Nova Law Review

Volume 40, *Issue* 1 2017 *Article* 3

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Abstract

The Supreme Court of Florida ruled in this survey year on two very important cases arising from the Supreme Court of the United States' 2012 opinion in *Miller v. Alabama*,1 which held unconstitutional the "sentencing scheme[s] . . . mandat[ing] life in prison without [the] possibility of parole for juvenile offenders."2

KEYWORDS: proceedings, termination, delinquency

2015 SURVEY OF JUVENILE LAW

MICHAEL J. DALE*

I. INTRODUCTION

The Supreme Court of Florida ruled in this survey year on two very important cases arising from the Supreme Court of the United States' 2012 opinion in *Miller v. Alabama*,[1] which held unconstitutional the "sentencing scheme[s] . . . mandat[ing] life in prison without [the] possibility of parole for juvenile offenders."[2] A series of Florida intermediate appellate court cases followed during this survey year, applying the Florida holdings as to *Miller*.[3] The Florida appellate courts continued to rule on a number of issues involving dependency and termination of parental rights ("TPR"), focusing in large part on rudimentary violations of procedural due process by the trial courts.[4] In the

* Professor of Law, Nova Southeastern University Shepard Broad College of Law. This Survey covers cases decided during the period from July 1, 2014 through June 30, 2015. The author thanks research assistants Michael Costello, Andree Quaresima, and Samantha Scheff and Research and References Services Librarian, Rob Beharriell, for their assistance in writing this Survey.

1. 132 S. Ct. 2455 (2012).

2. Falcon v. State, 162 So. 3d 954, 960 (Fla. 2015) (quoting *Miller*, 132 S. Ct. at 2469); Horsley v. State, 160 So. 3d 393, 394 (Fla. 2015) (quoting *Miller*, 132 S. Ct. at 2469).

3. *See Miller*, 132 S. Ct. at 2469; *Falcon*, 162 So. 3d at 958; *Horsley*, 160 So. 3d at 394, 397.

4. *See* Padgett v. Dep't of Health & Rehab. Servs., 577 So. 2d 565, 566, 569–70 (Fla. 1991); Dep't of Children & Families v. T.S., 154 So. 3d 1223, 1226 (Fla. 4th Dist. Ct. App. 2015).

delinquency area, restitution is a common dispositional alternative.[5] There, the appellate courts have on a number of occasions been obligated to reverse trial court decisions for improperly applying the restitution statute.[6]

Finally, and most importantly, the decades long shortcomings in the Florida dependency system—based in significant part on the lack of representation of children by lawyers, and the failure of Florida's Guardian ad Litem ("GAL") Program to both adequately and properly carry out its statutory role despite massive funding—have yet again remained a very serious problem during this survey year.[7]

II. DEPENDENCY PROCEEDINGS

In dependency proceedings, there must be competent and substantial evidence to form a basis for a finding of dependency.[8] Thus, a mother's homelessness and unemployment, standing alone, are insufficient to support a finding of prospective harm or neglect in a situation where the mother has not previously rejected services offered under Florida law, according to the Fourth District Court of Appeal in *E.R. v. Department of Children & Families*.[9]

In *N.J. v. Department of Children & Families (In re Interest of A.W.J.)*,[10] the Second District Court of Appeal reversed a finding of dependency premised upon a head injury to a child.[11] The only individual who testified at the adjudicatory hearing that the child's head injury was the result of abuse was a medical doctor.[12] However, first, the doctor was not asked whether she could provide her opinion within a reasonable degree of medical probability and, second, the doctor's opinion of abuse was not substantiated by record evidence but was simply a subjective opinion, which was thus not legally sufficient to support the trial court's adjudication of dependency.[13]

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5. *See* L.W. v. State, 163 So. 3d 598, 599 (Fla. 3d Dist. Ct. App. 2015); A.D. v. State, 152 So. 3d 798, 798 (Fla. 4th Dist. Ct. App. 2014); C.W. v. State, 150 So. 3d 882, 883 (Fla. 2d Dist. Ct. App. 2014).

6. *See* FLA. STAT. § 985.437(2) (2014); *L.W.*, 163 So. 3d at 601; *A.D.*, 152 So. 3d at 799; *C.W.*, 150 So. 3d at 883.

7. *See* Michael J. Dale, *2014 Survey of Juvenile Law*, 39 NOVA L. REV. 37, 62–63 (2014) [hereinafter Dale, *2014 Survey of Juvenile Law*]; Michael J. Dale & Louis M. Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated*, 35 NOVA L. REV. 305, 310, 329–31 (2011) [hereinafter Dale & Reidenberg, *Providing Attorneys for Children*]; *infra* Section V.B.

8. J.A.B. v. State, 148 So. 3d 151, 151–52 (Fla. 5th Dist. Ct. App. 2014).

9. 143 So. 3d 1131, 1133, 1136 (Fla. 4th Dist. Ct. App. 2014). *See generally* FLA. STAT. ch. 39.

10. 143 So. 3d 1109 (Fla. 2d Dist. Ct. App. 2014).

11. *Id.* at 1110–11.

12. *Id.* at 1111.

13. *Id.* at 1111–12.

In *Department of Children & Families v. T.S.*,[14] the intermediate appellate court reversed on a more fundamental ground.[15] The Department and the child appealed the dismissal of a petition for dependency and arraignment, arguing that the trial court had committed a fundamental error violating a child's due process rights by dismissing the petition without notice or an opportunity to be heard.[16] Recognizing the basic due process violation involving notice and an opportunity to be heard, the appellate court reversed.[17]

Case plans are an important part of dependency proceedings resulting, as they do, from the implementation of the federal Child Abuse Protection and Treatment Act, commonly known as CAPTA.[18] In *M.P. v. Department of Children & Families*,[19] the appellate court noted that generic case plans that do not relate to the individual needs and circumstances of the particular family are in violation of section 39.603 of the Florida Statutes.[20] In the case at bar, there being no evidence of the father's use of drugs, a case plan that ordered the father to submit to random drug screenings as part of the case plan constituted reversible error.[21] A similar result occurred in *M.B.W. v. Department of Children & Families* (*In re Interest of M.W.*).[22] In that dependency case, the Department conceded error in part as tasks were required beyond a parenting class, which had no relationship to the dependency as to the father.[23]

The issue of nexus—the tie between a parent's problem and risk of danger to the children—has perplexed the Florida dependency courts for almost twenty-five years since the Supreme Court of Florida decided *Padgett v. Department of Health & Rehabilitative Services*[24] in 1991.[25] In *E.H. v. Department of Children & Families*,[26] the appellate court affirmed the trial court finding that there was sufficient evidence to establish a substantial risk of imminent abuse to a child in a dependency case.[27] In *E.H.*, there were incidents of domestic violence, unemployment with an eviction from the home, and a mother with a mental health issue that had gone untreated, which was responsible for her previous child being removed from her care after she heard

14. 154 So. 3d 1223 (Fla. 4th Dist. Ct. App. 2015).
15. *Id.* at 1224.
16. *Id.*
17. *Id.* at 1226.
18. 42 U.S.C. § 622 (2012).
19. 159 So. 3d 341 (Fla. 4th Dist. Ct. App. 2015).
20. *Id.* at 343–44; *see also* FLA. STAT. § 39.603(1)(f) (2014).
21. *M.P.*, 159 So. 3d at 344.
22. 163 So. 3d 1229 (Fla. 2d Dist. Ct. App. 2015).
23. *Id.* at 1229.
24. 577 So. 2d 565 (Fla. 1991).
25. *Id.* at 570–71; Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 60–61.
26. 147 So. 3d 616 (Fla. 4th Dist. Ct. App. 2014).
27. *Id.* at 620–21.

voices encouraging her to shake that child.[28] In *E.H.*, the appellate court established that the mother's failure to recognize her mood disorder and her lack of participation in services, along with multiple domestic violence incidents between the mother and the father where the mother continued to engage in the relationship with the father despite the parent-involved nature of their relationship, constituted evidence of a substantial risk of imminent abuse to the child.[29]

An important technical procedural issue was before the First District Court of Appeal in *W.W. v. Guardian ad Litem Program*.[30] The issue was whether an order entered on a post-dependency motion seeking relief fully resolving the issues that were raised in the motion is reviewed by appeal rather than writ.[31] Applying a recent amendment to Rule 9.130(a)(4) of the Florida Rules of Appellate Procedure,[32] the appellate court concluded that orders entered on post-dependency motions seeking relief that fully resolve the issues raised in the motion are to be viewed as final orders under the appellate rule.[33]

Cases involving immigrant children are becoming more commonplace in the Florida dependency courts as a result of the influx of such children nationally.[34] In *In re Y.V.*,[35] a private petition for dependency was filed on behalf of a minor "living in Florida after illegally emigrating alone from Honduras."[36] The petition was dismissed by the trial court because the harm relating to the dependency took place outside of Florida, and "the court viewed the petition as an attempt to circumvent federal immigration law[]."[37] The appellate court reversed, finding that there was jurisdiction and that Florida

28. *Id.* at 617.

29. *Id.* at 620–21; *see also* W.R. v. Dep't of Children & Families, 137 So. 3d 1078, 1079 (Fla. 4th Dist. Ct. App. 2014) (finding that substantial evidence of harm to one child alone was not sufficient evidence to find substantial risk of imminent abuse to another child); E.M.A. v. Dep't of Children & Families, 795 So. 2d 183, 187 (Fla. 1st Dist. Ct. App. 2001) (finding that a substantial risk of harm can be met without past acts of harm where a mental illness is the type that would impact the parent's "judgment and ability to perform basic daily caretaking tasks").

30. 159 So. 3d 999, 1000 (Fla. 1st Dist. Ct. App. 2015).

31. *Id.*

32. *In re* Amendments to the Fla. Rules of Appellate Procedure, 2014 WL 5714099, at *7–8 (Fla. Nov. 6, 2014) (specifying the amendment to Rule 9.130(a)(4)).

33. *Id.*; *W.W.*, 159 So. 3d at 1000–01.

34. *See, e.g.*, WENDI J. ADELSON, SPECIAL IMMIGRANT JUVENILE STATUS IN FLORIDA: A GUIDE FOR JUDGES, LAWYERS, AND CHILD ADVOCATES 5, 7 (2007), http://media.law.miami.edu/clinics/children-and-youth/pdf/2007/special-immigrant-juvenile-manual-2007.pdf.

35. 160 So. 3d 576 (Fla. 1st Dist. Ct. App. 2015).

36. *Id.* at 577.

37. *Id.*

dependency law applies.[38] Although the appellate court reversed, it did note that "the trial court [was] not alone in its misgivings about the use of the dependency [proceedings] as a conduit to achiev[e] a favorable immigration status."[39] The appellate court also pointed to two provisions in chapter 39 of the Florida Statutes that applied to this child: abandonment, abuse or neglect by the parent and having no parent capable of providing supervision and care.[40] The appellate court then noted that the only reason the child was not in imminent risk of injury was because there is a responsible adult caring for the child on a voluntary basis.[41]

Domestic violence can be the source of dependency court jurisdiction.[42] Issues of domestic violence can also arise in the context of petitions to protect and against domestic violence pursuant to section 741.30 of the Florida Statutes.[43] In *Hair v. Hair*,[44] the appellate court reversed and remanded the trial court's decision with instructions to vacate a final judgment of injunction for protection.[45] The appellate court found that the petitioner did not possess "sufficient evidence that she was a victim of domestic violence or was in imminent danger [to become] a victim" as provided in the Florida Statutes.[46] Specifically, it found that the daughter did not wish to see or interact with her mother and that was not a basis for the issuance of a domestic violence restraining order.[47]

III. TERMINATION OF PARENTAL RIGHTS

Under Florida law, the petitioner must prove: first, that there are statutory grounds for termination of parental rights; second, that termination is in the "manifest best interest of the child;" and third, that termination is the least restrictive means to protect the child from serious harm.[48] In *B.K. v. Department of Children & Families*,[49] the appellate court addressed the application of the three standards in a case in which the father was

38. *Id.* at 581.
39. *Id.* at 579, 581.
40. *In re Y.V.*, 160 So. 3d at 578; *see also* FLA. STAT. § 39.01(15)(a), (e) (2014).
41. *In re Y.V.*, 160 So. 3d at 579.
42. *See* Michael J. Dale, *2007–2008 Survey of Juvenile Law*, 33 NOVA L. REV. 357, 357 (2009).
43. FLA. STAT. § 741.30.
44. 159 So. 3d 984 (Fla. 4th Dist. Ct. App. 2015).
45. *Id.* at 986.
46. *Id.* at 985; *see also* FLA. STAT. § 741.30.
47. *Hair*, 159 So. 3d at 985.
48. FLA. STAT. §§ 39.806, .810; Padgett v. Dep't of Health & Rehab. Servs., 577 So. 2d 565, 570–71 (Fla. 1991).
49. 166 So. 3d 866 (Fla. 4th Dist. Ct. App. 2015).

incarcerated.[50] Under Florida law, the substantive standard regarding incarceration is that the incarceration be for a *significant portion* of the child's life.[51] In *B.K.*, the father was scheduled for release after nearly eight and a half years of the child's life.[52] Here, the father would be "incarcerated for nearly fifty percent of [the child's] minority" at the point the father is to be released from prison.[53] The child had also been in foster care for a period of time, and "at the time of trial, the child was nearly six years old."[54] On the question of *manifest best interest*, the trial court found no bond with the child, no relative placement and that the child did not know who her father was.[55] Finally, the trial court found and the appellate court agreed based upon clear and convincing evidence that termination was in the best interest of the child.[56] Citing that termination was the least restrictive means of protecting the child, the appellate court noted that merely sending letters and cards to a child is not enough because "then it would be difficult indeed to terminate the rights of any parent incarcerated for a lengthy period of time, regardless of the child's lack of a real relationship with her parent. This [would] leave the child without any [parenting] at all, which would not be in her best interest."[57] The appellate court thus affirmed.[58]

On the other hand, in *D.S. v. Department of Children & Families*,[59] the court reversed a finding of termination of parental rights arising out of a father's incarceration.[60] In *D.S.*, "[i]n percentage terms, the father's incarceration amount[ed] to approximately 27[%] to 33[%] of the children's minorit[y]."[61] In doing so, the appellate court cited *B.C. v. Florida Department of Children & Families*,[62] in which the Supreme Court of Florida held that the percentages in *D.S.* would "not constitute a substantial portion of the children's minorit[y]."[63] While terminating the parental rights of the father to one of the three children,

50. *Id.* at 873.
51. *Id.*; *see also* FLA. STAT. § 39.806(1)(d)(1).
52. *B.K.*, 166 So. 3d at 873.
53. *Id.* at 874.
54. *Id.*
55. *Id.* at 872.
56. *Id.* at 872–73. "[T]he State must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child. . . . [and that] termination of those rights is the least restrictive means of protecting the child from serious harm." Padgett v. Dep't of Health and Rehab. Servs., 577 So. 2d 565, 571 (Fla. 1991).
57. *B.K.*, 166 So. 3d at 877.
58. *Id.*
59. 164 So. 3d 29 (Fla. 4th Dist. Ct. App. 2015).
60. *Id.* at 36.
61. *Id.* at 34.
62. 887 So. 2d 1046 (Fla. 2004).
63. *Id.* at 1054–55; *D.S.*, 164 So. 3d at 34.

the court did not find termination as to the other two.[64] Those children were in a stable home, not in the custody of the Department, and the father maintained a close relationship, given the father's incarceration, with the children.[65] Specifically, they knew who their father was and had "regular interaction with him, [which included] regular phone calls, letters, and visits."[66] At the time of his release, the children would be eleven and six.[67] Because they were with relatives and still had contact with their father, and there being no evidence of harm to the children, termination was not the least restrictive means to prevent harm, and the appellate court reversed.[68]

Whether termination of parental rights is the least restrictive means of protecting the child from harm, the third question before the trial court in any termination of parental rights case, was on appeal in two separate cases during this reporting cycle.[69] In *A.H. v. Department of Children & Families*,[70] a parent appealed termination of her parental rights as to her son on the ground that termination was not the least restrictive means of protecting the child from harm.[71] The State conceded error on this point.[72] The appellate court reviewed the record in which the trial court created a permanent guardianship for the child.[73] However, "there [was] no evidence that the mother's irregular contact[s]" caused harm to the child, although there was evidence "that the child had a strong bond with the permanent guardian and was doing . . . well" there, the child "also enjoyed his visits with [his] mother and his siblings and [wanted] to maintain a relationship with them."[74] Under those circumstances, termination of parental rights was not the least restrictive means of protecting the child from harm.[75] Interestingly, the GAL program apparently did not concede error.[76] The GAL program, although the record does not reflect whether the individual was qualified as an expert, testified that the parents were not "'bonded to [the child] at all. . . . Emotionally and mentally it would be devastating to take him

64. *D.S.*, 164 So. 3d at 34–36.
65. *Id.* at 35.
66. *Id.*
67. *Id.*
68. *Id.* at 36.
69. *See* C.D. v. Fla. Dep't of Children & Families, 164 So. 3d 40, 41 (Fla. 1st Dist. Ct. App. 2015); A.H. v. Dep't of Children & Families, 144 So. 3d 662, 664 (Fla. 1st Dist. Ct. App. 2014).
70. 144 So. 3d 662 (Fla. 1st Dist. Ct. App. 2014).
71. *Id.* at 664.
72. *Id.*
73. *Id.* at 664, 666.
74. *Id.* at 666.
75. *A.H.*, 144 So. 3d at 666.
76. *Id.* at 665.

out of his home [with the permanent guardian].'"[77] On the basis of this opinion, "[t]he GAL recommended termination of parental rights [based on] the . . . best interests of the child so [that] he could receive permanency through adoption."[78] By reversing, the appellate court rejected this lay opinion.[79] In fact, contrary to what occurred in this case, the GAL guidelines state that guardians ad litem shall not offer expert opinions.[80]

In *C.D. v. Florida Department of Children & Families*,[81] the appellate court reversed in part on the basis of the trial court's misinterpretation of *A.H.*[82] The appellate court held that first, the trial court ruling was in error because it was at odds with its own factual finding that the children did have a bond with their parents, and second, the trial court misconstrued age, which the "court held that TPR [could be] the least restrictive means of protecting a child from harm despite the fact that there was *little or no bond* between the child and [the parent]."[83]

Here, again, the appellate court rejected the opinion of the GAL who argued that TPR was the least restrictive means of preventing harm to the children.[84] The appellate court held that the GAL's opinion on appeal was "diametrically opposed to the position it took below in which it argued that the children would not be harmed by TPR because their aunt would allow them to have contact with the [m]other."[85]

The interplay of rights of putative fathers and termination of parental rights based upon abandonment was before the Fourth District in *A.S. v. Department of Children & Families*.[86] The father, whose paternity was established approximately a year after the child was born, appealed from a termination of parental rights adjudication.[87] The mother had played a nonexistent role in the child's life and termination had been entered against her.[88] The father did not know that he was the parent of the child until a

77. *Id.* (alterations in original).
78. *Id.*
79. *See id.* at 666.
80. *See A.H.*, 144 So. 3d at 664–65; FLA. GUARDIAN AD LITEM PROGRAM, FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS 9 (2015), http://www.guardianadlitem.org/wp-content/uploads/2014/08/Standards_Final_2015.pdf [hereinafter 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS].
81. 164 So. 3d 40 (Fla. 1st Dist. Ct. App. 2015).
82. *Id.* at 43–44; *see also A.H.*, 144 So. 3d at 666.
83. *C.D.*, 164 So. 3d at 43–44.
84. *Id.*
85. *Id.* at 44.
86. 162 So. 3d 335, 336–37 (Fla. 4th Dist. Ct. App. 2015).
87. *Id.* at 337.
88. *Id.* at 336.

paternity test was taken a year after the child was born.[89] Even then, he did not learn that he was the father for another approximately four months.[90] Once it was determined that he was the father, he began taking "steps to begin forming a relationship with [the child]."[91] Despite this, the trial court entered an order terminating the father's parental rights on the ground of abandonment.[92] The appellate court recognized that the definition of parent "does not include . . . an alleged or prospective parent unless the parental status falls within the terms of [section] 39.503(1) or [section] 63.062(1)."[93] Because the Department of Children and Families ("DCF") failed to utilize the proper provisions of chapter 39 of the Florida Statutes to locate the father and because the court could only consider whether the father abandoned the child once the father's paternity was established, the trial court erroneously relied upon the failure to take affirmative steps to establish paternity prior to that time.[94] The appellate court held that the trial court was not presented with clear and convincing evidence of abandonment.[95] And finally, the appellate court held that the father "was never offered a case plan despite [the fact that there was] no indication in the record that he was unable to comply with [it]."[96] On these bases, the appellate court reversed.[97]

Periodically, cases appear concerning the proper procedures for appeals in child welfare cases.[98] *R.W. v. Department of Children & Families*[99] involved the question of whether "the trial court erred in denying [a] post-judgment motion to set aside the surrender" of parental rights for lack of jurisdiction.[100] In *R.W.*, an expedited petition was filed by DCF to terminate the mother's parental rights to her child where the mother had executed a sworn consent to surrender those rights.[101] However, after receiving the order, the mother filed a motion claiming "that the judgment was inconsistent with the trial court's oral ruling on the mother's visitation rights pending adoption of the child. The trial court denied the motion, and the mother thereafter timely filed a notice of

89. *Id.* at 337.
90. *Id.*
91. *A.S.*, 162 So. 3d at 337.
92. *Id.* at 337–38; *see also* FLA. STAT. §§ 39.01(1), 39.503(1), 63.062(1) (2014).
93. *A.S.*, 162 So. 3d at 338 (first alteration in original) (quoting FLA. STAT. § 39.01(49)); *see also* FLA. STAT. §§ 39.503(1), 63.062(1).
94. FLA. STAT. § 39.803(8); *A.S.*, 162 So. 3d at 339.
95. *A.S.*, 162 So. 3d at 339.
96. *Id.* at 340.
97. *Id.*
98. *See, e.g.*, R.W. v. Dep't of Children & Families, 164 So. 3d 15, 17–18 (Fla. 1st Dist. Ct. App. 2015).
99. 164 So. 3d 15 (Fla. 1st Dist. Ct. App. 2015).
100. *Id.* at 16.
101. *Id.*

appeal."[102] However, "[p]rior to filing her initial brief, the mother filed a motion asking [the appellate] court to 'relinquish partial jurisdiction [so that] the trial court'" could consider the mother's motion for reconsideration.[103] The appellate court viewed the motion as one for relief from judgment and granted the motion, relinquishing jurisdiction.[104] After an evidentiary hearing, "the trial court . . . entered an order denying the motion for reconsideration."[105] The mother did not file a notice of appeal challenging that order but instead filed a status report to the appellate court.[106] The appellate court entered the filing and instructed the mother to have her initial brief filed.[107] Because "the mother did not file a notice of appeal seeking review of the order denying her motion for reconsideration," the court on appeal refused to interpret the status report as a notice of appeal.[108] Having "relinquished jurisdiction [for] the trial court to rule on the motion for reconsideration" in the absence of an appeal from the order on the motion for relief in judgment, the appellate court had no preserved issue before it and thus, affirmed the final judgment terminating the mother's parental rights.[109]

IV. JUVENILE DELINQUENCY

On March 19, 2015, the Supreme Court of Florida decided two cases involving application of the Supreme Court of the United States' opinions in *Graham v. Florida*[110] and *Miller*.[111] In *Graham*, the Supreme Court of the United States ruled that the Eighth Amendment does not allow a juvenile defendant to be sentenced to life in prison without parole for non-homicide crimes.[112] In *Miller*, the Supreme Court of the United States held that juveniles are constitutionally different from adults for purposes of sentencing based upon their diminished capacity and greater prospects for reform, and it held that the Eighth Amendment forbids the courts from sentencing juveniles to life in prison without the possibility of parole in capital cases.[113]

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102. *Id.* at 17.
103. *Id.*
104. *R.W.*, 164 So. 3d at 17–18.
105. *Id.* at 17.
106. *Id.*
107. *Id.*
108. *See id.* at 18.
109. *R.W.*, 164 So. 3d at 18.
110. 560 U.S. 48 (2010).
111. *See id.* at 82; Miller v. Alabama, 132 S. Ct. 2455, 2460, 2475 (2012); Falcon v. State, 162 So. 3d 954, 956, 959–60, 963–64 (Fla. 2015); Horsley v. State, 160 So. 3d 393, 394, 405–06, 409 (Fla. 2015).
112. *Graham*, 560 U.S. at 74, 82; *see also* U.S. CONST. amend. VIII.
113. *Miller*, 132 S. Ct. at 2469, 2474–75; *see also* U.S. CONST. amend. VIII.

Two Supreme Court of Florida cases followed the Supreme Court of the United States' rulings.[114] In *Falcon v. State*,[115] the Supreme Court of Florida held that *Miller* should be read retroactively.[116] In *Horsley v. State*,[117] the Supreme Court of Florida held that the remedy in terms of a sentencing option in order to comply with *Miller* does not require revival of the Florida statute regarding life with the possibility of parole after twenty-five years.[118]

The *Horsley* case involved post-*Miller* and *Graham* convictions of juveniles as adults based upon the Supreme Court of the United States' conclusion that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders."[119] The Supreme Court of Florida rejected the doctrine of statutory revival, which had been argued by the State.[120] The State took the position that the only possible sentencing options to comply with *Miller* were life without parole or the possibility of parole after twenty-five years.[121] The Supreme Court of Florida concluded that the recent change in the Florida Statute was effective on July 1, 2014, and should apply to those juvenile offenders whose sentences were for crimes committed prior to July 1, 2014, but after *Miller* and *Graham*.[122] The Florida Statute from 2014 governed those who did the killing and those who did not actually kill or attempt to kill.[123] The Legislature then added a detailed value process in the same statute.[124]

In *Falcon*, the Supreme Court of Florida undertook an analysis of whether *Miller* should be applied retroactively to juveniles who were convicted of capital offenses prior to the Supreme Court of the United States' decision in that case.[125] The Supreme Court of Florida ruled that *Miller* should be given retroactive effect based upon its retroactivity test set forth in *Witt v. State*.[126] The Court relied upon the principle set out in *Witt*, finding that *Miller*

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114. *See Falcon*, 162 So. 3d at 955, 959, 964; *Horsley*, 160 So. 3d at 394, 397, 408–09.

115. 162 So. 3d 954 (Fla. 2015).

116. *Id.* at 956, 963–64; *see also Miller*, 132 S. Ct. at 2475.

117. 160 So. 3d 393 (Fla. 2015).

118. *Id.* at 395, 409; *see also* FLA. STAT. § 775.082(3)(b)(2)(a) (2014); *Miller*, 132 S. Ct. at 2475.

119. *Horsley*, 160 So. 3d at 394 (quoting *Miller*, 132 S. Ct. at 2469); *see also* U.S. CONST. amend. VIII; *Miller*, 132 S. Ct. at 2469, 2475; Graham v. Florida, 560 U.S. 48, 74, 82 (2010).

120. *Horsley*, 160 So. 3d at 395.

121. *Id.*; *see also Miller*, 132 S. Ct. at 2469.

122. *See Horsley*, 160 So. 3d at 394–95, 406, 408–09.

123. FLA. STAT. § 775.082(1)(b)(1); *see also Horsley*, 160 So. 3d at 406.

124. Act effective July 1, 2014, ch. 2014-220, § 7, 2014 Fla. Laws 2869, 2876–77.

125. Falcon v. State, 162 So. 3d 954, 955 (Fla. 2015); *Miller*, 132 S. Ct. at 2469.

126. 387 So. 2d 922, 926 (Fla. 1980); *Falcon*, 162 So. 3d at 956; *see also Miller*, 132 S. Ct. at 2475.

constitutes a "*development of fundamental significance* and therefore, must be given retroactive effect."[127]

The issue of retroactivity under *Miller* initially was to be before the Supreme Court of the United States this term in a pair of cases, *State v. Montgomery*[128] and *State v. Toca*.[129] Although the Supreme Court of the United States granted a writ of certiorari in both cases, *Montgomery* was the only case heard due to the procedural issues that resulted in the dismissal of *Toca*.[130] Montgomery had been in prison for nearly fifty years after a *guilty without capital punishment* verdict was returned by the jury.[131] This verdict automatically imposed a life sentence without possibility of parole.[132] Montgomery sought collateral relief from the State of Louisiana for his conviction, arguing that *Miller* should retroactively apply to his sentence because of the automatic life sentence without parole that was attached to his conviction.[133] The trial court denied his motion and the Supreme Court of Louisiana denied his writ because the court had previously held that *Miller* did not retroactively apply.[134] However, the Supreme Court of the United States held in *Montgomery* that *Miller does* retroactively apply because the rule established in *Miller* was "a new substantive rule of constitutional law."[135] New substantive rules "alter[] the range of conduct or the class of persons that the law punishes" and *must* apply retroactively.[136] The Court found that although the rule in *Miller* was substantive, an individual affected by it is afforded the procedural opportunity to demonstrate that he or she belongs to the given protected class.[137] Given the Supreme Court holding in *Montgomery*, the decision in *Falcon*, holding that *Miller* applied retroactively will be upheld.[138]

This Survey has repeatedly discussed restitution as one of a number of dispositional alternatives in delinquency cases in addition to commitment, probation, community service, revocation of driver's license and attendance at

127. *Falcon*, 162 So. 3d at 956 (quoting *Witt*, 387 So. 2d at 931); *see also Miller*, 132 S. Ct. at 2475.
128. 136 S. Ct. 718 (2016), *rev'g* 141 So. 3d 264 (La. 2014).
129. 141 So. 3d 265 (La. 2014).
130. Toca v. Louisiana, 135 S. Ct. 1197 (2015) (dismissing certiorari).
131. *Montgomery*, 136 S. Ct. at 725–26.
132. *Id.* at 726.
133. *Id.* at 726–27.
134. *Id.* at 727.
135. *Id.* at 732–35.
136. *Montgomery*, 136 S. Ct. at 732 (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)).
137. *Id.* at 735.
138. *See Montgomery*, slip op. at 14; *Miller*, 132 S. Ct. at 2469; Falcon v. State, 162 So. 3d 954, 956 (Fla. 2015).

school.[139] Despite what would appear to be a statute clear on its face, this past year the appellate courts dealt with seven separate cases involving the restitution provision provided in section 985.437 of the Florida Statutes.[140] In *J.A.B. v. State*,[141] the child appealed a $460 restitution award.[142] "At the restitution hearing, the victim stated that . . . it would cost between $460 and $490 to repair the damage to [the] vehicle" while giving no basis for his opinion.[143] No document was introduced demonstrating the actual repair cost.[144] Thus, as "the award was not supported by competent [and] substantial evidence," the appellate court reversed.[145]

In *K.R. v. State*,[146] a child appealed from a $479 restitution adjudication arising out of the theft of an automobile.[147] Because the victim simply testified that the amount "was like [$479] plus like there would be no tax," and there was no further evidence, the court on appeal reversed based upon the speculative amount testified to by the victim.[148]

In *S.M. v. State*,[149] the juvenile had been ordered to pay $8629 in restitution arising out of the theft of an automobile.[150] The appellate court affirmed on the grounds that the victim of the automobile expressed an opinion as to the value of the automobile basing the opinion on information obtained from a website, such as the *Kelley Blue Book*.[151] However, in so ruling, the appellate court held that taking judicial notice of an online *Kelley Blue Book* evaluation, although it did not occur in this case, would not comply with the Florida Rules of Evidence.[152] The appellate court explained that there needed to be evidentiary demonstration that the *Kelley Blue Book* website had the "level

139. FLA. STAT. § 985.455(1)–(2) (2014); Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 53.

140. K.R. v. State, 155 So. 3d 507, 509 (Fla. 4th Dist. Ct. App. 2015); L.W. v. State, 163 So. 3d 598, 599–601 (Fla. 3d Dist. Ct. App. 2015); S.M. v. State, 159 So. 3d 966, 967–68 (Fla. 2d Dist. Ct. App. 2015); A.D. v. State, 152 So. 3d 798, 798 (Fla. 4th Dist. Ct. App. 2014); C.W. v. State, 150 So. 3d 882, 883 (Fla. 2d Dist. Ct. App. 2014); J.A.B. v. State, 148 So. 3d 151, 151 (Fla. 5th Dist. Ct. App. 2014); M.K. v. State, 143 So. 3d 428, 430 (Fla. 4th Dist. Ct. App. 2014); *see also* FLA. STAT. § 985.437(1)–(2).

141. 148 So. 3d 151 (Fla. 5th Dist. Ct. App. 2014).

142. *Id.* at 151.

143. *Id.*

144. *Id.*

145. *Id.* at 151–52.

146. 155 So. 3d 507 (Fla. 4th Dist. Ct. App. 2015).

147. *Id.* at 508–09.

148. *Id.*

149. 159 So. 3d 966 (Fla. 2d Dist. Ct. App. 2015).

150. *Id.* at 967.

151. *Id.* at 967, 969.

152. *S.M.*, 159 So. 3d at 967, 969; *see also* FLA. STAT. § 90.202(12) (2014).

of accuracy [contradicted] with that of a court-recognized appraiser" or was "relied upon by a high percentage of car traders."[153]

A case involving both the competence of a victim to testify to the value of stolen goods and the failure of the State to demonstrate that the value of the stolen goods reached the statutory minimum was before the Fourth District in *M.K. v. State*.[154] In this delinquency case, the respondent appealed the order finding him guilty of first-degree petty theft, arguing that there was no competent evidence of the value of the stolen necklace so that the respondent could be charged with third-degree grand theft, which required that the property be "valued at $300 or more [or] . . . less than $5,000."[155] Because the twelve-year-old victim could not provide competent evidence as to the value of the stolen necklace and that the victim was not competent to testify as to the value required, the appellate court reversed.[156] Specifically, "because the necklace was a gift, the victim was unable to testify [as] to [the] . . . purchase price or replacement cost beyond" testifying as to what the victim was told by a parent based upon research on the Internet.[157]

Two cases, *C.W. v. State*[158] and *L.W. v. State*,[159] dealt with the question of whether the court could properly enter an order of restitution in a delinquency case where the respondent was not present.[160] In the *C.W.* case, the court ordered $664 in restitution at the rate of $25 per month.[161] However, the respondent was not present and the court failed to find that the child had the ability to pay.[162] Because the child was not present and there was no showing that the child had waived his presence, the court reversed.[163] However, in *L.W.*, where the child was ordered to pay $321.61 in $30 monthly installments based upon a damaged window, the court found at first the child had waived his right to attend, as the lawyer withdrew his objection based upon the child not being present.[164] However, the trial court failed to make the requisite factual findings of the child's or the family's ability to make payments of $30 per month.[165]

153. *S.M.*, 159 So. 3d at 967.
154. 143 So. 3d 428, 430–31 (Fla. 4th Dist. Ct. App. 2014).
155. *Id.* at 430; *see also* FLA. STAT. § 812.014(3)(c)(1).
156. *M.K.*, 143 So. 3d at 431–32.
157. *Id.* at 431.
158. 150 So. 3d 882 (Fla. 2d Dist. Ct. App. 2014).
159. 163 So. 3d 598 (Fla. 3d Dist. Ct. App. 2015).
160. *Id.* at 599; *C.W.*, 150 So. 3d at 883.
161. *C.W.*, 150 So. 3d at 883.
162. *Id.*
163. *Id.*
164. *L.W.*, 163 So. 3d at 599–600.
165. *Id.* at 601.

In *A.D. v. State*,[166] the trial court entered a restitution order regarding a camera even though there was no reference to it "as an item stolen in the grand theft count contained in [the] . . . petition for delinquency."[167] On that simple basis, the court held that the trial court lacks the authority to require restitution, as the only restitution allowable is that of which arises out of the offense charged as reflected in the information or factual basis for the plea.[168]

In a delinquency case, it is not unusual for the State to be unable to serve a respondent—alleged delinquent—with a summons to appear.[169] In *State v. C.W.*,[170] the State appealed a trial court final order entered sua sponte, dismissing the petition in a delinquency case for failure to serve.[171] The appellate court ruled quite simply that the trial court improperly ruled on an issue that was not before it and that it interfered with the State's discretion to bring charges against the child.[172] However, oddly, because the State had not preserved the argument for appeal, the appellate court dismissed—albeit, writing to emphasize that where no motion to dismiss had been filed by the child, the trial court was without authority to dismiss the prosecution *sua sponte*.[173]

Discovery is an important matter in delinquency and adult criminal cases often reaching constitutional dimensions.[174] In *M.H. v. State*,[175] a child appealed from an order that withheld "adjudication of delinquency and impos[ed] probation for [the] burglary of an unoccupied dwelling and [petty] theft."[176] The claim on appeal was a discovery violation in which the State listed the victim of the charged offenses as a Category B witness rather than a Category A witness under Florida law.[177] As a result, the trial court failed to hold a *Richardson Hearing*.[178] Failure to conduct a hearing under the facts of the case constituted reversible error.[179]

The question of a proper search and seizure, in the context of a child who was not in school and thus a possible truant, was before the Fourth District

166. 152 So. 3d 798 (Fla. 4th Dist. Ct. App. 2014).
167. *Id.* at 798.
168. *Id.* at 798–99.
169. *See* State v. C.W., 166 So. 3d 950, 950 (Fla. 4th Dist. Ct. App. 2015).
170. 166 So. 3d 950 (Fla. 4th Dist. Ct. App. 2015).
171. *Id.* at 950.
172. *Id.*
173. *Id*.
174. *See, e.g.*, Richardson v. State, 246 So. 2d 771, 773, 777 (Fla. 1971).
175. 151 So. 3d 32 (Fla. 3d Dist. Ct. App. 2014).
176. *Id.* at 33.
177. *Id.*
178. *Id.*; *see also Richardson*, 246 So. 2d at 773–77.
179. *M.H.*, 151 So. 3d at 37.

in *J.R. v. State*.[180] The child was found guilty of possession of marijuana after the trial court denied the child's motion to suppress.[181] The police officer had initially observed the child from the officer's patrol car on a school day at about 8:15am.[182] In reversing the denial of the child's motion to suppress, the appellate court held that the officer had begun the stop for truancy without reasonable grounds to believe that the child was absent from school.[183] Florida's status offense statute does not authorize a police officer to preemptively detain a child who may be plotting to skip school later.[184] The appellate court thus reversed, upholding the motion to suppress.[185]

Florida's method for determining whether a juvenile charged with an act of delinquency should be held in secure detention is determined on the basis of something known in Florida as the Risk Assessment Instrument ("RAI").[186] In *A.M. v. State*,[187] a juvenile filed a petition for writ of habeas corpus seeking release from secure detention because his offense was improperly determined to be a violent third-degree felony.[188] The trial court found that a robbery by sudden snatching of a cell phone qualified as a violent third-degree felony, which raised A.M.'s RAI to the level of secure detention.[189] The Third District Court of Appeal reversed the lower court's finding and held that the proper designation of robbery by snatching under the facts of the case was *a non-violent* third degree felony, which would have resulted in a lesser RAI determination.[190] In *D.L. v. State*,[191] a juvenile filed a petition for writ of habeas corpus on the basis that the court incorrectly scored the RAI by double scoring possession of a firearm and failing to address whether an unrelated felony charge was concurrently pending against the child.[192] The Fifth District Court of Appeal reversed, finding as it had in other appeals that it is improper to include three additional points for possession of a firearm where the possession is already given the maximum ten points for the third degree felony charge under Florida law.[193]

180. 149 So. 3d 1196, 1196 (Fla. 4th Dist. Ct. App. 2014).
181. *Id.*
182. *Id.*
183. *Id.* at 1197–98.
184. *Id.*; *see also* FLA. STAT. § 984.13(1)(b) (2014).
185. *J.R.*, 149 So. 3d at 1198.
186. FLA. STAT. § 985.255(3)(a).
187. 147 So. 3d 98 (Fla. 3d Dist. Ct. App. 2014).
188. *Id.* at 99.
189. *Id.* at 99–100.
190. *Id.* at 101–02; FLA. STAT. § 812.131.
191. 147 So. 3d 653 (Fla. 5th Dist. Ct. App. 2014).
192. *Id.* at 654.
193. *Id.* at 655; *see also* M.W. v. Dep't of Juvenile Justice, 15 So. 3d 782, 783–84 (Fla. 1st Dist. Ct. App. 2009).

V. OTHER MATTERS

A. *Due Process Shortcomings in the Dependency Court*

It is clear beyond peradventure that basic due process rights apply in dependency and termination of parental rights cases.[194] Nonetheless, repeated failures to comply with the basic due process constitutional protections arise in the dependency court in Florida and, most recently, cases in Miami demonstrate this shortcoming.[195] First, in *R.C. v. Department of Children & Family Services*,[196] a termination of parental rights case, a parent sought "certiorari relief from a sua sponte order of the trial court [obligating the mother] to submit to a pregnancy test."[197] The appellate court quashed the trial court order due to the complete failure to accord the mother notice and because there was also no showing of good cause as applied by law.[198] In so doing, after quoting at length from the trial court proceeding and describing it as being "patently obvious from the record in this case that the trial [court] acted for reasons of its own rather than any rule of law," the appellate court concluded by citing to Alexander Hamilton.[199] "As Alexander Hamilton long ago warned us, 'it can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature."[200] The appellate court then added "[t]he principle bears an occasional reiteration, even—and perhaps especially—[with]in our children's court. There was no pretense made of following any legislative directives or intentions in this case."[201]

A second Miami case is *R.W. v. Department of Children & Families*.[202] In that case, in a short opinion, the appellate court reversed on the grounds that the same trial court's termination of parental rights decision was based upon a determination that continued involvement of the father in the family relationship "threaten[ed] the safety or well-being of the child[ren] [regardless] of

194. FLA. STAT. § 984.01(1)(a); Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 45; *see also* U.S. CONST. amends. V, XIV.

195. *See* U.S. CONST. amends. V, XIV; A.A. v. Dep't of Children & Families, 147 So. 3d 621, 622–23 (Fla. 3d Dist. Ct. App. 2014); R.C. v. Dep't of Children & Family Servs., 150 So. 3d 1277, 1279–80 (Fla. 3d Dist. Ct. App. 2014); R.W. v. Dep't of Children & Families, 147 So. 3d 631, 632 (Fla. 3d Dist. Ct. App. 2014).

196. 150 So. 3d 1277 (Fla. 3d Dist. Ct. App. 2014).

197. *Id.* at 1277.

198. *Id.* at 1279–80.

199. *Id.*

200. *R.C.*, 150 So. 3d at 1280 (quoting THE FEDERALIST NO. 78, at 452–53 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009)).

201. *Id.*

202. 147 So. 3d 631 (Fla. 3d Dist. Ct. App. 2014).

services."[203] However, the amended petition did not allege such a statutory basis but pleaded only abandonment, and thus, the appellate court reversed.[204]

The third Miami case is *A.A. v. Department of Children & Families*.[205] Here, the appellate court reversed because the mother was denied due process as a result of the same trial court's failure to hold an evidentiary hearing before denying her motion for modification.[206] In that case, there was a combined failure—first, to hold an evidentiary hearing and then, to make a written factual finding addressing the requisite factors enumerated in the statute.[207] Those failures constituted a basic violation of due process rights.[208] These cases follow on the heels of earlier appellate court rulings reversing the same trial court in Miami for its failure to comply with basic constitutional principles in *G.W. v. Department of Children & Families*[209] and *F.M. v. State Department of Children & Families*.[210]

B. *The Ongoing Failure to Provide Counsel for Children in Child Welfare Cases in Florida and Shortcomings in the GAL Program*

In 1980, the Supreme Court of Florida held in *In re D.B.*[211] that children are not entitled to counsel in termination of parental rights cases.[212] Until July of 2014, the only way that children received counsel in dependency and termination of parental rights cases in Florida was through volunteer lawyer appointments or in several counties legal aid representation.[213] Thus, while all parties to these cases were represented by counsel—DCF, the parents, and the GAL Program—the only unrepresented party was the child unless a volunteer attorney or legal aid lawyer took the child's case.[214] The GAL Program's role,

203. *Id.* at 632.
204. *Id.*
205. 147 So. 3d 621 (Fla. 3d Dist. Ct. App. 2014).
206. *Id.* at 622, 624.
207. *Id.* at 623; *see also* FLA. STAT. § 39.621(10) (2014).
208. *A.A.*, 147 So. 3d at 622–23.
209. 92 So. 3d 307 (Fla. 3d Dist. Ct. App. 2012).
210. 95 So. 3d 378, 381–82 (Fla. 3d Dist. Ct. App. 2012); *G.W.*, 92 So. 3d at 309–10; *see also* Michael J. Dale, *2013 Survey of Juvenile Law*, 38 NOVA L. REV. 81, 86–87 (2013) [hereinafter Dale, *2013 Survey of Juvenile Law*]. The same trial court was reversed in *R.L.R. v. State*, a case in which the trial court had held that chapter 39 somehow preempted the Rules Regulating the Florida Bar on the confidentiality of the lawyer child client relationship. 116 So. 3d 570, 572 (Fla. 3d Dist. Ct. App. 2013); *see also* FLA. STAT. ch. 39.
211. 385 So. 2d 83 (Fla. 1980).
212. *Id.* at 91.
213. *Id.* at 92.
214. *Id.* at 87–88, 92–93.

as discussed below, is not to represent the child as a lawyer would do but to represent the child's best interests.[215]

During its 2014 session, the Legislature passed a statute authorizing the expenditure of $5 million to pay for lawyers to act as attorneys ad litem to represent children before the dependency court in five categories of cases that are based upon the children's special needs.[216] The serious shortcomings in the statute are detailed in last year's survey article, including the ethical issues relating to the roles of the GAL Program and DCF and their attorneys in requesting the appointment of and choosing the lawyers for the five categories of children.[217] The problem with the law is exacerbated by the fact that literally hundreds of other children with serious physical, mental, and educational problems do not have the right to counsel because they do not fit within the five categories of the statute as determined by these possibly opposing parties.[218]

In 2014, the General Counsel for the GAL Program prepared a document titled *Children with Certain Special Needs Attorney Registry* that directly illustrates the underlying problems that arise when applying the 2014 amendment to section 39.01305 of the Florida Statutes.[219] First, the document states that "[t]he appointing court is required to consult with the GAL [Program] in attempting to locate a pro bono attorney. If a pro bono attorney cannot be located or a recommendation is not provided with[in] [fifteen] days, the court is authorized to appoint compensated counsel."[220] A 2011 study demonstrates the inability of the Florida Bar to provide pro bono lawyers to children in dependency proceedings,[221] thus making it both futile and time consuming to locate pro bono attorneys and necessitating the use of compensated attorney

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215. Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 63; Michael J. Dale & Louis M. Reidenberg, *The Kids Aren't Alright: Every Child Should Have an Attorney in Child Welfare Proceedings in Florida*, 36 NOVA L. REV. 345, 352–53 (2012) [hereinafter Dale & Reidenberg, *The Kids Aren't Alright*].

216. FLA. STAT. § 39.01305(3)(a)–(e); *see also* Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 62.

217. Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 61–63; *see also* Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 330; Dale & Reidenberg, *The Kids Aren't Alright*, *supra* note 215, at 353.

218. *See* FLA. STAT. § 39.01305(3)(a)–(e).

219. *See* FLA. STAT. § 39.01305; DENNIS MOORE, GUARDIAN AD LITEM PROGRAM, CHILDREN WITH CERTAIN SPECIAL NEEDS ATTORNEY REGISTRY (2014), *available at* http://www.slideplayer.com/slide/4327595.

220. MOORE, *supra* note 219.

221. *See* UNIV. OF FLA. & FLORIDA'S CHILDREN FIRST, LEGAL REPRESENTATION OF DEPENDENT CHILDREN: A 2012 REPORT ON FLORIDA'S PATCHWORK SYSTEM 2–4 (2012), https://www.law.ufl.edu/_pdf/academics/centers-clinics/centers/legal-rep-of-dep-children-12.pdf (demonstrating the Bar's inability to provide a substantial number of pro bono lawyers for children in dependency cases).

representation.[222] Second, according to the document prepared by the GAL General Counsel, it is possible to be registered to represent children for a fee in dependency cases even if the attorney has never actually handled such a case.[223] The attorney merely needs to demonstrate one of the following prerequisites set out in the document: that the attorney has "observed at least thirty hours of hearings in dependency cases including at least one shelter hearing—one dependency adjudicatory hearing, one judicial review hearing, one hearing pursuant to rule 8.350 [of the Florida Rules of Juvenile Procedure] and one termination of parental rights trial."[224] Contrary to this prerequisite, attorneys for children "must have the requisite skill and competence to represent children in [these complex] cases that involve, among other matters," a variety of federal statutory rights as well as myriad, medical, psychological, educational, "cultural, racial, moral, and religious issues."[225]

A review of the application of the 2014 amendment to section 39.01305 of the Florida Statutes in its first year demonstrates additional ongoing problems with the law, leaving aside the issues of the attorney qualifications necessary to handle these cases and the ethical issues of the GAL Program's role in choosing the lawyers for children as a separate party in the proceeding.[226] First, during the first fifteen months of operation, only 1236 children were appointed counsel with an expenditure of $900,000 out of a budget of $5 million, leaving $4.1 million unspent.[227] Unfortunately, this data does not distinguish between volunteer and paid lawyers.[228] As explained above, the Florida law requires an attempt to find volunteers before hiring a lawyer.[229] Yet, during the initial fifteen-month period, more than twenty-eight thousand children were before the dependency court.[230] Second, the appointment of lawyers for children varied dramatically among the circuits with no correlation to their population.[231] In the

222. *See id.*

223. MOORE, *supra* note 219.

224. *Id.*; *see also* FLA. R. JUV. P. 8.350.

225. Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 351.

226. *See* FLA. STAT. § 39.01305 (2014).

227. JUSTICE ADMIN. COMM'N, APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S.: COUNT BY CIRCUIT AND CASE DESCRIPTION, APPOINTED JULY 1, 2014–SEPTEMBER 21, 2015 (2015) [hereinafter APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S.] (data on file with author); JUSTICE ADMIN. COMM'N, PAYMENTS ON SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S.: COURT APPOINTED BY CIRCUIT AND APPROPRIATION FISCAL YEAR, JULY 1, 2014–SEPTEMBER 24, 2015 (2015) [hereinafter COSTS PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S.] (data on file with author); Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 62.

228. *See* APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; COSTS PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227.

229. FLA. STAT. § 39.01305(4)(a).

230. FLA. GUARDIAN AD LITEM PROGRAM, GAL REPRESENTATION REPORT: NOVEMBER 2014 (Dec. 2014) [hereinafter GAL REPRESENTATION REPORT: NOVEMBER 2014].

231. *See* APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227.

Sixth Circuit—Pasco and Pinellas Counties—with a population of 1.4 million, there were 254 paid appointments of attorneys ad litem at a cost of $199,000.[232] In the Seventeenth Circuit—Broward County—with a population of 1.8 million, there were 37 appointments at a cost of $25,000.[233] In the Thirteenth Circuit—Hillsborough County—with a population of 1.3 million, there were 138 appointments at a cost of $106,000.[234] In the Eleventh Circuit—Miami-Dade County—with a population of 2.6 million, 130 lawyers were appointed at a cost of $57,000.[235] These statistics do not account for the appointment of pro bono lawyers who under the 2014 statute are to be assigned first and found by the GAL Program.[236] Nor does it account for the availability of legal aid lawyers to represent some of these children in some of the circuits.[237] However, the population differences among the circuit courts raises the question of why the process of paid appointments differs so dramatically from circuit to circuit.[238]

The historical role of the GAL Program is also problematic for reasons unrelated to the 2014 amendment to section 39.010305 of the Florida Statutes.[239] First, data produced during this survey year as well as recent reports

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232. *Id.*; JUSTICE ADMIN. COMM'N, PAYMENTS ON SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S.: COURT APPOINTED BY CIRCUIT AND APPROPRIATION FISCAL YEAR, JULY 1, 2014–SEPTEMBER 24, 2015 (2015) [hereinafter ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S.] (data on file with author); *State & County Quickfacts: Pasco County, Florida*, CENSUS.GOV, http://quickfacts.census.gov/qfd/states/12/12101.html (last revised Dec. 2, 2015); *State & County Quickfacts: Pinellas County, Florida*, CENSUS.GOV, http://quickfacts.census.gov/qfd/states/12/12103.html (last revised Dec. 2, 2015).

233. APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232; *State & County Quickfacts: Broward County, Florida*, CENSUS.GOV, http://quickfacts.census.gov/qfd/states/12/12011.html (last revised Dec. 2, 2015).

234. APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232; *Total Population in Hillsborough County Zip Codes*, TAMPA HILLSBOROUGH ECON. DEV. CORP., http://www.tampaedc.com/wp-content/uploads/2015/09/Hillsborough-County-Population-by-ZIP-Code.pdf (last visited Jan. 30, 2016).

235. APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232; *Miami-Dade County*, SOUTHFLORIDAFINDS.COM, http://www.southfloridafinds.com/county/miami-dade (last visited Jan. 30, 2016).

236. *See* FLA. STAT. § 39.01305 (2014); APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227.

237. *See* APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232.

238. *See* APPOINTMENTS TO CASES PURSUANT TO S. 39.01305, F.S., *supra* note 227; ATTORNEY FEES PAID FOR SPECIAL NEEDS CASES PURSUANT TO S. 39.01305, F.S., *supra* note 232.

239. *See* FLA. STAT. § 39.01305; Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 330.

from the GAL Program demonstrate ongoing serious flaws in the program.[240] First, the budget of the GAL Program now exceeds forty-two million dollars not including federal funds and in-kind services.[241] Yet, the GAL Program was only able to represent approximately 76%[242] of the children before the dependency court in 2014, despite employing more than 145 attorneys, including an appeals unit.[243] It is hard to be certain of the accuracy of these figures because the Statewide GAL Program—*Performance Advocacy Snapshot*—only provides percentages.[244] Thus, it would appear that as of June 2015, the court appointed the GAL Program to 84.3% of the children in dependency proceedings.[245] Of the 84.3%, 77.5% had an Active Certified Volunteer.[246] Thus, it would appear that 65.3% of the children before the dependency court last June had an active certified GAL volunteer.[247] One cannot tell from the GAL website whether the remaining 34.7% of the children had GAL best interest representation or if they were simply left with nothing.[248] A recent announcement from the GAL Program in Palm Beach County seeking donations stated that it could only represent the best interests of about 800 of the 1200—66%—children before the dependency court in that Circuit.[249] In

240. *See* FLA. GUARDIAN AD LITEM PROGRAM, GAL REPRESENTATION REPORT: MAY 2015 (June 2015) [hereinafter GAL REPRESENTATION REPORT: MAY 2015]; GAL REPRESENTATION REPORT: NOVEMBER 2014, *supra* note 230; FLA. GUARDIAN AD LITEM PROGRAM, GAL REPRESENTATION REPORT: MAY 2014 (June 2014) [hereinafter GAL REPRESENTATION REPORT: MAY 2014]. GAL are the lowest paid state attorneys, and the amount of cases they take exceeds the American Bar Association's recommended number, according to a study authorized and paid for by the GAL Program. FLA. GUARDIAN AD LITEM PROGRAM, GUARDIAN AD LITEM ATTORNEY COMPENSATION ANALYSIS 3 (June 30, 2014), http://www.guardianadlitem.org/wp-content/uploads/2015/01/GAL-Attorney-Compensation-Study-Final-Version.pdf. One might surmise the study was prepared and paid for to a Florida based company for fundraising purposes. *See id.* Significantly, the lawyers at the Offices of Regional Counsel, albeit without a study to support their problems, are also paid at low salaries with caseloads far exceeding professional norms. *See id.* at 15–16.

241. *Justice Administrative Commission: Guardian ad Litem Program*, FLA. OFF. PROGRAM POL'Y ANALYSIS & GOV'T ACCOUNTABILITY, http://www.oppaga.state.fl.us/profiles/1016 (last updated June 11, 2015).

242. GAL REPRESENTATION REPORT: NOVEMBER 2014, *supra* note 230.

243. Dale & Reidenberg, *Providing Attorneys for Children in Dependency Proceedings*, *supra* note 7, at 330.

244. *Statewide Guardian ad Litem Program — Performance Advocacy SnapShot (PASS)*, GUARDIANADLITEM.ORG (June 2015), http://www.guardianadlitem.org/wp-content/uploads/2014/08/GAL-SnapShot-June-2015.pdf.

245. *Id.*

246. *Id.*

247. *See id.*

248. *See id.*

249. Michelle Piasecki, *Nonprofit to Help Kids in Need Is Restarted*, PALM BEACH POST, Dec. 4, 2014, at N4.

Broward County, matters appear to be worse.[250] A June 2015 report from the GAL Program stated that the GAL Program was appointed for 82.23% of the children before the dependency court, and 56.06% of those children received a volunteer GAL.[251] Thus, less than half of the children in Broward County had a GAL Program representative.[252]

Second, the GAL Program seems to be confused about its proper role or continues to choose to misstate it.[253] The GAL Program in Florida is under the supervision of a state agency in the executive branch that is statutorily authorized to collect and provide information to the court when appointed by the court as to what in certain limited situations it believes is in the best interest of the children.[254] It does not represent the child as an attorney does, although its literature at times says it does.[255] GAL volunteers and paid staff may not practice law, as is the case with any other non-lawyer.[256] Thus, they may not provide legal advice to the child, just as the GAL Program lawyers may not, leaving no confidential relationship between any GAL representative and the child.[257]

Third, GALs cannot provide expert opinions to the court, although as the case law discussed earlier in this survey demonstrates, they have done so.[258] The guidelines for the GAL Program, however, are disingenuous in this regard.[259] They state

> "[v]olunteers are not being used as experts in a case and will testify as lay people, however this does not take away the fact that they may be credentialed and should be permitted to identify themselves as

250. *See* GAL REPRESENTATION REPORT: MAY 2015, *supra* note 240.

251. *Id.*

252. *See id.*

253. *See* Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 330.

254. FLA. STAT. § 39.8296 (2014); FLA. GUARDIAN AD LITEM, IMAGINING THE FUTURE: 35TH ANNIVERSARY 1980–2015 7, 15–17 (2015), http://www.issuu.com/liz338/docs/annual_report-web.

255. Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 330.

256. FLA. STAT. § 61.403(7); *see also Volunteer FAQ*, FLORIDA GUARDIAN AD LITEM PROGRAM, http://www.guardianadlitem.org/faq (last visited Jan. 31, 2016).

257. STATEWIDE GUARDIAN AD LITEM OFFICE, STANDARDS OF OPERATION 15 (2006), http://www.guardianadlitem.org/wp-content/uploads/2014/12/StandardsOfOperation.pdf [hereinafter STANDARDS OF OPERATION]; *see also* 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80 at 19.

258. *See* A.H. v. Dep't of Children & Families, 144 So. 3d 662, 665 (Fla. 1st Dist. Ct. App. 2014).

259. *See* 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80, at 9.

> such [and] . . . [t]he court report should not reiterate their credentials to bolster their credibility."[260]

The simple outstanding question—as any lawyer would immediately recognize—is: What is the relevance of the credential, if not to add to the credibility of the witness and thus bolster the witness' testimony?[261]

Finally, the confusion in the operation of the GAL Program is only exacerbated by its articulation of the role of its lawyers.[262] Despite calls by this author in this Article and in other articles for the GAL Program to properly state the role of its lawyers—to represent the GAL Program—it does not do so.[263] It continues to conflate its role with that of the attorney who actually represents the *legal* interest of the child.[264] For example, the *Dependency Practice Manual*, apparently written by GAL Program special counsel, in the introduction states that "[i]t is hoped that attorneys will use this manual to ensure that children are the focus of dependency proceedings, that their voices are heard, and that *their legal interests [are] protected through proactive legal advocacy*."[265] That statement defines the role of a child's lawyer.[266] It does not define the role of a GAL lawyer whose sole ethical obligation is to represent his or her client, which is the GAL Program.[267] To do otherwise would violate the Florida Rules of Professional Responsibility.[268] The GAL guidelines as redrafted this year only makes matters worse. They refer once again to the "Child's Best Interest Attorney" and describe the role as "the attorney employed by the [department] to protect [the] child's best interest either in the circuit dependency courts or the appellate courts. There is no attorney-client relationship between the CBI attorney and the child; however, representing the best interest of the child is the sole purpose of their advocacy."[269] This

260. *Id.*

261. *See id.*

262. *See id.*, at 7.

263. *See id.*; Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 324.

264. *See* 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80, at 7; FLA. STATEWIDE GUARDIAN AD LITEM OFFICE, DEPENDENCY PRACTICE MANUAL 2 (2014), http://www.guardianadlitem.org/wp-content/uploads/2014/08/The_Practice_Manual_Final.pdf; Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 331.

265. FLA. STATEWIDE GUARDIAN AD LITEM OFFICE, *supra* note 257, at 2 (emphasis added).

266. *See id.*

267. *See id.*; Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 331–32.

268. Dale & Reidenberg, *Providing Attorneys for Children*, *supra* note 7, at 331–32; *see also* STANDARDS OF OPERATION, *supra* note 257, at 6, 20.

269. 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80, at 7.

statement can only be described as legal nonsense.[270] The GAL Program lawyer represents the GAL Program, a statutory party in a dependency case.[271] It is impossible for a lawyer to represent an idea. The GAL Program literature describes a form of legal representation that simply does not exist.[272] Attempting to apply these GAL guidelines is inconsistent with the law and defies logic.[273]

VI. CONCLUSION

The Supreme Court of Florida decided two major cases this survey year.[274] First, it set forth the procedure for applying the Supreme Court of the United States holdings in *Graham* and *Miller* that rendered life without parole unconstitutional as applied to juveniles who committed capital and non-capital offenses.[275] Second, it held that *Miller* should apply retroactively.[276]

The Florida intermediate appellate courts were active in deciding delinquency matters primarily involving proper application of restitution standards.[277] The appellate courts were also busy implementing the *Horsley* decision, which set out the test for how to determine the proper sentence for a juvenile previously incarcerated for life without parole.[278] In the dependency and TPR areas, the issue of proper application of the nexus problem was once again before the appellate courts.[279] Another common issue involved the dependency court rights of immigrant children.[280] Also, a pattern of failure to comply with basic due process rights of parents in child welfare cases appears to be developing in the juvenile court in Miami as this survey and surveys over the past two years have illustrated.[281]

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270. *See id.*

271. Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 63; Dale & Reidenberg, *The Kids Aren't Alright*, *supra* note 215, at 353.

272. *See* 2015 FLORIDA GUARDIAN AD LITEM PROGRAM STANDARDS, *supra* note 80, at 6–7.

273. *See id.*; FLA. STAT. § 39.01305(b) (2014).

274. *See* Falcon v. State, 162 So. 3d 954, 963–64 (Fla. 2015); Horsley v. State, 160 So. 3d 393, 408–09 (Fla. 2015).

275. *Horsley*, 160 So. 3d at 408; *see also* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012); Graham v. Florida, 560 U.S. 48, 82 (2010).

276. *Horsley*, 160 So. 3d. at 408–09; *see also Miller*, 132 S. Ct. at 2460.

277. *See supra* Part IV.

278. *See Horsley*, 160 So. 3d at 408–09; *supra* Part IV.

279. *See supra* Part III.

280. *See In re* Y.V., 160 So. 3d 576, 577 (Fla. 1st Dist. Ct. App. 2015); *supra* Part II.

281. *See* Dale, *2014 Survey of Juvenile Law*, *supra* note 7, at 62; Dale, *2013 Survey of Juvenile Law*, *supra* note 210, at 86–87; *supra* Section V.A.

Finally, all children in Florida should be entitled to counsel in dependency and TPR proceedings.[282] The 2014 amendment to section 39.01305 of the Florida Statutes, giving some children some lawyers in some cases access to counsel, is grossly inadequate.[283] The GAL Program, with a budget in excess of forty-two million dollars, consistently and without restraint, mistakes its role to the detriment of the children.[284] The establishment of consistent guidelines across the board is crucial in providing adequate *legal* representation that children not only need, but deserve, in *all* juvenile proceedings, whether dealing with delinquency, TPR, or dependency.[285]

282. *See* FLA. STAT. § 39.01305 (2014); *supra* Section V.B.
283. *See* FLA. STAT. § 39.01305(3); *supra* Section V.B.
284. *See supra* Section V.B.
285. *See supra* Parts II–V.