has been amended to remove the reference to commitment of a child to a licensed child-placing agency. This amendment conforms the rule to sections 39.811(2) and 39.812(1), Florida Statutes. See §§ 4–5, Ch. 2001-3, Laws of Fla. (See Appendix G.)

Editorial changes have also been made.

Rule 8.510. Subdivision (a)(3) has been amended to require failure to appear to be *personal* and to specify the actions to be taken by the court. This amendment conforms the rule to sections 39.801(3)(a) and (3)(d), Florida Statutes.

Subdivision (a)(4) has been amended to clarify the procedure for entry of admissions or consents to termination of parental rights. Termination of parental rights now requires a two-prong determination. The best interest of the child is the second prong. See § 39.802(4), Fla. Stat.

Editorial changes have been made.

Rule 8.515. Subdivision (a)(1) has been amended to delete the requirement to offer counsel if the parents have executed voluntary surrenders to terminate their parental rights. The amendment conforms the rule to section 39.013(9)(d), Florida Statutes.

The Committee Note has also been deleted.

Rule 8.525. Subdivision (i)(1) has been amended to change the last sentence to read “placed for adoption” rather than “adopted.” This amendment conforms the rule to section 39.811(7)(b), Florida Statutes.

Editorial changes have also been made.

Rule 8.535. Subdivision (c) has been amended to add a sentence stating that the petition for adoption must be filed in the court that entered the judgment terminating parental rights unless a motion for a change of venue has been granted. The amendment conforms the rule to section 39.812(5), Florida Statutes.

Editorial changes have also been made.

Forms 8.908, 8.959, 8.960, and 8.979. Language has been added to each of these notices of hearing regarding assistance for persons with disabilities. This amendment conforms these forms to the requirements of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* and *Fla. R. Jud. Admin.* 2.065. (See Appendix I.)

The Committee on Families and Children in the Court made a number of suggestions for additional items that could be included in *Form 8.960*. The Juvenile

Court Rules Committee will consider these in the next cycle.

The committee respectfully requests that the court amend the Florida Rules of Juvenile Procedure as proposed in this report.

Respectfully submitted _____.

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