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2010 Survey of Juvenile Law

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2010 SURVEY OF JUVENILE LAW

MICHAEL J. DALE*

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I. INTRODUCTION

The Supreme Court of Florida only decided three cases directly related to children's issues in the past years: two in the delinquency area and one governing termination of parental rights. The intermediate appellate courts again remained active—particularly in the termination of parental rights field. On the other hand, in the juvenile delinquency area, most of the decisions dealt with generic issues of criminal procedure that are not unique to the juvenile delinquency field, and thus are not covered in this article. Several changes in Chapters 39 and 985 require brief review.

II. DEPENDENCY

Incarceration can constitute grounds for a finding of dependency in the form of abandonment.¹ In the termination of parental rights context, the test for termination based upon incarceration is different and requires that the period of incarceration be a substantial portion of the time before the child reaches the age of eighteen.² However, the incarceration alone cannot rise to the level of abandonment unless there is also a showing that the parent has not provided for support and has not established or maintained a substantial relationship with the child.³ “Marginal efforts and incidental or token visits

* Professor of Law, Nova Southeastern University Shepard Broad Law Center. This Survey covers cases decided during the period from July 1, 2009 through June 30, 2010. This article marks Professor Dale's twentieth *Nova Law Review* juvenile law survey.

1. FLA. STAT. § 39.01(1) (2010).

2. *Id.* § 39.806(1)(d)(1).

3. *See id.*; *id.* § 39.01(1).

or communications” are insufficient under the statute.⁴ In *B.T. v. Department of Children & Families*,⁵ a father appealed a final order of dependency on grounds of abandonment due to his incarceration.⁶ The father had “numerous convictions for drug and firearm offenses and ha[d] been incarcerated since” the child’s birth.⁷ At the time of the adjudicatory hearing, he was serving ninety-six months in prison.⁸ Recognizing that incarceration is a factor in abandonment but may not be the sole standard, the appellate court found that the father had testified that he failed to make financial payments because of incarceration and received photographs of his child.⁹ Although the Department of Children and Families (DCF) offered no other evidence, the appellate court affirmed, yet remanded for the court to make findings in accordance with the opinion that the father failed to make adequate efforts to see and support his child.¹⁰

When the child is taken from the home, the initial proceeding, known as a shelter hearing in Florida, involves notification to the parents, appointment of a guardian ad litem, informing the parents of their right to counsel, and establishment of “probable cause that reasonable grounds for removal exist,” shown by DCF. In *L.M.B. v. Department of Children & Families*,¹¹ a mother filed a petition for a writ of certiorari in an effort to “quash the trial court’s shelter order which sheltered her three-year-old child in the father’s home.”¹² The trial court conducted a shelter hearing prior to entering the order, but refused to allow the mother to present evidence regarding whether the child should be removed.¹³ The trial court held that by reviewing the probable cause for removal question it could make its determination from the “‘four corners’ of the verified shelter petition.”¹⁴ When the mother subsequently consented to the adjudication of dependency, the appellate court nonetheless ruled on the issue, as it was “important and capable of repetition, yet evading review.”¹⁵ Relying on decisions from other Florida District Courts of Appeal, the court held that a parent has a statutory right to be heard and present

4. *Id.* § 39.01(1).

5. 16 So. 3d 940 (Fla. 5th Dist. Ct. App. 2009).

6. *Id.* at 941.

7. *Id.*

8. *Id.*

9. *Id.* at 941–42.

10. *B.T.*, 16 So. 3d at 941–42.

11. 28 So. 3d 217 (Fla. 4th Dist. Ct. App. 2010) (per curiam).

12. *Id.* at 218.

13. *Id.* (citing FLA. STAT. § 39.402(2) (2009)).

14. *Id.*

15. *Id.* (citing *L.M.C. v. Dep’t of Children & Families*, 935 So. 2d 47, 47 (Fla. 5th Dist. Ct. App. 2006)).

evidence at a shelter hearing.¹⁶ In so ruling, the court held that affidavits from the parties may be an adequate substitute for live testimony.¹⁷

An interesting issue involving the application of section 57.105 deals with an award of attorney's fees in a case where party and counsel knew or should have known that the claim was not supported by facts or an application of then-existing law arose this survey year in the dependency context. In *Department of Children & Families v. S.E.*,¹⁸ DCF appealed from a trial court's fee award in favor of the mother pursuant to section 57.105.¹⁹ The trial court granted the mother's motion to dismiss the dependency proceeding based upon a letter from the statewide medical director of the child protection teams of the Department although two physicians had concluded that the child was the victim of Munchausen Syndrome by proxy.²⁰ DCF decided to proceed, however, on the ground that the mother still posed a threat of harm despite the director's letter.²¹ The parent filed a renewed motion to dismiss on the grounds that the "amended petition failed to specifically set forth the acts or omissions upon which the petition was based."²² The trial court granted the motion to dismiss and subsequently held a hearing on the mother's entitlement to fees.²³ Applying an abuse of discretion standard, the appellate court reversed the finding of an entitlement to fees, holding that at the time of the filing, DCF quite properly relied upon the opinions of medical professionals and thus was "always supported by the necessary material facts to overcome an award" under section 57.105.²⁴

III. TERMINATION OF PARENTAL RIGHTS

Florida law provides that it is possible for a parent to impliedly consent to termination of parental rights based upon the parent's failure to personally appear at the adjudicatory hearing.²⁵ The appellate courts regularly deal with cases involving termination of parental rights based upon a parent's failure to appear.²⁶ The specific question before the Supreme Court in *Florida De-*

16. *L.M.B.*, 28 So. 3d at 219. (citing FLA. STAT. § 39.402(8)(a) (2009)).

17. *Id.* at 218 (citing FLA. R. JUV. P. 8.305(b)(5)).

18. 12 So. 3d 902 (Fla. 4th Dist. Ct. App. 2009) (per curiam).

19. *Id.* at 902.

20. *Id.* at 902-03.

21. *Id.* at 903.

22. *Id.*

23. *S.E.*, 12 So. 3d at 903.

24. *Id.* at 903-04.

25. FLA. STAT. § 39.801(3)(d) (2010).

26. See Michael J. Dale, 2007-2008 Survey of Juvenile Law, 33 NOVA L. REV. 357, 371-72 (2009) [hereinafter Dale, 2007-2008 Survey].

partment of Children & Family Services v. P.E.,²⁷ was “whether, when consent to termination of parental rights has been entered . . . upon the parent’s failure personally to appear at the adjudicatory hearing, the trial court must nevertheless receive evidence of the grounds for termination alleged in the petition for termination of parental rights.”²⁸ The case was before the Supreme Court because of a conflict in opinions by the intermediate appellate courts.²⁹ The Supreme Court held that when an order terminating parental rights on the basis of implied consent occurs, the parent’s failure to appear constitutes a form of consent to the adjudication, and “the parent may not challenge the basis for the termination of parental rights.”³⁰ The parents’ failure to appear constitutes a form of default.³¹ The Supreme Court did recognize that a parent may vacate the judgment by meeting a three part test showing: due diligence, excusable neglect, and the existence of a meritorious defense to the proceeding.³² Finally, the Supreme Court found in the case before it that the trial court concluded that the mother’s testimony was not credible and that she did not offer any evidence of the third prong; thus, it affirmed the ruling of the Second District Court of Appeal.³³

A second case involving termination of parental rights (TPR) based upon a parent’s failure to appear is *A.H. v. Department of Children & Families*.³⁴ In that case, a month before the TPR trial, the father emailed his attorney to say that he could not appear because he lacked the financial resources to fly in for the hearing from New York where he lived.³⁵ The court had previously advised the father that he had to appear at trial.³⁶ At a status conference, where the father appeared telephonically, he explained that he could

27. 14 So. 3d 228 (Fla. 2009).

28. *Id.* at 234.

29. *See id.*; *P.E. v. Dep’t of Children & Family Servs. (In re H.E.)*, 3 So. 3d 341 (Fla. 2d Dist. Ct. App. 2009), *approved by* 14 So. 3d 228 (Fla. 2009); *S.S. v. State Dep’t of Children & Family Servs.*, 976 So. 2d 41 (Fla. 3d Dist. Ct. App. 2008), *overruled in part by* Fla. Dep’t of Children & Family Servs. v. P.E., 14 So. 3d 228 (Fla. 2009); *R.H. v. Dep’t of Children & Family Servs.*, 860 So. 2d 986 (Fla. 3d Dist. Ct. App. 2003), *overruled in part by* Fla. Dep’t of Children & Family Servs. v. P.E., 14 So. 3d 228 (Fla. 2009); *Dep’t of Children & Families v. A.S.*, 927 So. 2d 204 (Fla. 5th Dist. Ct. App. 2006).

30. *P.E.*, 14 So. 3d at 236; *see also* *R.B. v. Dep’t of Children & Families*, 997 So. 2d 1216, 1218 (Fla. 5th Dist. Ct. App. 2008); Michael J. Dale, 2009 *Survey of Juvenile Law*, 34 *NOVA L. REV.* 199, 212–13 (2009) [hereinafter Dale, 2009 *Survey*].

31. *P.E.*, 14 So. 3d at 230.

32. *Id.* at 236 (citing *E.S. v. Dep’t of Children & Family Servs.*, 878 So. 2d 493, 496 (Fla. 3d Dist. Ct. App. 2004); *FLA. R. CIV. P.* 1.540(b)(1)).

33. *Id.* at 237.

34. 22 So. 3d 801 (5th Dist. Ct. App. 2009).

35. *Id.* at 802.

36. *Id.*

not attend the trial, and the court stated, “Okay. Well, your attorney will be here.”³⁷ When the father failed to appear three days later for the TPR hearing, DCF asked the court to enter a consent to termination judgment.³⁸ The father’s lawyer objected for the record without further elaboration.³⁹ The appellate court reversed, finding that the court’s statement to the appellant intimated that the appellant’s attorney could appear for the father.⁴⁰ The court further noted that the appellant’s “attorney failed to request a continuance, made a half-hearted objection to the request for default and sought to be discharged at the first available opportunity.”⁴¹ Although the appellate court did not comment in other respects upon the attorney’s conduct,⁴² the court reversed, finding that the trial court abused its discretion.⁴³

An important evidentiary issue that arises regularly in Florida as well as in other jurisdictions is the question of hearsay statements by children in child protection cases.⁴⁴ In *T.O. v. Department of Children & Families*,⁴⁵ a mother and father appealed from termination of their parental rights to four children.⁴⁶ Although it affirmed, the appellate court, nonetheless, discussed the hearsay statements of the two children in which a number of witnesses testified that the children described violence between their parents and between the father and an older brother.⁴⁷ The children were allowed to testify in camera, although one of the children answered several questions but declined to answer questions about her parents.⁴⁸ The Florida Rules of Evidence contain an exception to hearsay for the admission of child victim statements.⁴⁹ However, prior to the admission of such statements, the trial court is obligated to conduct a hearing and make a preliminary determination that the hearsay statements come from a trustworthy source and are reliable.⁵⁰

37. *Id.*

38. *Id.*

39. *A.H.*, 22 So. 3d at 802.

40. *Id.*

41. *Id.*

42. See Dale, 2009 Survey, *supra* note 30, at 210; Michele R. Forte, Comment, *Making the Case for Effective Assistance of Counsel Involuntary Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 193, 194–95 (2003) (discussing the issue of ineffective assistance of counsel in child welfare cases in Florida).

43. *A.H.*, 22 So. 3d at 803.

44. See 2 MICHAEL J. DALE, REPRESENTING THE CHILD CLIENT, § 7.07 (2010) [hereinafter DALE, CHILD CLIENT].

45. 21 So. 3d 173 (Fla. 4th Dist. Ct. App. 2009).

46. *Id.* at 174.

47. *Id.* at 175.

48. *Id.*

49. See FLA. STAT. § 90.803(23) (2010).

50. *Id.*

Furthermore, the child must then either testify at trial or be declared unavailable.⁵¹ If the child is unavailable, the hearsay statements may still be admissible, but only after the court determines that there is corroborating evidence verifying the abuse or neglect.⁵² The appellate court held that the child was unavailable under the Florida Rules of Evidence because she persisted in refusing to testify concerning the subject matter of her statement.⁵³ Thus, the appellate court concluded, the child was unavailable to testify, and the child's hearsay statements were admissible because "there was sufficient corroborating evidence of the sexual abuse."⁵⁴

Complicated procedural issues can arise when an appellate court reverses the termination of parental rights as to one parent but affirms as to the other. Such was the problem in *Interest of I.R. v. Department of Children & Family Services & Guardian Ad Litem Program*.⁵⁵ The difficulty in this situation is that only certain grounds apply under Florida law whereby termination of parental rights may occur as to one parent and not as to the other.⁵⁶ In the context of a case where termination of parental rights is sought against both parents, the surviving ground allowing termination of the rights of one parent must be one of those grounds permissible in a one parent termination.⁵⁷ Only then is affirmance proper. However, where there is a reversal of the order terminating one parent's parental rights and the remaining ground does not allow for single parent termination, the entire case must be remanded for further proceedings.⁵⁸

A second appellate opinion involving the issue of single parent termination of parental rights under Florida law is *J.S. v. Department of Children & Families*.⁵⁹ In that case, the trial court terminated the rights of the mother and declined to terminate the rights of the father.⁶⁰ The mother appealed the order terminating her parental rights, and the Guardian Ad Litem Program and DCF appealed the order declining to terminate the father's parental rights.⁶¹ The appellate court reversed as to both trial court judgments.⁶² The mother argued on appeal that the trial court was in error in finding grounds

51. *Id.* § 90.803(23)(a)(2).

52. *Id.*

53. *T.O.*, 21 So. 3d at 178 (citing FLA. STAT. § 90.804(1)(b)).

54. *Id.*

55. 18 So. 3d 26, 27 (Fla. 2d Dist. Ct. App. 2009).

56. *See* FLA. STAT. § 39.811(6)(e).

57. *Id.*

58. *In re R.R.*, 18 So. 3d at 27.

59. 18 So. 3d 1170, 1171 (Fla. 1st Dist. Ct. App. 2009).

60. *Id.*

61. *Id.*

62. *Id.* at 1179.

for a single parent termination under the Florida Statute.⁶³ The appellate court agreed with the mother that the trial court did err in finding grounds for a single parent termination because the trial court must consider additional factors pursuant to Florida law when terminating one parent's parental rights without terminating the parental rights of the other.⁶⁴ Reviewing the facts of the case, findings set out in the trial court's order, and the ultimate disposition of the case, the appellate court concluded that the trial court abused its discretion because the appellate court could not find evidence supporting the specific additional factors necessary for a single parent termination.⁶⁵

Questions occasionally come up concerning treating sibling differently in dependency and termination of parental rights cases. In *W.P.R. v. Department of Children & Family Services & Guardian Ad Litem Program*,⁶⁶ a father appealed the termination of parental rights to his son, although the father did reunify with three older children who also had been the subject of the original dependency petition.⁶⁷ The appellate court explained that the father had received additional case plans for all four children and that his actions with regard to each were identical.⁶⁸ According to the appellate court, there had been no factual showing of different action toward the children or differences in the case plan but rather simply "disparate treatment of the children."⁶⁹ DCF conceded error, and the appellate court reversed and remanded.⁷⁰ However, in dicta, the appellate court recognized that it is possible to treat siblings differently in TPR proceedings but not where the sole reason for treating the children differently is the adoptability of an individual child.⁷¹

Under Florida law, termination of parental rights requires DCF to prove three elements: 1) grounds for termination, 2) termination as "the least restrictive means of protecting the child from serious harm," and 3) "termination is in the child's best interest."⁷² In *R.A. v. Department of Children &*

63. *Id.* at 1174.

64. *J.S.*, 18 So. 3d at 1174; *see* FLA. STAT. § 39.811(6) (2010)).

65. *Id.* at 1175–76.

66. 17 So. 3d 851 (Fla. 2d Dist. Ct. App. 2009).

67. *Id.* at 852.

68. *Id.*

69. *Id.*

70. *Id.* at 853 (citing *B.B. v. Dep't of Children & Families*, 793 So. 2d 988 (Fla. 2d Dist. Ct. App. 2001)).

71. *In re R.R.*, 17 So. 3d at 853.

72. *Padgett v. Dep't of Health & Rehabilitative Servs.*, 577 So. 2d 565, 568–69 (Fla. 1991); *E.D. v. Dep't of Children & Family Servs. (In re E.D.)*, 884 So. 2d 291, 295 n.3 (Fla. 2d Dist. Ct. App. 2004).

Families,⁷³ the Fifth District reversed the trial court order terminating a father's parental rights after conducting an ordered analysis of the tri-part test.⁷⁴ As to the least restrictive means of protecting the child, the appellate court found that the evidence of prospective harm was speculative, at best.⁷⁵ It then further held that the trial court's conclusion that proof of statutory grounds was enough to terminate parental rights simply ignored the statutory requirement that termination be in the manifest best interest of the child.⁷⁶

While most child protection cases involve petitions filed by DCF, it is possible for private parties, including parents, to file both petitions for dependency and for termination of parental rights. In *H.D. v. J.L.D.*,⁷⁷ a mother of an eleven-year-old child appealed the denial of a petition for termination of the parental rights of the child's adoptive father.⁷⁸ Apparently, the trial court did so without holding a hearing. In her petition, the mother had stated that the "adoptive father voluntarily executed an affidavit of surrender of . . . parental rights" and that it was in the child's best interest to terminate them.⁷⁹ Without holding a hearing, the trial court found that "terminating [the adoptive father's] parental rights would not serve 'the manifest best interests' of the minor child," in that it would terminate the child's right to support.⁸⁰ The appellate court recognized that, on the one hand, Chapter 39 does allow certain shortcuts to termination when there is a "voluntary surrender of parental rights."⁸¹ However, an adjudicatory hearing is nonetheless required in voluntary termination cases, and the trial court does have the power to deny a petition for termination where to do so may terminate the responsibility of the respondent parent to provide substantial support.⁸² However, the appellate court concluded, to deny the mother the right to a hearing constitutes a denial of due process rights to present evidence that termination is in the child's best interest.⁸³

73. 30 So. 3d 722 (Fla. 5th Dist. Ct. App. 2010).

74. *Id.* at 724.

75. *Id.*

76. *Id.*

77. 16 So. 3d 334 (Fla. 4th Dist. Ct. App. 2009).

78. *Id.* at 334.

79. *Id.* at 335.

80. *Id.* The appellate court quoted the trial's court's opinion.

81. *Id.* (quoting *L.O. v. Fla. Dep't of Children & Family Servs.*, 807 So. 2d 810, 812 (Fla. 4th Dist. Ct. App. 2002)).

82. *H.D.*, 16 So. 3d at 335 (citing *Rathburn v. Dep't of Children & Family Servs.*, 826 So. 2d 521, 523 (Fla. 4th Dist. Ct. App. 2002)).

83. *Id.*

Case plans are an essential part of dependency proceedings in Florida as elsewhere.⁸⁴ *E.C. v. Department of Children & Family Services & Guardian Ad Litem (In re E.C.)*⁸⁵ involved the question of the impact of the failure to file a case plan which was “approved by the court and relied upon by the parties throughout the proceedings.”⁸⁶ The crucial fact in the case was that a case plan addendum was never entered in the court file nor included as part of the trial court record until the pendency of the appeal.⁸⁷ The majority held that the technical failure to file and the unique facts of the case were such that the error did not go to “the foundation or the merits” of the matter and thus was not fundamental error.⁸⁸ However, there was a lengthy dissent by Judge Wallace.⁸⁹ Although the dissent also would have reversed on other grounds as to the failure to file an addendum to the case plan, the dissent concluded that the request for “termination . . . was fatally flawed from its inception.”⁹⁰ In other words, the termination was unauthorized by state law.⁹¹

The second case involving appellate review of the trial court’s ruling on termination of parental rights for noncompliance with a case plan is *S.F. v. Department of Children & Family Services*.⁹² In that case, the parents appealed from an order terminating parental rights to three children, and among the issues was whether the parents failed to comply with the requirement of their case plan under Florida law.⁹³ The appellate court found that the trial court did not distinguish its findings amongst the three children, two of whom were parties to the original case plan, and a third child who had been adjudicated dependent only seven months before the termination.⁹⁴ The problem was that in Florida parents were entitled to a twelve month period to comply with a case plan.⁹⁵ In the case at bar, the youngest child was only

84. See 1 Michael J. Dale, *Representing the Child Client*, ¶ 407(2) (Matthew Bender 3d ed. 2010).

85. 33 So. 3d 710 (Fla. 2d Dist. Ct. App. 2010).

86. *Id.* at 711.

87. *Id.* at 712 n.1.

88. *Id.* at 715.

89. See *id.* at 715–24 (Wallace, J., dissenting).

90. *In re E.C.*, 33 So. 3d at 722 (quoting *Y.F. v. Dep’t Children & Family Servs.*, 893 So. 2d 641, 642 (Fla. 2d Dist. Ct. App. 2005) (per curiam)).

91. *Id.* at 721.

92. 22 So. 3d 650 (Fla. 2d Dist. Ct. App. 2009).

93. *Id.* at 654; see FLA. STAT. § 39.806(1)(e)(2) (2010).

94. *In re S.F.*, 22 So. 3d at 654.

95. See FLA. STAT. § 39.806(1)(e)(1).

nine months old at the time of the termination, and thus, the twelfth month had not passed since that child was removed from the father's custody.⁹⁶

The Florida appellate courts recently decided the question of the obligation of the Justice Administrative Commission to pay attorney's fees to lawyers appointed to represent indigent parents in two terminations of parental rights cases. In *Justice Administration Commission v. Goettel*⁹⁷ and *Justice Administrative Commission v. Harp*,⁹⁸ the question was whether a lawyer who was appointed to represent a parent who had voluntarily executed a written surrender of parental rights was entitled to attorney's fees in the termination proceeding to be paid by the state commission.⁹⁹ In both cases, the court held that the attorney would not receive fees from the state agency because once the parent had executed a written surrender, the parent no longer had a right to appointed counsel in the termination proceeding.¹⁰⁰ Put in other words, the lawyer was "improperly appointed for the termination proceeding."¹⁰¹ In *Harp*, the court explained that nothing in the Chapter 39 provision governing termination of parental rights authorizes the court to appoint a lawyer to a parent who executed a voluntary surrender.¹⁰² The language of the statute was plain and unambiguous.¹⁰³

IV. JUVENILE DELINQUENCY

Rules concerning a speedy trial apply in juvenile delinquency cases. A technical question concerning speedy trial requirements was before the Supreme Court of Florida in *State v. Nelson*.¹⁰⁴ In that case, a juvenile was arrested for armed burglary and carrying a concealed weapon.¹⁰⁵ "Both the ninety-day juvenile and 175-day adult speedy trial periods began to run from the date of arrest," and before the expiration of either, the State filed a petition for delinquency.¹⁰⁶ However, the case was not scheduled for an adjudicatory hearing prior to the expiration of the juvenile speedy trial period.¹⁰⁷ At a hearing within days after the expiration of that period, the defense re-

96. *In re S.F.*, 22 So. 3d at 654.

97. 32 So. 3d 786 (Fla. 2d Dist. Ct. App. 2010).

98. 24 So. 3d 779 (Fla. 5th Dist. Ct. App. 2009).

99. *Goettel*, 32 So. 3d at 786; *Harp*, 24 So. 3d at 780.

100. *Goettel*, 32 So. 3d at 787; *Harp*, 24 So. 3d at 781.

101. *Goettel*, 32 So. 3d at 786.

102. *Harp*, 24 So. 3d at 781.

103. *Id.*

104. 26 So. 3d 570 (Fla. 2010).

105. *Id.* at 572.

106. *Id.*

107. *Id.*

requested a continuance to participate in discovery.¹⁰⁸ “[A] few days after the adult speedy trial period expired, the State direct-filed an information in felony court.”¹⁰⁹ The question before the Supreme Court was the effect of a post-expiration defense continuance on the procedural provisions of the speedy trial rule.¹¹⁰ The Court noted that, while under both the state and federal Constitution, a criminal defendant has the right to a speedy and public trial, a defendant, including a juvenile, may waive the right to a speedy hearing.¹¹¹ After a detailed review of the complexities of the issue, the Court held that the State is entitled to a “recapture period” under Florida law.¹¹² A continuance chargeable to the defense which is made after expiration of the speedy trial period but prior to a defendant filing a notice of expiration, waives the defendant’s speedy trial right under the default period of Florida law.¹¹³

Among the various dispositional alternatives available in a delinquency case in Florida is revocation of a juvenile’s driver license. Interpretation of this type of disposition alternative was before the Second District Court of Appeal in *State v. K.R.G.*¹¹⁴ In that case, the juvenile committed the act of possession of marijuana.¹¹⁵ The juvenile court withheld adjudication and placed the child on probation and declined to comply with certain mandatory provisions which required it to revoke the child’s driver’s license for the delinquent act of marijuana possession.¹¹⁶ However, because the provision is mandatory, the appellate court reversed.¹¹⁷

Although a juvenile is entitled to counsel free of charge if indigent, under Florida law, the legislature has provided for assessment of attorney’s fees against the child who has been found to have committed an act of delinquency.¹¹⁸ The question before the Fifth District Court of Appeal in *W.Z. v. State*¹¹⁹ was whether it was appropriate to enter an order requiring the child and his parents to pay attorney’s fees of fifty dollars for the work of the public defender and for his parents to further pay the cost of two mental competency exams which had been ordered as a result of motions filed by the pub-

108. *Id.*

109. *Nelson*, 26 So. 3d at 572.

110. *Id.* at 571–72.

111. *Id.* at 576.

112. *Id.* at 580.

113. *Id.*

114. 12 So. 3d 1269 (Fla. 2d Dist. Ct. App. 2009).

115. *Id.* at 1269.

116. *Id.*

117. *Id.* at 1269–70.

118. *See* FLA. STAT. § 985.033(1) (2010).

119. 35 So. 3d 51 (Fla. 5th Dist. Ct. App. 2010).

lic defender.¹²⁰ After affirming the award of attorney's fee, the appellate court reversed as to the cost of the mental competence evaluations because there is no provision in state law authorizing such assessment.¹²¹ The court could not find anything in statute or case law to support the proposition that the child or the child's parents were obligated to pay these costs.¹²² The court thus reversed as to the latter charge.¹²³

The waiver of counsel in delinquency cases comes up regularly in Florida. Of course, the right to counsel is predicated upon the 1967 Supreme Court of the United States opinion in *In re Gault*.¹²⁴ The right to counsel is so important that Florida has established detailed rules of juvenile procedure governing the waiver process. In *N.S. v. State*,¹²⁵ the trial court advised the child at the disposition hearing that the child had a right to have counsel appointed during which the State presented evidence regarding restitution.¹²⁶ However, the trial court did not obtain the required written waiver.¹²⁷ Furthermore, the record in the case did not show that an attorney discussed the pros and cons of the waiver with the child.¹²⁸ The *Florida Rules of Juvenile Procedure* provide that waiver of counsel may only happen "after the child has had a meaningful opportunity to confer with counsel" regarding the consequences of waiver and other relevant factors.¹²⁹ Furthermore, also pursuant to the *Florida Rules of Juvenile Procedure*, the child's "mother did not verify in writing that she had discussed waiving counsel" with the child or that waiver appeared to the mother to be knowing and voluntary.¹³⁰ While the court would normally remand for resentencing, because the child was placed on probation and an order was ultimately entered terminating supervision, reversal was not necessary.¹³¹

In another technical case involving waiver of counsel, in *A.M.E. v. State*,¹³² the child appeared at a hearing with her mother but with no counsel.¹³³ At that time the child "waived her right to counsel, signed a written

120. *Id.* at 51.

121. *Id.* at 51–52.

122. *Id.* at 52.

123. *Id.* at 53.

124. 387 U.S. 1 (1967).

125. 27 So. 3d 793 (Fla. 1st Dist. Ct. App. 2010).

126. *Id.* at 794.

127. *Id.*

128. *Id.*

129. See FLA. R. JUV. P. § 8.165(a).

130. *N.S.*, 27 So. 3d at 794.

131. *Id.*

132. 18 So. 3d 1251 (Fla. 2d Dist. Ct. App. 2009).

133. *Id.* at 1251.

waiver of counsel, and entered a guilty plea.”¹³⁴ In addition, the mother signed the written waiver.¹³⁵ When the child later appeared for a dispositional hearing, the trial court did not renew the offer of counsel before adjudicating the child delinquent and ordering placement.¹³⁶ The appellate court held that neither the trial court’s inquiry of the child nor the waiver form fully complied with the *Florida Rules of Juvenile Procedure*.¹³⁷ The State properly conceded error.¹³⁸ However, because the child turned nineteen, the State also raised the issue of whether the child was any longer “under the jurisdiction of the juvenile division of the trial court for purposes of remand.”¹³⁹ The appellate court held that it could remand although it did not decide whether other issues that might be raised once the case was remanded would be within the jurisdiction of the trial court.¹⁴⁰

Waiver of counsel is also relevant in delinquency cases involving revocation of probation. In *L.D.S.J. v. State*,¹⁴¹ a child challenged the revocation of probation in which he entered a plea without the assistance of counsel.¹⁴² The argument on appeal was that the trial court did not determine whether the child intelligently and knowingly waived the right to counsel nor whether the court also failed to conduct a thorough inquiry into the child’s voluntariness of the waiver.¹⁴³ The appellate court agreed with the appellant.¹⁴⁴ Regrettably, as the appellate court explained, “The record is devoid of any discussion regarding whether Appellant had an opportunity and whether that opportunity was meaningful, to confer with an attorney regarding his right to counsel.”¹⁴⁵ The appellate court also explained that the “trial court failed to inquire about the child’s comprehension of the offer” or his capacity to make the choice or even the existence of any unusual circumstances that would preclude the child “from exercising the right of self-representation.”¹⁴⁶ The court rejected the argument that the child and his mother signed a written waiver of rights form as being adequate.¹⁴⁷ However, even in that situation,

134. *Id.*

135. *Id.*

136. *Id.*

137. *A.M.E.*, 18 So. 3d at 1251.

138. *Id.* at 1252.

139. *Id.*

140. *Id.*

141. 14 So. 3d 289 (Fla. 1st Dist. Ct. App. 2009) (per curiam).

142. *Id.* at 290.

143. *Id.*

144. *Id.*

145. *Id.* at 290–91.

146. *L.D.S.J.*, 14 So. 3d at 291.

147. *Id.*

there was no showing that anyone discussed with the child “the decision to waive his right to counsel” or that the child “made a knowing and voluntary decision to waive” it.¹⁴⁸ While it did not comment on the variety of ways that the trial court failed to comply with the proper procedures for waiver, the appellate court reversed and remanded.¹⁴⁹

The Supreme Court of Florida recently addressed the issue of juvenile restitution, an issue that had come up regularly before the intermediate appellate courts over a number of years.¹⁵⁰ The matter came before the Court in *J.A.B. v. State*¹⁵¹ on the basis of a conflict between the First and Second District Courts of Appeal.¹⁵² The issue was whether the trial court may set the amount of restitution and payment in a reasonable amount upon evidence showing the earnings that the juvenile may reasonably be expected to make and may also establish a commencement date for payment so long as the court provides the juvenile with a reasonable amount of time to obtain employment.¹⁵³ The Supreme Court first ruled that restitution is a creature of statute and thus was obligated to analyze the language of the Florida law and legislative intent.¹⁵⁴ The Court concluded that given the language of the statute and the policies underlining it as well as the wide discretion given judges in awarding restitution, “a hard and fast rule” prohibiting a judge from establishing the commencement date for payment of restitution and requiring that the payments only be ordered contingent upon the juvenile actually getting employment is inappropriate.¹⁵⁵ However, the Court then added the caveat that when the State seeks enforcement of an order of restitution based upon nonpayment, the issue before the court would be whether the “juvenile has the ability to pay the amount” and that the “juvenile’s inability to find employment despite reasonable efforts” would also be relevant.¹⁵⁶

A second restitution case is *J.P. v. State*.¹⁵⁷ In a brief case involving a theft of projectors from a Miami high school in which the appellant was

148. *Id.*

149. *Id.* Waiver of the right to counsel is an important and basic matter with which the courts should be familiar. See Michael J. Dale, 2005-2006 *Survey of Florida Juvenile Law*, 31 NOVA L. REV. 577, 579–82 (2007) [hereinafter Dale, 2005-2006 *Survey*].

150. See Dale, 2009 *Survey*, *supra* note 30, at 216–17.

151. 25 So. 3d 554 (Fla. 2010).

152. See *J.A.B. v. State*, 993 So. 2d 1150, 1155 (Fla. 2d Dist. Ct. App. 2008) (en banc), approved by 25 So. 3d 554 (Fla. 2010); *J.A.M. v. State*, 601 So. 2d 278, 279 (Fla. 1st Dist. Ct. App. 1992) (per curiam), overruled in part by *J.A.B.*, 25 So. 3d at 555.

153. *J.A.B.*, 25 So. 3d at 555.

154. *Id.*

155. *Id.* at 560.

156. *Id.*

157. 35 So. 3d 180 (Fla. 3d Dist. Ct. App. 2010).

charged with grand theft, the question was whether the principal's testimony was adequate to establish the value of the two projectors at the time of the theft.¹⁵⁸ The appellate court noted the principal's testimony of the projectors' purchase price, the projectors were brand new when installed, and the theft occurred two months after installation of the projectors. Further, the court found that it would cost a specific amount to replace each one, which was adequate to establish the fair market value of the property at the time the theft occurred.¹⁵⁹

The proper influence of Miranda warnings to juveniles also comes up regularly in the Florida courts.¹⁶⁰ In *D.B. v. State*,¹⁶¹ a juvenile appealed from a "denial of a motion to suppress after entering a no contest plea to the charges of burglary of a dwelling, grand theft and criminal mischief."¹⁶² The child argued that he was not given Miranda warnings.¹⁶³ The court applied the totality of the circumstances test to conclude that a reasonable eleven-year-old would not feel free to leave the police interrogation room.¹⁶⁴ Since the court also found that the child was in custody, Miranda warnings were required.¹⁶⁵ The appellate court described the location as a small room, under camera surveillance, without the presence of the juvenile's mother.¹⁶⁶ The court further found that the purpose of the interview was to obtain incriminating evidence because the child was placed in the five-by-five interrogation room, left alone with the door closed for sixteen minutes, and when the police officer entered the room, he advised the child that the child's mother wanted him to tell the truth.¹⁶⁷

Search and seizure issues can also come up in the context of juvenile delinquency cases in Florida. This was the issue in *L.C. v. State*.¹⁶⁸ The child appealed, claiming a Fourth Amendment violation when a police officer performed a weapons search without first performing a pat-down on a fifteen-year old truant before placing her in the back of a police car to execute a statutory obligation to take the child to school.¹⁶⁹ The police officer

158. *Id.* at 181.

159. *Id.* at 181.

160. *See* Dale, 2007-2008 Survey, *supra* note 26, at 384.

161. 34 So. 3d 224 (Fla. 4th Dist. Ct. App. 2010).

162. *Id.* at 225.

163. *Id.*

164. *Id.* at 227.

165. *Id.*

166. *D.B.*, 34 So. 3d at 227.

167. *Id.* at 226.

168. 23 So. 3d 1215 (Fla. 3d Dist. Ct. App. 2009).

169. *Id.* at 1216.

had no basis to suspect the child of possessing any weapons.¹⁷⁰ The police officer searched all of her pockets and found a small bag of marijuana.¹⁷¹ The case turned on a technicality—the failure of the police officer to conduct a pat down prior to directly searching the child’s pockets.¹⁷² Also significant to the court’s analysis was the fact that the context in which the police officer took the child into custody was a truancy matter which, under Florida law, is not a crime.¹⁷³ Thus, in the absence of reasonable suspicion, the police officer was not justified in proceeding to a direct search of the child just because he felt uneasy for his safety.¹⁷⁴ A pat-down was required first.¹⁷⁵ The court thus reversed and remanded.¹⁷⁶

V. SCHOOL MATTERS

A detailed discussion of school discipline is beyond the purview of this survey.¹⁷⁷ In *A.B.E. v. School Board of Brevard County*,¹⁷⁸ a child appealed from a final administrative order of the School Board of Brevard County expelling her.¹⁷⁹ The middle school student was expelled from school after drinking alcohol and for activities which substantially disrupted the orderly conduct of the school.¹⁸⁰ The appellate court held that the school records did not contain competent substantial evidence to support the Board’s finding that the child was subject to expulsion.¹⁸¹ Specifically, the appellate court said that, under Florida law, the School Board’s power to punish the student’s conduct is limited to conduct that occurs on school premises or during transportation to and from the school premises.¹⁸² In the case at bar, the child’s actions in drinking alcohol occurred at home in the morning prior to going to school.¹⁸³ Thus, “the School Board could not punish her for con-

170. *Id.* at 1217.

171. *Id.*

172. *Id.* at 1219.

173. *L.C.*, 23 So. 3d at 1218 (citing *C.G. v. State*, 689 So. 2d 1246, 1247 (Fla. 4th Dist. Ct. App. 1997)).

174. *Id.* at 1220.

175. *Id.*

176. *Id.*

177. See 1 Michael J. Dale, *Representing the Child Client*, ¶¶ 6, 10 (Matthew Bender 3d ed. 2010).

178. 33 So. 3d 795 (Fla. 5th Dist. Ct. App. 2010).

179. *Id.* at 796.

180. *Id.* at 797.

181. *Id.* at 799.

182. *Id.* at 798.

183. *A.B.E.*, 33 So. 3d at 798.

suming the alcohol at home.”¹⁸⁴ The School Board could, however, punish her for being under the influence of alcohol while at school.¹⁸⁵ There was no evidence that the child was under the influence of alcohol because the evidence showed that she had taken only two sips of alcohol at home and then became sick at school.¹⁸⁶ Apparently, there was also no evidence that the child’s actions at school disrupted the school’s learning environment.¹⁸⁷ For these reasons, the appellate court reversed the expulsion.¹⁸⁸

VI. RIGHTS OF PUTATIVE FATHERS

The Supreme Court of Florida held in 2007, in *Heart of Adoptions, Inc. v. J.A.*,¹⁸⁹ that unmarried fathers were entitled, as a matter of due process, to notice of the obligations to file with Florida’s Putative Father Registry.¹⁹⁰ In a recent case, *K.D. v. Gift of Life Adoptions, Inc.*,¹⁹¹ an adoption agency provided some notice to an unmarried father who was in jail in another state.¹⁹² The adoption agency filed the petition for termination of rights pending adoption prior to the time it served the putative father with notice of the termination petition.¹⁹³ The putative father appealed from the trial court order granting summary judgment and terminating the father’s natural parental rights.¹⁹⁴ The appellate court reversed, finding that because the father was not provided with notice until after the petition was filed and was not served with notice of the intended adoption plan at any time, the procedure violated the father’s right to timely notice and opportunity to comply with obligations under Florida Putative Father Registry Law.¹⁹⁵

In a second case involving the rights of a putative father, a biological father sought rights to his child under circumstances where the child was born to a couple who was married. In *Schuler v. Guardian Ad Litem Program*,¹⁹⁶ the putative father and DCF appealed from a trial court order dismissing the putative father’s paternity action and placing the child with DCF for adop-

184. *Id.* at 799.

185. *Id.*

186. *Id.*

187. *Id.*

188. *A.B.E.*, 33 So. 3d at 799.

189. 963 So. 2d 189 (Fla. 2007).

190. *Id.* at 191.

191. 17 So. 3d 1244 (2d Dist. Ct. App. 2009).

192. *Id.* at 1244.

193. *Id.*

194. *Id.* at 1246.

195. *Id.* at 1248; *see* FLA. STAT. §§ 63.054(1), .062(2) (2010).

196. 17 So. 3d 333 (Fla. 5th Dist. Ct. App. 2009) (per curiam).

tion.¹⁹⁷ On appeal, the court affirmed on the ground that when a child becomes adoptable after the parent's parental rights are terminated, the child cannot become unadoptable when a third party, albeit the child's biological father, seeks to intervene.¹⁹⁸ Under Florida law, a biological father of a child born during the course of his mother's intact marriage is not the father of the child.¹⁹⁹ Rather, it is the mother's husband.²⁰⁰ It is only through a *Privette* hearing that the biological father successfully can intervene and obtain rights as against the biological parents.²⁰¹ And when the biological parent seeks to do so, it must be shown that doing so is in the best interest of the child, and the burden rests heavily upon the putative parent.²⁰²

VII. STATUTORY CHANGES

There were only a few significant statutory changes regarding dependency, TPR, and delinquency matters during the survey year. A provision in Chapter 39 dealing with confidential material such as medical, mental health, substance abuse, child welfare, education, and financial records among others held by a guardian ad litem were subject to the Open Government Sunset Review Act. However, that statute was changed by deleting the reference so as to increase the confidentiality of such records.²⁰³ Chapter 39 was also amended to obligate indigent parents to pay their application fee together with reasonable attorney's fees in dependency and TPR cases as occurs in other types of proceedings as governed by Chapter 57.²⁰⁴ A pilot program for attorneys ad litem, which had been fiscally terminated years earlier, was effectively repealed June 29, 2002.²⁰⁵

In the delinquency area, a significant change in Chapter 985 dealt with gender-specific programming, terminating the obligation of the Office of Program Policy Analysis and Government Accountability (OPPAGA) to conduct an analysis of programs for young females within the Department of Juvenile Justice.²⁰⁶ Statutory changes eliminating programs included the deletion of the pilot program concerned with the cost of supervision and

197. *Id.* at 335.

198. *Id.* at 336.

199. *Id.* at 335.

200. *Id.*

201. *See* Dep't of Health & Rehabilitative Servs. v. *Privette*, 617 So. 2d 305, 307 (Fla. 1993).

202. *Id.* at 308.

203. *See* FLA. STAT. § 39.0132(4)(a)(2) (2010).

204. *See id.* § 39.0134(1)

205. FLA. STAT. § 39.4086 (2009).

206. FLA. STAT. § 985.02(8)(a)-(b) (2010).

care.²⁰⁷ The goal of deleting the Task Force Development was to prevent children from becoming habitual juvenile offenders²⁰⁸ and the removal of the Department of Juvenile Justice's obligation to present an annual report on the performance of all assessment and treatment of serious and habitual offenders to various governmental officials.²⁰⁹

VIII. CONCLUSION

The Supreme Court of Florida decided just three juvenile law cases this survey year. The intermediate appellate courts, however, decided a substantial number of cases with a particular focus on termination and depth of analysis regarding parental rights matters.

207. FLA. STAT. § 985.0395.

208. *See id.* § 985.047.

209. *See id.*