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Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated

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PROVIDING ATTORNEYS FOR CHILDREN IN DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN FLORIDA: THE ISSUE UPDATED

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I. INTRODUCTION

Florida's system for providing protection and safety to children in the State's child welfare system has changed over the past decade. Regretfully, the changes do not appear to have had a significant impact in two areas:

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increasing the safety and protection of children in the system[1] and providing children with independent attorneys to advocate on their behalf.[2] Investigations, lawsuits, grand juries, amendments to court rules,[3] and newspaper ar-

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1. "Florida ranks third in the nation in the rate of children killed by abuse" and neglect. Sofia Santana, *Report: Florida Child Death Rate High*, SUN-SENTINEL, Oct. 21, 2009, at 6B; *see Kids Count Overall Rank 2010*, ANNIE E. CASEY FOUND, http://datacenter.kidscount.org/data/bystate/StateLanding.aspx?state=FL (last visited Apr. 20, 2011); J. KATE STOWELL, POLICY GRP. FOR FLA.'S FAMILIES & CHILDREN, THE STATE OF FLORIDA'S CHILD: A REPORT FOR THE FLORIDA CHILDREN AND YOUTH CABINET 5 (2009), *available at* http://childrensmovementflorida.org/research/the_state_of_floridas_children/the_state_of_floridas_child_report.pdf; Daphne Taylor, *Murder-Suicide Leaves Six Dead*, S. FLA. TIMES (Sept. 28, 2010), http://www.sfltimes.com/index.php?option=com_content &task=view&id=5431& Itemid=199 (describing the failure of Florida Department of Children and Families in protecting children). *But see* George Sheldon, Secretary Sheldon's Speech to the FCC Conference (Oct. 28, 2010) (transcript available at http://www.FLchildren.org/news/51671/Central-NWS-Secretary-Sheldon's-Speech-to-the-FCC-Confrence.htm); Tom Lyons, *Helping Bad Parents Learn to Become Better*, SARASOTA HERALD TRIB., Sept. 28, 2010, at BN1; Jerome Burdi, *Child Abuse Cases Rise in S. Florida–Recession and Reporting System Are Factors in Increase*, SUN SENTINEL, Jan. 2, 2011, at 1B; John Lantigua, *DCF Head Defends Agency's Handling of Abused Twins*, PALM BEACH POST (Feb. 18, 2011, 9:59 AM), http://www.palmbeachpost.com/news/crime/dcf-head-defends-agencys-handling-of-abused-twins-1263618.html; Anna Valdes, *DCF Looking into Worker in Twins Abuse Case*, PALM BEACH POST (Feb. 19, 2011, 9:10 PM), http://www.sun-sentinel.com/news/palm-beach/fl-dcf-abuse-follow-20110219,0,5353291.story. *See also* DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs., 489 U.S. 189, 189 (1989). An analysis of the harm to children who do not enter the Florida welfare system because of the agency's failure to investigate conditions in the home and remove the children is beyond the scope of this article. According to the Department of Children and Families' "Quick Facts" publication, the budget of the Office of Family Safety as of August 30, 2010, was $1,025,913,287.00. FLA. DEP'T OF CHILDREN & FAMILIES, DCF QUICK FACTS 21 (2010) [hereinafter DCF QUICK FACTS], *available at* www.dcfstate.flus/newsroom/docs/quickfacts.pdf.

2. For a review of both issues through 2001, see Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769 (2001) [hereinafter Dale, *Providing Counsel*]. A Florida Bar supported effort to provide counsel to some children in the child welfare system, SB 1860, discussed in this article, never made it out of committee during the 2010 legislative session. *See infra* Part IV. According to the 2002 Blue Ribbon Panel Report on the disappearance of Rilya Wilson, "Sixteen times since 1985, other scandals have prompted governors to appoint 11 special panels and state's attorneys to convene . . . separate grand juries, to investigate DCF or its predecessor . . . , the Department of Health and Rehabilitative Services. Now this gubernatorial panel, the 12th, has answered a governor's call to do the same." BLUE RIBBON PANEL, BLUE RIBBON PANEL REPORT (2002) [hereinafter BLUE RIBBON PANEL REPORT]; *see also* 31 Foster Children v. Bush, 329 F.3d 1255, 1261–62 (11th Cir. 2003). For a discussion of the latest DCF review, see Anna Valdes, *DCF Head Names 3 to Review Agency's Handling of Dead Girl, Injured Boy*, PALM BEACH POST (Feb. 21, 2011, 5:45 PM), http://www.palmbeachpost.com/news/crime/dcf-head-names-3-to-review-agencys-handling-1271212.html.

3. *See generally In re* Amendments to the Fla. Rules of Judicial Admin., the Fla. Rules of Juvenile Procedure, and the Fla. Rules of Appellate Procedure—Implementation of the

ticles continue to demonstrate the myriad failures in the Florida system.[4] Two notorious examples hi-lite the shortcomings:[5] the cases of the foster child, Rilya Wilson, who disappeared in 2001, and Gabriel Myers, who was found dead by hanging in his foster home in 2008. Rilya Wilson's disappearance produced articles around the country and a detailed investigation which has exposed serious flaws in Florida's child welfare system.[6] The Wilson case produced legislation, the Rilya Wilson Act, which requires coordination between the Department of Children and Families (DCF) and community-based providers with local school readiness coalitions and licensed early education child care providers.[7] The Act also dramatically increased the prominence and significance of the role of the Guardian Ad Litem Program (GAL Program).[8]

Comm'n on Dist. Court of Appeal Performance and Accountability Recommendations, 24 So. 3d 47 (Fla. 2009) [hereinafter In re Amendments to the Fla. Rules of Judicial Admin.].

> I wholeheartedly concur with the Court's adoption of the recommendations of the Commission on District Court Performance and Accountability to address ongoing issues of unnecessary delay in dependency and termination of parental rights appeals. The Commission's recommendations and this Court's adoption of these amendments are based on the recognition that for every day of delay on appeal, which is added to the length of the prior ongoing court proceedings, the future of the child is in limbo to his or her potential detriment.

Id. at 52 (Pariente, J., concurring); *see, e.g.*, Settlement Agreement Between Plaintiffs and Defendant Big Bend Community Based Care, Inc., Foster Children Susan C. v. Dep't of Children & Families, No. 27-2006-CA-00076 (Fla. 2d Cir. Ct. 2006) [hereinafter Settlement Agreement]; *see also* Dale, *Providing Counsel*, *supra* note 2, at 784; BLUE RIBBON PANEL REPORT, *supra* note 2; *31 Foster Children*, 329 F.3d at 1255.

4. *Who's Financially Responsible: DCF or Private Contractors?*, DAILY BUS. REV. (May 27, 2010, 2:30 AM), http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202469823751&hbxlogin=1; Kelli Kennedy, *Florida Case Could Hold Private Firms, Insurers Liable for Foster Kids' Injuries*, INS. J. (May 26, 2010), http://www.insurancejournal.com/news/southeast/2010/05/26/110185.htm; *DCF Launches Probe Into Death of Child Found in Cooler*, 2WESH.com, (Jan. 26, 2011, 11:56 AM), http://www.wesh.com/news/26631951/detail.html; *Foster Care Tot Suffers Skull Injury*, SUN-SENTINEL, Feb. 10, 2011, at 1B.

5. A third example of deficiencies in the system came to light as this article was undergoing a final edit by the Nova Law Review. Carol Marbin Miller, *State Steps in Less, and More Kids Die*, MIAMI HERALD (Feb. 26, 2011), http://www.miamiherald.com/2011/02/24/v-fullstory/2087601/state-steps-in-less-and-more-kids.html; Valdes, *supra* note 2; *Child Abuse Investigation of the Barahona Twins: DCF's "Ugly Past"*, PALM BEACH POST, http://www.palmbeachpost.com/news/1284134.html (last visited Apr. 20, 2011); John Lantigua, *Guardian Claims He Was Pulled from Barahona Case with No Explanation*, PALM BEACH POST (Feb. 25, 2011, 11:59 AM), http://www.palmbeachpost.com/news/guardian-claims-he-was-pulled-from-barahona-twins-1280905.html.

6. *See* Abby Goodnough, *Woman Accused of Killing a Missing Child in Florida*, N.Y. TIMES, Mar. 17, 2005, at A24; *see also* BLUE RIBBON PANEL REPORT, *supra* note 2.

7. FLA. STAT. § 39.604(3) (2010).

8. *See* BLUE RIBBON PANEL REPORT, *supra* note 2.

Seven-year old Gabriel Myers was found hanged in the bathroom of the foster home in which he lived while being administered a number of psychotropic medications.[9] His death resulted in a DCF investigation, which produced a report containing 107 findings related to shortcomings in the child welfare system's approach to children with mental health medication issues.[10] The central finding in the report was: "It is clear that, throughout his

9. Fred Grimm, *So Much Bluster, But Foster Drug Nightmare Goes On*, MIAMI HERALD, May 2, 2010, at 1B; Tom Lyons, *In Another Tragic Death, Another Lesson for DCF*, SARASOTA HERALD TRIB., June 2, 2009, at BN1; Carol Marbin Miller, *Child-Welfare Panel: Drugs Misused on Foster Kids*, MIAMI HERALD, Aug. 13, 2009, at 7A.

10. GABRIEL MYERS WORK GRP, FLA. DEP'T OF CHILDREN & FAMILIES, REPORT OF GABRIEL MYERS WORK GROUP ON CHILD-ON-CHILD SEXUAL ABUSE 3 (May 14, 2010) [hereinafter GABRIEL MYERS REPORT MAY 2010], *available at* http://www.dcf.state.fl.us/initiatives/GMWorkgroup/docs/Gabriel%20myers%20COC%20report%20May%2014%202010.pdf. First, it does not appear in the report that an expert in suicidology was an active resource. This is a particularly significant shortcoming because research discloses that the number of suicides by children ages 5–7 in 2007 in the United States was 2 out of a population of approximately 12 million. *WISQARS Injury Mortality Report*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/injury/wisqars/fatal.html (last visited Apr. 20, 2011) (Follow "Fatal Injury Reports 1999–2007" hyperlink; then select "suicide" and "custom age range 5 to 7"; then follow "submit request" hyperlink). *See also* SUICIDE PREVENTION CTR., WHAT FOSTER PARENTS CAN DO TO PREVENT SUICIDE (Dec. 2010), http://www.sprc.org/Featured_resources/customized/pdf/FosterParents.pdf. Second, additional findings were that: "While the child's [GAL] [is] responsib[le] for ascertaining and informing the court of the child's position, it is not clear that this is happening [on a regular and consistent basis]. Furthermore, not all [foster] children . . . have a [GAL]." GABRIEL MYERS WORK GRP., FLA. DEP'T OF CHILDREN & FAMILIES, REPORT OF GABRIEL MYERS WORK GROUP 12 (Nov. 19, 2009) [hereinafter GABRIEL MYERS REPORT NOV. 2009], *available at* http://www.dcf.state.fl.us/initiatives/GMWorkgroup/docs/GabrielMyersWorkGroupReport082009Final.pdf.

The Work Group heard a number of advocates express their view that the court should appoint an attorney for each child whose mental health needs suggest use of psychotropic medication. BERNARD P. PERLMUTTER, THE ROLES OF THE CHILD'S ATTORNEY AD LITEM AND THE CHILD'S PERSPECTIVE IN PSYCHOTROPIC MEDICATION HEARINGS 4–5 (Aug. 5, 2009), *available at* http://www.dcf.state.fl.us/initiatives/GMWorkgroup/docs/meeting080509/BP_GMYERS_PRES_20090810113031.pdf. Further, many proffered that the best practice is for all children in dependency to be appointed an attorney (with sufficient training and experience to provide meaningful and effective assistance of counsel). *See id.* at 12. The problem of lack of counsel is magnified when one reviews Florida Administrative Rule 65c-35.005 entitled "Child Involvement in Treatment Planning." FLA. ADMIN. CODE ANN. r. 65C-35.005 (2010). Under the regulation, the only way a child may obtain counsel is if "a child of sufficient age, understanding, and maturity declines to assent to the psychotropic [drugs]" or "[w]henever the child requests the discontinuation of the psychotropic medication, and the prescribing physician refuses to order the discontinuation . . . ." *Id.* r. 65C-35.005(3)(b), (4). In both situations, the matter must be referred to a DCF CLS lawyer who shall request an attorney be appointed. *Id.* The ethical issues this raises for lawyers representing DCF should be obvious.

placement in foster care, and although he was attended by many well-meaning professionals, Gabriel Myers was 'no one's child'. . . . No [] individual or agency became a champion to ensure that he was understood and that his needs were identified and met in a timely manner."[11] It appears that Myers had not been appointed an independent attorney, although two different individuals had acted as his guardian ad litem (GAL).[12]

Two years earlier, the Florida Statewide Advocacy Council reviewed 1180 DCF family files and determined that 652 or more of the children were, or had been, on psychotropic medications.[13] This information was filed with the Supreme Court of Florida and resulted in an amendment to the Florida Rules of Juvenile Procedure, requiring hearings for children receiving such medication.[14] However, that number appears to have increased. In a non-final report in August 2010, DCF reported approximately 2583 children from ages zero to seventeen were being prescribed psychotropic medications.[15] The Florida media also regularly reports on other deaths and injuries in the

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An effort to correct the perceived psychotropic medication issue in the Florida Legislature, in the Spring of 2010, failed. S.B. 1860 2010 Leg. (Fla. 2010) (died in Comm. on Children, Families, & Elder Affairs Apr. 30, 2010); H.B. 1567 2010 Leg. (Fla. 2010) (died in Health Care Servs. Policy Comm. Apr. 30, 2010); Grimm, *supra* note 9; Carol Marbin Miller & Marc Caputo, *Effort to Protect Children from Overmedication Fails*, MIAMI HERALD, Apr. 30, 2010, at 7B.

11. GABRIEL MYERS REPORT NOV. 2009, *supra* note 10, at 4.

12. *See id.* at 5–6. It is significant that the Myers tragedy arose despite the presence of two GALs, given that the 2002 Blue Ribbon Report on the Rilya Wilson matter found implementation of a robust GAL Program to be central to the correction of children's foster care problems. *See* BLUE RIBBON PANEL REPORT, *supra* note 2. Inexplicably, the Gabriel Myers report contains no discussion of the role of the GALs in the case. The Myers report also recommends that DCF "[i]dentify and hold accountable *a champion*, normally the case manager, to ensure the child is treated as a prudent parent would treat their own child." GABRIEL MYERS REPORT NOV. 2009, *supra* note 10, at 6 (emphasis added). This irony is now compounded by the fact that under the current contract between DCF and the private lead agencies in the Florida child welfare system, legal decision making rests with DCF CLS lawyer and not with the case manager. *See* Contract between Fla. Dep't of Children & Families and Child & Family Connections, Inc., 45 (July 1, 2009) [hereinafter Contract] (on file with Nova Law Review).

13. Jan Pudlow, *Court Examines Representation for Foster Kids*, FLA. BAR NEWS (Dec. 1, 2006), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf (search "Court Examines Representation for Foster Kids"; then follow hyperlink).

14. *In re* Amendments to the Fla. Rules of Juvenile Procedure, 952 So. 2d 517, 522 (Fla. 2007) (Pariente, J., concurring) (per curiam).

15. DCF QUICK FACTS, *supra* note 1, at 20. A 2010 Bill suspended the procedures governing administration of psychotropic drugs. H.B. 1567 2010 Leg. (Fla. 2010) (died in Health Care Servs. Policy Comm. Apr. 30, 2010).

child welfare system.[16] More recently, Florida has moved toward a reduction of the number of children in foster care.[17] However, Florida still ranks low in comparison to other states in national surveys of child welfare services.[18]

Most importantly for the discussion here, since 2000 there has been almost no change in the system of independent legal representation of children in child welfare proceedings in Florida.[19] Children in Florida still have no absolute right to an independent attorney as a matter of case law precedent, state statute, or public policy.[20] Thus, independent legal representation takes place, if at all, on an ad hoc basis if the trial judge so decides.[21] This is the case despite the fact that the Florida GAL 2009 Annual Report states in the first paragraph on the first page that the child's "*champion* is the GAL Program. The Program is uniquely independent. Even as the volunteer learns the child's wishes, and . . . express[es] [his or her] wishes to the court, the Program is not bound by [those] wishes. Our only obligation . . . is to advocate for the child's best interest."[22]

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16. *23-Month-Old Dies in Foster Care*, NEWS4JAX.COM, (Apr. 22, 2005), http://www.news4jax.com/news/4407580/detail.html; Carol Marbin Miller, *Cries for Help Go Unheeded by DCF by Design*, MIAMI HERALD, Nov. 29, 2009, at 1A; Michael Mayo, *2003 Child Abuse Tally: 81 Dead, Infinite Heartbreak*, SUN-SENTINEL, Sept. 19, 2004, at 1B; Carol Marbin Miller et al., *DCF Lapses Proved Fatal for 37 Kids*, MIAMI HERALD, Nov. 3, 2002, at 1A; *Foster Care Tot Suffers Skull Injury*, SUN-SENTINEL, *supra* note 4.

17. Erik Eckholm, *Florida Shifts Child-Welfare System's Focus to Saving Families*, N.Y. TIMES, July 25, 2009, at A12.

18. *Kids Count Overall Rank—2010*, ANNIE E. CASEY FOUND., http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?ind=37 (last visited Apr. 20, 2011).

19. *Compare id.* (showing Florida's nationwide ranking in 2010 at thirty-five out of fifty states), *with Kids Count Overall Rank—2002*, ANNIE E. CASEY FOUND., http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?loct=2&by=v&order=a&ind=137&dtm=10657&tf=13 (last visited Apr. 20, 2011) (showing Florida's nationwide ranking in 2002 at thirty-five out of fifty states). Limited exceptions include the Foster Children's Project (FCP) of the Legal Aid Society of Palm Beach County and the Legal Aid Service of Broward County Dependency Law Project, which represent some children in dependency proceedings. LEGAL AID SOC'Y OF PALM BEACH CNTY., INC., FOSTER CHILDREN'S PROJECT 2 (2009), *available at* http://www.legalaidpbc.org/downloads/brochures/Foster-Childrens-Project.pdf; *Children's Advocacy Project*, LEGAL AID SERV. OF BROWARD CNTY., INC., http://www.legalaid.org/broward/childrens_advocacy.htm (last visited Apr. 20, 2011).

20. *See* FLA. R. JUV. P. 8.217; *In re* D.B., 385 So. 2d 83, 87 (Fla. 1980); Dale, *Providing Counsel*, *supra* note 2, at 770.

21. *See* FLA. R. JUV. P. 8.217.

22. FLA. GUARDIAN AD LITEM PROGRAM, FLA. GUARDIAN AD LITEM 2009 ANNUAL REPORT 2 (2009) [hereinafter GAL 2009 REPORT], *available at* http://www.guardianadlitem.org/documents/GAL-2009AnnualReport.pdf (emphasis added). This statement is particularly ironic because in November the report of the Gabriel Meyers work group stated that what was needed for each child was "a champion." GABRIEL MYERS REPORT NOV. 2009, *supra* note 10,

On the other hand, counsel for the parents employed by the Office of Criminal Conflict and Civil Regional Counsel (Office of Regional Counsel), DCF, and the State of Florida's GAL Program have each dramatically expanded and changed since 2000. In addition, an inexplicable oddity in Florida is that the GAL Program has been statutorily named as a free-standing independent party in a dependency and termination of parental right (TPR) case[23] with attorneys of its own, separate from the child who, although unrepresented by an attorney, is also a party.[24] The child is, therefore, the only unrepresented party in a dependency proceeding.[25] As this article shall demonstrate, the Florida system is fundamentally flawed. It is a gerry-rigged scheme that produces irreconcilable ethical conflicts for the attorneys working in the system, is pragmatically unworkable, and most importantly, indefensibly denies children the right to an independent attorney to represent them.

This article begins with a statement of the problem and then provides an overview of changes in the Florida child welfare system since 2000. It focuses on changes in the approach to legal representation in the GAL Program, DCF, and the system of providing attorneys for parents now known as the Office of Regional Counsel. It then reviews the irreconcilable conflicts, confusion, and serious ethical constraints faced by the attorneys practicing in the system; reviews the current professional thinking as to the role of attorneys for children outside the State of Florida; discusses Florida constitutional principles that entitle children to attorneys; and then concludes by arguing in favor of providing independent attorneys for all children in Florida from the beginning of a dependency case through TPRs.

II. STATEMENT OF THE PROBLEM

The right to an attorney is one of America's most basic civil, legal privileges. Yet, children in Florida have no absolute right to independent attorney

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at 6. Myers had two GALs whom the GAL Annual Report says are "champion[s]" for the child. *See id.*

STANDARDS OF OPERATION 23. *See* FLA. STAT. § 39.01(51) (2010). Florida is one of only three states that uses this approach; the others are Ohio and Oklahoma. *See* OHIO REV. CODE ANN. § 2151.281 (2010); OKLA. STAT. tit. 10A, § 1-4-306 (2010). The Florida scheme would be impossible in the Federal Court system because of the case and controversy clause of the United States Constitution, Article III, Section 2, Clause 1. *See* Muskrat v. United States, 219 U.S. 346, 351, 353–55 (1911) (citing U.S. Const. art. III, § 2, cl. 1); *see also* Flast v. Cohen, 392 U.S. 83, 96 (1968).

24. FLA. STAT. § 39.01(51).

25. *See* GAL 2009 REPORT, *supra* note 22, at 4.

representation in dependency and termination of parental rights cases.[26] The majority of child advocate attorneys argue that attorneys for these children should represent their clients' "expressed wishes" rather than "best interest" and that children are entitled to be heard in court.[27] Most representation and determinations under a best interest model "take[] place without the child being heard, without the necessary resources, and without the trained, qualified investigation and deliberation that would best serve the child."[28]

A child's attorney "provides legal services for a child and . . . owes all of the same duties that are due [to] an adult client, including undivided loyalty, confidentiality, diligence, conflict of interest, communication, duty to advise, and competent representation."[29] Under the traditional, client-directed, or expressed wishes model, the attorney-client evidentiary privilege applies.[30] Attorneys are governed by ethics rules that impose a duty includ-

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26. *See* CHILDREN'S ADVOCACY INST. & FIRST STAR, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN 7 (2d ed. 2009) [hereinafter NATIONAL REPORT CARD, SECOND EDITION], *available at* http://www.caichildlaw.org/misc/final_rtc_2nd_edition_lr.pdf.

27. *Id.* at 17.

28. CHILDREN'S ADVOCACY INST. & FIRST STAR, A CHILD'S RIGHT TO COUNSEL: FIRST STAR'S NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR CHILDREN 5 (1st ed. 2007), [hereinafter NATIONAL REPORT CARD, FIRST EDITION], *available at* http://www.firststar.org/LinkClick.aspx?fileticket=Zh0LWwpfvRA%3d&tabid=74. In 2007, thirty-seven states and other U.S. jurisdictions provided for counsel either as best interest representation or traditional counsel. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 59 (3d Int'l ed. 2007); *see also* CHILD WELFARE INFORMATION GATEWAY, REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS: SUMMARY OF STATE LAWS 6 (2009), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/representall.pdf. New York has provided counsel for children since the 1960s. Claire Sandt Chiamulera, *New York Legislation Lowers Caseloads for Children's Attorneys*, 26 A.B.A. CHILD L. PRAC. 124, 124 (2007). For a detailed analysis of the position of the Legal Aid Society of the City of New York that children have independent attorneys, *see generally* GARY SOLOMON, LEGAL AID SOCIETY, GIVING THE CHILDREN A MEANINGFUL VOICE: THE ROLE OF THE CHILD'S LAWYER IN CHILD PROTECTIVE, PERMANENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS (2010), *available at* http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf; COMM. ON CHILDREN & THE LAW, N.Y. STATE BAR ASS'N, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, & TERMINATION OF PARENTAL RIGHTS PROCEEDINGS (2007), *available at* http://www.nysba.org/am/template.cfm?section=law_guardian_representation_standards&template=/cm/contentdisplay.cfm&contentid=11559. In Pennsylvania, children have had the right to counsel since 1972. LUCY JOHNSTON-WALSH ET AL., ASSESSING THE QUALITY OF CHILD ADVOCACY IN DEPENDENCY PROCEEDINGS IN PENNSYLVANIA 9 (2010) (citing Stapleton v. Dauphin Cnty. Child Care Serv., 324 A.2d 562, 566 (Pa. Super. Ct. 1974), *overruled in part by In re* G.C., 673 A.2d 932, 939 (Pa. Super. Ct. 1996), *aff'd per curiam*, 735 A.2d 1226 (Pa. 1999)).

29. NATIONAL REPORT CARD, SECOND EDITION, *supra* note 26, at 151.

30. FED. R. EVID. 502; FLA. STAT. § 90.502 (2010).

ing, but not limited to, maintaining the child's confidences, counseling, and advising the client.[31] The attorney abides by the child client's expressed wishes concerning the objectives of the representation, counseling him or her on those objectives.[32] If an attorney reasonably believes that the child's expressed wishes conflict with the child's legal interests, including being contrary to the child's best interests, and the attorney has been unable in his or her efforts to successfully counsel and advise the client, and a child cannot adequately act in the child's own interest as described in the Florida Rules of Professional Conduct, then as a last step the attorney may seek to have a GAL appointed to advocate for the child's legal interests.[33] Alternatively, an attorney may ethically withdraw from representation.[34] The American Bar Association (ABA) has made it clear that a "nonlawyer guardian ad litem cannot and should not be expected to perform any legal functions on behalf of a child."[35]

According to a 2009 report by the Washington, D.C. based nonprofit organization First Star, 63% of the states mandated the appointment of attorneys for the child.[36] Fifty-one percent of the states mandated that the child's attorney, when appointed, serve in a client-directed capacity.[37] Since First Star's first report in 2007, seventeen states improved their state laws governing children client-directed legal representation for child victims in dependency court and foster care proceedings.[38] According to First Star, nationally between 2007 and 2009 the number of states providing independent attorney representation to children increased.[39] Florida was not among them.[40] In

31. MODEL RULES OF PROF'L CONDUCT R. 1.4, 1.14 (2003).

32. MODEL RULES OF PROF'L CONDUCT R. 1.4, 1.14; R. REG. THE FLA. BAR R. 4-1.14 (1993); Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 103, 106 (2008).

33. Federle, *supra* note 32, at 106. ABA Model Rule 1.14(b) provides greater guidance to the lawyer. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(b). It says: "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including . . . appointment of a [GAL]." *Id.*

34. MODEL RULES OF PROF'L CONDUCT R. 1.16(b).

35. AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 2 (1996) [hereinafter ABA STANDARDS OF PRACTICE], *available at* http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf.

36. NATIONAL REPORT CARD, SECOND EDITION, *supra* note 26, at 8.

37. *Id.*

38. *Id.* at 9.

39. *Compare* NATIONAL REPORT CARD, FIRST EDITION, *supra* note 28, at 13, *with* NATIONAL REPORT CARD, SECOND EDITION, *supra* note 26, at 8.

fact, in First Star's first report, Florida received a grade of an F.[41] Then, in First Star's second report, Florida again received an F.[42]

As things stand now, the Florida system is structured in a manner that provides no attorney for a child, but does provide GAL Program representation of the child's best interest in dependency proceedings through a separate party, the GAL Program, with whom the child has no legal relationship recognized under American law.[43]

III. OVERVIEW OF RECENT CHANGES IN FLORIDA

A. *Recent History*

The Florida Legislature has declared "that the health and safety of children [is] of paramount concern" in the administration of child welfare services.[44] However, when it comes to the representation of children in the dependency system, Florida law establishes a system of competing interests between what is best for the child and the child's legal rights. Florida law provides that children in foster care have a GAL who is a separate party.[45] As a matter of practice, the GAL Program is appointed as the party to represent the child's best interests.[46] It then assigns a GAL, usually a volunteer layperson, for the child.[47] The GAL Program then also assigns a staff

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40. NATIONAL REPORT CARD, FIRST EDITION, *supra* note 28, at 33.

41. *Id.*

42. NATIONAL REPORT CARD, SECOND EDITION, *supra* note 26, at 46. Florida's GAL Program Executive Director, Theresa A. Flury, stated: "The Report also fails to acknowledge that when the child's ability to make decisions in regard to representation is impaired, according to the Florida Bar Rules, an attorney may have to act as 'de facto guardian' for that child." Press Release, Theresa A. Flury, Fla. Statewide Guardian Ad Litem Office, Florida's Guardian Ad Litem Program Rejects Florida's Grade (Oct. 2009), http://www.guardianadlitem.org/documents/FinalPressRelease101609.pdf [hereinafter GAL Rejects Grade].

43. FLA. STAT. §§ 39.402(8)(c), .822(1) (2010); FLA. R. JUV. P. 8.215; *In re* D.B., 385 So. 2d 83, 87 (Fla. 1980). In effect, under Florida law one represents another party. *See* FLA. STAT. §§ 39.402(8)(c), .822(1); FLA. R. JUV. P. 8.215; *In re D.B.*, 385 So. 2d at 87.

44. FLA. STAT. § 39.4085.

45. *Id.* § 39.01(51); FLA. R. JUV. P. 8.215.

46. FLA. STAT. § 39.4085(20). The term "attorney ad litem" (AAL) is rarely used nationally. It is defined in Florida as "an attorney who has completed any additional requirements as provided by law. The AAL shall have the responsibilities provided by law." FLA. R. JUV. P. 8.217(c). The attorney is appointed "to represent the child in any proceeding." FLA. R. JUV. P. 8.217(b); *see, e.g.*, TEX. PROB. CODE ANN. § 34A (West 1956). In Arkansas, attorneys ad litem represent children in abuse and neglect cases. *See Administrative Order No. 15*, ARK. JUDICIARY, https://courts.arkansas.gov/adlitem/public/order_15.cfm (last visited Apr. 20, 2011).

47. *See* FLA. R. JUV. P. 8.215(b)–(c).

attorney to represent it.[48] An "attorney ad litem" (AAL) may only be appointed, in the discretion of the court, to represent the child's legal interests.[49] As the following discussion illustrates, children are rarely appointed an independent attorney.

Since 2000, the argument in Florida over what kind of "representation" dependent children should have in dependency proceedings, GALs, AALs, or a combination of both, has been the subject of sharp debate.[50] As one judge who sat as a member of the Florida Bar Commission on the Legal Needs of Children Representation Subcommittee said in 2001, while GALs are required to advocate the child's wishes to the court, they "are duty bound to recommend what [is in the] best [interest of] the child, not necessarily what the child wants."[51] Some juvenile court judges in Florida oppose across the board independent representation of children by attorneys.[52] One judge has called it "'harmful to children,' unnecessary, and too expensive to be feasible,"[53] and argued that only some children, not all, need an AAL.[54] Another judge has stated that she "does not believe that every child in her courtroom needs an attorney."[55] One judge explained that "a lawyer is bound by the attorney-client privilege to keep the secret as the client wishes. But a GAL can tell the child's secret without violating any ethical canons—and is actually prohibited from advocating contrary to the safety of the child."[56] This judge argued further that under the lawyer-driven model, "lawyers either violate their ethics or hurt children."[57] The judge also said, "Where we

48. *Id.*

49. *Id.* at 8.217(a), (b).

50. *See* Jan Pudlow, *Should All Children in Court Be Represented?*, FLA. BAR NEWS (Nov. 1, 2001), http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf (search "Should All Children in Court Be Represented"; then follow hyperlink); James H. Seals, Legal Representation of Children in Dependency Proceedings Presented to the Legal Subcommittee of the Task Force For Fostering Services; Michael J. Dale & Louis M. Reidenberg, Letters to The Florida Bar News, *Lawyers for Kids*, FLA. BAR NEWS (Apr. 15, 2010), http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf (search "Lawyers for Kids"; then follow hyperlink dated Apr. 15, 2010); Gary Blankenship, *Lawyers v. GALS—What Is Best for a Child in Dependency Court?*, FLA. BAR NEWS (Jan. 1, 2010), http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf (search "Lawyers v. GALs—What Is Best for a Child in Dependency Court?"; then follow hyperlink).

51. Pudlow, *supra* note 50; *see also* FLA. R. JUV. P. 8.215(c)(3).

52. Pudlow, *supra* note 50.

53. *Id.*

54. *Id.*

55. Jacqueline Charles, *Changes Sought for Child Guardian Program*, MIAMI HERALD, Feb. 18, 2002, at 1B.

56. Pudlow, *supra* note 50.

57. *Id.* While provocative, these statements demonstrate a fundamental failure in understanding lawyers' ethics. For a discussion of this topic, see *infra* Part IV.

differ is when it comes to the best interest of the child. If the model is attorney-driven, you cannot have best interest."[58] Another judge has said that lawyers representing children will argue that their client should get a tattoo.[59] In an earlier article, one of the authors of this article argued that the best interest of the child versus the child's stated interest is a "red herring," and that attorneys should be hired in every case.[60] Both authors of this article support this proposition. Finally, at one time an attorney who lobbies the Legislature to fund advocacy programs stated, "Every child needs a well-trained lawyer. . . . We can't pick and choose which children should be saved."[61]

Over the past decade, public policy decisions have resulted in expansion of the GAL Program in Florida rather than instituting a system of independent attorneys for children. When it amended Chapter 39 to establish the Statewide GAL office in 2003, the Legislature found "that the Governor's Blue Ribbon [Panel] concluded that 'if there is any program that costs the least and benefits the most, this one is it,' and that the volunteer is an 'indispensable intermediary between the child and the court, between the child and DCF.'"[62]

These legislative findings are suspect for a number of reasons. First, research discloses no objective documentation supporting the Blue Ribbon Panel's findings.[63] Second, at the time the Legislature relied upon the Blue Ribbon Panel findings to increase funding,[64] the GAL Program consisted almost exclusively of volunteers, and its funding was limited. Today, the Legislature funded budget of the program, with a large full-time staff, exceeds $30 million.[65] Third, at the time the Legislature relied upon the Blue Ribbon Panel findings, there was no other program existing in Florida with which to compare the GAL Program in terms of benefits and costs. Finally,

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58. *Id.*

59. Blankenship, *supra* note 50.

60. *See* Dale, *Providing Counsel*, *supra* note 2, at 813.

61. FLA. BAR, COMM'N ON THE LEGAL NEEDS OF CHILDREN 9 (2002), *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/0718346282810A0985256BEA00684438/$FILE/finalLNCversionfromJan%20website%20file.pdf?OpenElement [hereinafter LEGAL NEEDS OF CHILDREN].

62. FLA. STAT. § 39.8296(1)(c) (2010) (amended 2003) (quoting BLUE RIBBON PANEL REPORT, *supra* note 2).

63. The Panel appears to have based its opinion upon the statements of a number of witnesses who urged the Panel to place GALS among its highest priorities and statistics in DCF District 11. *See generally* BLUE RIBBON PANEL REPORT, *supra* note 2.

64. FLA. STAT. § 39.8296(1)(c).

65. Research discloses various other sources of statewide GAL Program income in individual counties from, for example, a series of foundations, such as Voices for Children, and in kind contributions from the counties. A detailed discussion of GAL funding follows at Part III(B) *infra*.

the Legislature made no independent findings to support its conclusion, perhaps because there is very little professional literature supporting the effectiveness of GALs or CASAs in child welfare cases.[66]

In fact, to date the Legislature has not mandated, nor has there been, an objective in-depth study of the effectiveness of the GAL Program; still, the debate continues. The following discussion summarizes the ongoing debate about attorneys for children in Florida.

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66. One seeking such professional literature is faced with scant results. *See generally e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., FINAL REPORT ON THE VALIDATION AND EFFECTIVENESS STUDY OF LEGAL REPRESENTATION THROUGH GUARDIAN AD LITEM (1994); CALIBER ASSOCS., EVALUATION OF CASA REPRESENTATION (2004), *available at* http://www.nccpr.org/reports/casa.pdf; ORG. RESEARCH SERVS., EVALUATION OF COURT APPOINTED SPECIAL ADVOCATES/GUARDIANS AD LITEM VOLUNTEER IMPACT 1 (2005), *available at* http://nc.casaforchildren.org/files/public/community/judges/Judges_Survey_FullReport.pdf; OFFICE OF THE INSPECTOR GEN. AUDIT DIV., DEP'T OF JUSTICE, NATIONAL COURT-APPOINTED SPECIAL ADVOCATE PROGRAM, (2006), *available at* http://www.justice.gov/oig/reports/OJP/a0704/final.pdf; OFFICE OF PROGRAM EVALUATION & GOV'T ACCOUNTABILITY OF THE MAINE STATE LEGISLATURE, REPORT NO. SR-GAL-05, PERFORMANCE AUDIT OF GUARDIAN AD LITEM FOR CHILDREN IN CHILD PROTECTION CASES—PROGRAM MANAGEMENT CONTROLS NEEDED TO IMPROVE QUALITY OF GUARDIAN SERVICES, AND ASSURE EFFECTIVE ADVOCACY OF CHILDREN'S BEST INTERESTS (2006), *available at* http://www.maine.gov/legis/opega/reports/Guardians_ad_litem/GAL%20Final%20Report.pdf; S.C. GEN. ASSEMBLY LEGISLATIVE AUDIT COUNCIL, A REVIEW OF THE SOUTH CAROLINA GUARDIAN AD LITEM PROGRAM (2007), *available at* http://lac.sc.gov/NR/rdonlyres /35476BBD-2BC0-4C4F-879B-EFC01F296ABE/0/ GAL.pdf; OFFICE OF THE FAMILY & CHILDREN'S OMBUDSMAN, REPORT ON GUARDIAN AD LITEM REPRESENTATION OF CHILDREN IN CHILD ABUSE AND NEGLECT PROCEEDINGS § 1 (1999), *available at* http://www.governor.wa.gov/ofco/reports/ofco_199901.pdf; ERIK S. PITCHAL ET AL., NAT'L ASS'N OF COUNSEL FOR CHILDREN, EVALUATION OF THE GUARDIAN AD LITEM SYS. IN NEBRASKA (2009), *available at* http://ppc.nebraska.edu/userfiles/file/Documents/projects/GuardianLB961/NACC%20(Report%20plus%20Appendices).pdf. One empirical study which will result in such literature is in the works. The Children's Bureau of the U.S. Department of Health and Human Services "awarded the University of Michigan Law School a five-year, 5 million dollar grant to serve as the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep)" in 2009. *National Quality Improvement Center on the Representation of Children in the Child Welfare System*, UNIV. OF MICH. LAW SCH., http://www.law.umich.edu/CENTERSANDPROGRAMS/CCL/Pages/NationalQualityImprovementCenterontheRepresentationofChildrenintheChildWelfareSystem.aspx (last visited Apr. 20, 2011) [hereinafter *QIC-ChildRep*], *FY 2009 Children's Bureau Discretionary Awards*, ADMIN. FOR CHILDREN & FAMILIES, http://www.acf.hhs.gov/programs/ef/programs_fund/discretionary/2009.htm (last visited Apr. 20, 2011). The study was approved "to gather, develop, and communicate knowledge on child representation that presents the strengths and weaknesses of varying methods of representing children, promotes consensus on the role of the child's legal representative, and provides an empirically based analysis of how legal representation for the child might best be delivered." *QIC-ChildRep*, *supra*; *see also* PITCHAL ET AL., *supra*, at 179–80.

1. The Bar Commission

In 2002, the Florida Bar Commission on the Legal Needs of Children, a committee composed of a variety of child advocates, issued a report with recommendations to improve Florida's system of child representation in court proceedings.[67] The Commission found that "[c]hildren should have Legal Counsel and/or a [GAL] represent them in court whenever their interests may be at stake" in child abuse, neglect, and TPR cases.[68] While judges should maintain discretion to appoint counsel for children in certain proceedings, the Commission advocated that judges "shall" appoint legal counsel "[i]n cases where the state is seeking commitment or placement of a dependent child, for longer than 24 hours" in a staff-secure or physically secured facility.[69]

"Children in court proceedings have specific legal needs and rights, and often they are the only unrepresented party," the Commission said.[70] "Children are entitled to the same zealous advocacy adult clients expect of their lawyers. Yet, too often, children come to court powerless, with no one representing them at all. . . . Judges are left to make life-altering decisions about a child without sufficient information to back up sound decisions."[71] "'Florida needs to catch up with the majority of states that protect children by providing them counsel. . . . [It is] the only way that Florida can protect against tragedies in the lives of children in foster care, and shorten the amount of time they stay in care.'"[72]

In 2002, the Florida Bar Commission on the Legal Needs of Children's Representation Subcommittee supported Senate Bill 686 to provide attorneys for abused and neglected children in dependency proceedings with the goal that "no child go unrepresented in court."[73] The bill would have increased the GAL Program budget by $12 million but it was pulled before it was heard by the House.[74] Judge Kathleen Kearney, former secretary for DCF

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67. *See generally* LEGAL NEEDS OF CHILDREN, *supra* note 61.

68. *Id.* at 10.

69. *Id.* at 11.

70. *Id.* at 6.

71. *Id.* at 5; Thomas Tryon, *Kids in Court: Into the Lion's Den, Without Legal Counsel*, SARASOTA HERALD TRIB., Aug. 4, 2002, at F1 (quoting LEGAL NEEDS OF CHILDREN, *supra* note 61, at 5).

72. Carol Marbin Miller, *Lawyers Sought for Kids in State Care*, MIAMI HERALD, Nov. 21, 2001, at 11B (quoting Howard Talenfeld, a Broward County child advocate).

73. Jan Pudlow, *Bill to Double GAL Budget Down but, Maybe, Not Out*, FLA. BAR NEWS (Apr. 15, 2002), http://www.floridabar.org/DIV/COM/JN/JNNews01.nsf/Articles/7BCE5713787C8BB085256B950049EE6A.

74. *Id.*

and a former juvenile court judge, was an opponent of the bill and was said to be "of the opinion there are too many lawyers in the courtroom right now."[75] She was quoted as saying, "There are some areas of the country where every child gets an attorney and in the fight in court, the child's well-being, safety, and permanency get lost. It ends up not being about the child, but about who wins."[76] Judge Kearney felt that the best way to represent children is through GALs and that attorneys should only be appointed at the judge's discretion.[77]

Even though Senate Bill 686 did not pass in 2002, the GAL Program budget was increased by $7.5 million.[78] $1.7 million of this funding was used to finance the Ninth Judicial Circuit AAL Project in Orange County, where GALs were appointed in every case and attorneys were appointed on a case-by-case basis in the judge's discretion.[79] "Of the $7.5 million for legal representation for children, 'only about $3 million of that [was] actually ear-marked for attorneys, and the majority of that [was] ear-marked for attorneys for the GAL Program.'"[80] The program was discontinued after one year.[81]

2. The Blue Ribbon Panel

In 2002, Governor Jeb Bush convened a Blue Ribbon Panel on Child Protection to investigate Florida's child welfare system after the disappearance of Rilya Wilson.[82] The five-year-old disappeared from Florida's foster care system for sixteen months before it was discovered that she was missing, and that she had neither a GAL nor an attorney.[83] At the time of her

75. *Id.*

76. *Id.*

77. *Id.* This statement appears to be at odds with the New York experience where all children have been provided with independent counsel since the late 1960's. Merril Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 752 (2006); Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMPLE POL. & CIV. RTS. L. REV. 663, 665 (2006).

78. Jan Pudlow, *New Money Appropriated for Dependency Cases*, FLA. BAR NEWS (July 1, 2002), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/8B6575674B76FDB885256BE30068DDCD.

79. *Id.*

80. *Id.*

81. Jan Pudlow, *Children's Programs Take a Hard Hit*, FLA. BAR NEWS (June 15, 2003), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/53964376F5B661A185256D410073BF5A.

82. Carol Marbin Miller, *Legislators Reluctant to Fund Child Welfare*, MIAMI HERALD, May 15, 2002, at 2B; FLA. GUARDIAN AD LITEM PROGRAM, 25 YEARS OF CHILD ADVOCACY 14 [hereinafter GAL 25 YEARS OF CHILD ADVOCACY], *available at* http://www.guardianadlitem.org/forms/GAL25thReport.pdf.

83. BLUE RIBBON PANEL REPORT, *supra* note 2; Miller, *supra* note 82.

disappearance, it was estimated that 50% of dependent children did not have a GAL.[84] The Blue Ribbon Panel also found DCF to be "'underfunded, understaffed, underappreciated' and 'overworked . . . overburdened, overwhelmed.'"[85] It found that Florida's child protection system had been through twenty-two revisions in thirty-three years.[86]

"[T]he panel recommended that the Florida Legislature set among its highest priorities the full funding of the [GAL] Program [so] that every child under [DCF supervision] [w]ould have a GAL."[87] The Legislature then reiterated the unsupported statement of the Governor's Blue Ribbon Panel that "'if there is any program that costs the least and benefits the most, this one is it,' and that the GAL volunteer is an 'indispensable intermediary between the child and the court, between the child and DCF.'"[88] As noted, research discloses no documentary support for this statement.[89]

Since its inception, the GAL Program had been supervised by court administration within the circuit courts.[90] However, this was perceived as a conflict of interest because the program was being supervised by judges before whom the GALs were to appear.[91] As a result of the Blue Ribbon Panel's finding, a Statewide GAL Office was created within the Justice Administrative Commission in 2004, in order to "provide a statewide infrastructure to increase functioning and standardization among the local programs currently operating in the [twenty] judicial circuits."[92]

3. Privatization

In the late 1990's the Florida Legislature enacted legislation, entitled "PRIVATIZATION," championed by then-Governor Jeb Bush, to turn around the foster care services system in Florida which had been tarnished by scandal for many years.[93] The legislation expressed the specific intent

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84. Miller, *supra* note 82.

85. Commentary, *More Reforms in Order for Child Protection System*, TAMPA TRIB., June 2, 2002, at 2.

86. *Id.*

87. GAL 25 YEARS OF CHILD ADVOCACY, *supra* note 82, at 14.

88. FLA. STAT. § 39.8296(1)(c) (2010); Sarah Herald, Carol Licko, Sister Jeanne O'Laughlin, & David Lawrence, Chair, *Blue Ribbon Panel Report* (2002).

89. *See supra* note 65, and accompanying text.

90. FLA. STAT. § 39.8296(1)(b).

91. *Id.*

92. *Id.* § 39.8296(2), (1)(d).

93. FLA. DEP'T OF CHILDREN & FAMILIES, BRIEFING BOOK 10 (2006) [hereinafter BRIEFING BOOK, *available at* http://www.dcf.state.fl.us/admin/publications/docs/visionvalue voices2006full.pdf; Alvin W. Wolfe, *What's Wrong With Florida's Child Welfare System? They Kept the Communities Out of Community Based Care*, FLA. HEALTH & HUMAN SERVS.

that DCF privatize or outsource (i.e., contract with competent community based agencies) "the provision of foster care and related services statewide."[94] The legislation provided a three year time period within which to phase in and accomplish "privatization" statewide, beginning on January 1, 2000.[95] The process was intended to transform a child welfare system that had been monopolized by government and charities through combining and outsourcing foster care and related services to service agencies with increased local ownership of both service delivery and design.[96] Services were to be provided by not-for-profit-lead agencies that developed and managed comprehensive, community based-networks of providers who were equipped to deliver all services and supports necessary to meet the needs of child victims and their families.[97] Protective investigation remained with the state or a few sheriff departments.[98]

The lead agencies were to have the capacity to carry out a number of tasks, including: "family preservation, independent living, emergency shelter, residential group care, foster care, therapeutic foster care, intensive residential treatment, foster care supervision, case management, postplacement supervision, permanent foster care, and family reunification."[99] Safety of children was to be, at all times, the foremost concern.[100] The impact of this change as it relates to the need for attorneys for children is clear. First, an outside private agency with different perspectives and leadership impacts the quality and quantity of care children receive in foster care. It is one step removed from DCF, and accountability becomes more attenuated.

Second, the standard DCF contract with lead agencies provides that Children's Legal Services (CLS), which defines itself as a "statewide law

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BD., INC., http://www.fhhsb.org/What%20Is%20Wrong%20with%20Florida.html (last visited Apr. 20, 2011); *see* KATHRYN ALBOWICZ, FLORIDA'S EXPERIMENT WITH PRIVATIZING CHILD WELFARE SERVICES 2 (2004), *available at* http://www.afscme.org/docs/flchild.pdf. (criticizing privatization, but citing to other studies).

94. FLA. STAT. § 409.1671(1)(a) (2010).

95. *Id.* The label describing this process was also changed by the 2000 Florida Legislature from "privatization" to "community based child welfare" and then thereafter changed to "community based care." For a discussion of the underlying reasons for the changes, see Wolfe, *supra* note 93.

96. *Children, Youth and Families*, FLA. DEP'T OF CHILDREN & FAMILIES, http://www.dcf.state.fl.us/programs/cbc (last visited Apr. 20, 2011).

97. *Id.*

98. FLA. STAT. § 39.3065 (2010).

99. *Id.* § 409.1671(1)(a).

100. EVALUATION OF COMMUNITY-BASED CARE IN FOSTER CARE AND RELATED SERVICES IN FLORIDA, at v (2001), *available at* http://www.dcf.state.fl.us/admin/publications/docs/executive_summary-toc.pdf.

firm,"[101] has all "legal decision-making authority pertaining to any dependency and termination of parental rights proceeding from inception to completion."[102] This scheme adversely affects children because it places traditional child welfare party decision-making in the hands of a non-party clientless state-wide law firm within the Department—CLS.[103] Put differently, it is as though CLS lawyers are representing themselves.[104]

4. The 2010 Bar Bill

Beginning in 2008, the Legal Needs of Children Committee of the Florida Bar began developing proposed legislation to provide counsel to children in some dependency and TPR cases.[105] Relying on the work of this Committee, the Florida Bar through its then president announced its strong support for the Committee's Bill.[106] The 2010 bill provided that children would be represented by attorneys in certain articulated cases, including children who have been in and out of home care for more than two years and in whose cases no TPR petition has been filed, children with developmental disabilities, and children faced with psychotropic medication.[107] Significantly, it did not include children when they first entered the child welfare system.[108] The

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101. Contract, *supra* note 12, at 44.

102. *Id.* at 45.

103. *See* DEP'T OF CHILDREN AND FAMILIES LEGAL WORKGROUP, REP. OF THE DEP'T OF CHILDREN AND FAMILIES LEGAL WORKGROUP 17–18 (Sept. 17, 2007) (on file with Dep't of Children and Families) [hereinafter LEGAL WORKGROUP].

104. *See* Contract, *supra* note 12, at 44. At the same time, Exhibit B of the lead agency contract states key parties and the critical witnesses in the case are the case managers and child protective investigators. *Id.*

105. *See* Fla. Comm. on Fla. Children First for the Fla. Bar Standing Comm. on the Legal Needs of Children, Ch. 39.820 (Proposed draft of July 18, 2008) (on file with the Nova Law Review) [hereinafter Fla. Children First].

106. Gary Blankenship, *Bar to Support Legislation to Provide Lawyers for Kids in Dependency Court*, FLA. BAR NEWS (Jan. 1, 2010), http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf (search "Bar to Support Legislation to Provide Lawyers for Kids in Dependency Court"; then follow hyperlink); Julie Levin, *Lawyers Go to Bat for Children in State Care*, MIAMI HERALD, July 26, 2009, at 6BE.

107. S.B. 1860 2010 Leg. (Fla. 2010) (died in Comm. on Children, Families, & Elder Affairs Apr. 30, 2010). At some point in the legislative process this category of child was removed from the bill. *See generally id.*

108. *See id.* The authors of this article opposed the Bill. Michael J. Dale & Louis M. Reidenberg, Op-Ed., *All Florida's Abused Kids Deserve Lawyers*, SUN-SENTINEL, Feb. 28, 2010, at 4F. Curiously, one of the major supporters of the Bill was quoted as saying, "[f]oster care is like being in the ocean . . . [t]he longer children are there, the better chance they'll drown." Blankenship, *supra* note 50. One would have thought that this view would have justified a provision in the bill that all children receive an independent attorney at the begin-

bill died when it reached the Committee on Children, Families, and Elder Affairs.[109] Thus, by the fall of 2010, children in Florida still had no right to independent legal representation, while substantial changes had, however, occurred in the legal representation of the other three parties in Chapter 39 proceedings—the GAL Program, DCF, and parents.

B. *The Guardian Ad Litem Program*

Florida's system of GAL participation in dependency proceedings has dramatically changed since 2001. In order to understand how Florida's GAL Program works, it is first important to understand its sources of funding. The origin of the GAL approach to child protection is the federal Child Abuse Prevention and Treatment Act of 1975 (CAPTA),[110] a federal funding statute. In compliance with the federal law, in 1984 Florida enacted juvenile court rules "[r]equiring that the appointed GAL represents the best interests of the child as opposed to representing the child within the context of the counsel-client relationship."[111]

To receive funding under CAPTA, a state must have:

> provisions and procedures requiring that in *every case* involving an abused or neglected child which results in a judicial proceeding, a [GAL], who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to *represent* the child in such proceedings.[112]

Although CAPTA does not clearly delineate the duties a GAL must perform, CAPTA does specify two purposes for which a GAL must be appointed: "to obtain first-hand, a clear understanding of the situation and needs of the child; and to make recommendations to the court concerning the

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ning of a dependency case, as the authors of this article argued when the bill was pending and argue now. *Id.*

109. *Florida Senate Website Archive-S1860 Attorney Representation for Children*, http://archive.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&BillNum=1860&Year=2010 (last visited Apr. 20, 2011).

110. 42 U.S.C. § 5106a (2006). CAPTA was recently reauthorized by Congress. Clara Totenberg Green, *Congress Reauthorizes Child Abuse Prevention and Treatment Act and the Family Violence Prevention and Services Act*, LEGAL MOMENTUM (Dec. 14, 2010), http://legalmomentum.typepad.com/blog/2010/12/congress-reauthorizes-child-abuse-prevention-and-treatment-act-and-the-family-violence-prevention-an.html.

111. Petition of the Fla. Bar to Amend the Fla. Rules of Juvenile Procedure, 462 So. 2d 399, 426 (Fla. 1984) (per curiam) [hereinafter Petition of the Fla. Bar].

112. § 5106(a)(b)(2)(xiii) (emphasis added).

best interests of the child."[113] The law allows attorneys to be GALs.[114] The law does not say anything about the issue of the attorney representing the child as a traditional client with the ethical obligations that attach to it. It may be argued that a state that allows CAPTA funds to pay for traditional attorneys to represent children is not in compliance with the law. However, as Professor Katherine Hunt Federle has noted, no state has ever been found to be out of compliance for this reason.[115] Florida, as this article explains, has spent a nominal amount of state GAL Program funds on traditional attorneys for children.

Florida has authorized, but never met, the mandate of 100% GAL "representation" required under CAPTA.[116] Litigation to successfully enforce CAPTA is unlikely because several federal courts have held that there is no private right of action under the statute.[117] The remaining remedy, asking the Secretary of Health and Human Services to cut off funding to Florida, is unlikely.[118] Despite the federal and state mandates that each child in judicial dependency proceedings be appointed a GAL, in 2009 there were approximately 5400 children in the dependency system with no advocate.[119] Even

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113. *Id.* (emphasis added).

114. *See* Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. L.Q. 441, 442 n.2 (2000) [hereinafter Duquette, *Two Distinct Roles*].

115. Federle, *supra* note 32, at 108; *see generally* DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE (4th ed. 2010); *See also Prefatory Note* to UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT 1–10 (amended 2007), *available at* http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.pdf.

116. *See* FLA. STAT. §§ 39.402(8)(c)(1), .807(2)(b)(3) (2010); *see also* Michael J. Dale, *Juvenile Law: 1998 Survey of Florida Law*, 24 NOVA L. REV. 179, 190 (1999) (collecting opinions stating that failure to appoint a GAL is not reversible error). GAL long range program plan projection indicates that 100% GAL appointments will not even be achieved by 2015. STATEWIDE GUARDIAN AD LITEM OFFICE, LONG RANGE PROGRAM PLAN: FISCAL YEARS 2010-2011 THROUGH 2014-2015 4 (2009). This projection seems to be at odds with DCF report that the number of children in care has decreased.

117. *See* 31 Foster Children v. Bush, 329 F.3d 1255, 1274 (11th Cir. 2003); Dale, *Providing Counsel*, *supra* note 2, at 779–80. *But see* Marisol A. *ex rel.* Forbes v. Guiliani, 929 F. Supp. 662, 683–84 (S.D.N.Y. 1996), *aff'd by* 126 F.3d 372 (2d. Cir. 1997); Henry v. Willden, No. 2:10-cv-00528-RCJ-PAL, 2010 WL 4362809, at *14 (D. Nev. Oct. 26, 2010); Rodwell v. Cleveland, No. 08-11437, 2010 WL 1417775, at *5 n.5 (E.D. Mich. Apr. 5, 2010); Hilbert v. Cnty. of Tioga, No. 3:03-CV-193, 2005 WL 1460316, at *14 (N.D.N.Y. June 21, 2005) (holding that CAPTA does not provide enforceable rights); Woods v. G.B. Cooley Hosp. Serv. Dist., No. 07-0926, 2007 WL 4812054, at *3 (W.D. La. Dec. 10, 2007).

118. *See* note 120 *infra*.

119. *See* Press Release, Fla. Statewide Guardian Ad Litem Office, Statewide Guardian Ad Litem Program Executive Director Marks First Six Months (July 8, 2009) [hereinafter GAL First Six Months], *available at* http://www.guardianadlitem.org/documents/PressRelease

though there is a deficiency, according to the U.S. Department of Health and Human Services Administration for Children and Families, the State will continue to receive federal funding as long as the governor is making diligent efforts towards 100% representation.[120]

The agency responsible for administration of CAPTA grant funds in Florida is DCF.[121] In 2001, the GAL Program budget was $14.1 million.[122] By 2006–07, the budget had increased to $34,349,313.[123] In 2000, a GAL was actually only involved in 58% of the cases in which the GAL Program was appointed.[124] The highest number of children represented came in 2007, when 32,520 children had a GAL, but this number has steadily declined, according to the Program, due to budget cuts even though the Program consists primarily of volunteers.[125] In 2007–08, the budget was reduced by 4%, and in 2008–09 it was reduced by an additional 3.2%, totaling over $2.5 million in cuts.[126] Furthermore, 4% of the 2007–08 existing appropriation was withheld.[127] In 2008, the program stated that it was going to request an additional $5 million in funding in order to comply with the statutory mandate that all children have a GAL.[128] However, the funding was not received, and the GAL Program was reduced by an additional 7.5% for the 2009–10 fiscal

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07.08.09.pdf. In its 2009 Annual Report, the Program said that it represented eighty percent of the children under dependency court jurisdiction. GAL 2009 REPORT, *supra* note 22, at 12.

120. Telephone Interview with Carola Pike, Child Welfare Program Specialist, Atlanta Region, Admin. for Children & Families (Aug. 17, 2009).

121. *See* FLA. DEP'T OF CHILDREN & FAMILIES, CHILD & FAMILY SERVICES PLAN 2010–2014 117 (June 30, 2009) [hereinafter CHILD & FAMILY SERVICES PLAN], *available at* http://centerforchildwelfare.fmhi.usf.edu/kb/resource/Child%20and%20Family%20Services%205%20Year%20Plan%202010%20-%202014.pdf; *see* FLA. DEP'T OF CHILDREN & FAMILIES, FLORIDA CHILD ABUSE PREVENTION & TREATMENT ACT (CAPTA) STATE PLAN 8–4 (2004), *available at* http://www.uky.edu/SocialWork/crp/states/fl/Floridas2004CAPTAPlan.pdf.

122. OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, REPORT NO. 02-10, INFORMATION BRIEF: GUARDIAN AD LITEM PLACEMENT MAY SHIFT FOR REASONS OF FUNDING AND CONFLICT OF INTEREST 2 (2002) [hereinafter INFORMATION BRIEF], *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0210rpt.pdf.

123. STATEWIDE GUARDIAN AD LITEM OFFICE, LONG-RANGE PROGRAM PLAN 13 (2007) [hereinafter 2007 LONG-RANGE PROGRAM PLAN], *available at* http://www.justiceadmin.org/gal/GAL%20-LRPP%202008-09%20Final.pdf.

124. INFORMATION BRIEF, *supra* note 122, at 2.

125. FLA. GUARDIAN AD LITEM PROGRAM, FLA. GUARDIAN AD LITEM 2008 ANNUAL REPORT 6 (2008) [hereinafter GAL 2008 REPORT], *available at* http://www.guardianadlitem.org/documents/GAL2008AnnualReport.pdf.

126. *Id.* at 2.

127. *Id.*

128. *Id.*

year to a total of $31,986,200.00.[129] The total state legislative funded budget for the GAL Program was $30,427,288.[130]

For the fiscal year 2009–10, the State received $1,978,011 in CAPTA funds.[131] The CAPTA funds are used by DCF for other child welfare purposes and not for the GAL Program. Nor does the GAL Program receive the $818,800.00 in funds received by the State of Florida under the federal Children's Justice Act.[132] The federal Children's Justice Act grants to states the power to develop, establish, and operate programs that improve investigation and prosecution of child abuse and neglect cases. Some states use these funds to train lawyers who represent parties in these cases.[133] Some states use the funding to support child advocacy centers or support child fatality review teams.[134] The GAL Program also has resources beyond its state legislative allocation of funds. These include free office space, county donations, foundation support, and corporate and public giving. State legislation has allowed the Statewide GAL Office to "create a direct-support organization" to raise funds, obtain grants, gifts, and bequests of various types including securities and property for the Statewide GAL Office.[135] The GAL Program has also developed a series of direct-support non-profit organizations to

129. GAL First Six Months, *supra* note 119; STATEWIDE GUARDIAN AD LITEM OFFICE, LONG RANGE PROGRAM PLAN 6 (2009), [hereinafter 2009 LONG RANGE PROGRAM PLAN], *available at* http://www.guardianadlitem.org/documents/2009-2010LongRangeProgramPlan_000.pdf; *see also Government Program Summaries: Justice Administrative Commission Guardian Ad Litem Program*, OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, http://www.oppaga.state.fl.us/profiles/1016 (last updated May 5, 2010) [hereinafter *Government Program Summaries*] (stating GAL Program Budget is $30,747,537.00).

130. *Government Program Summaries*, *supra* note 129.

131. *See* CHILD & FAMILY SERVICES PLAN, *supra* note 121, at 144. It does not appear that any of the CAPTA funds are actually used to fund either GALs or attorneys for children. CAPTA funds are spent by DCF for other child welfare purposes. Telephone Conversation with Darrell Vabaldo, Chief of Resource Mgmt., Family Safety and Preservation Servs., Dep't of Children & Families, (Dec. 23, 2010); E-mail from Darrell Vabaldo, Chief of Resource Mgmt., Family Safety and Preservation Servs. to Author, DCF (Dec. 1, 2010, 12:59PM) (on file with Nova Law Review).

132. *See* E-mail from Vabaldo to Author, *supra* note 131; 42 U.S.C. § 5106(c).

133. 42 U.S.C. § 5106(c). Some of these funds are to be used to establish a state task force on children's justice.

134. Florida spent $515,800 on the DCF Summit. Other funds support the state task force on children's justice. *See* E-Mail from Joe Frolick, Communications Director, DCF to Reference and Instructional Services Librarian, Nova Southeastern Univ. Shepard Broad Law Ctr. (Dec. 1, 2010, 1:23PM) (on file with Nova Law Review).

135. FLA. STAT. § 39.8298(1) (2010). *Government Program Summaries*, *supra* note 129. According to Nathan Ray, the Florida GAL Foundation spent $22,649 on lobbying in 2009. *See* FLORIDA GUARDIAN AD LITEM SHORT FORM TAX RETURNS (2009); Telephone Conversation with Nathan Ray, Legislation Dir., GAL Program (Dec. 22, 2010).

raise private funds for its mission.[136] The GAL Program Annual Report does not appear to report any of this non general revenue funding income, which amounts to $6,316,190.49.[137]

In addition to funding, one needs to understand the role of the GAL Program in a dependency proceeding in Florida. GALs represent the best interests of children in court proceedings.[138] Although GALs appear in court, they do not represent the child in the sense that the law recognizes that term. Rather, they "represent" to the court what they believe is in the best interests of the child.[139] Most GALs are volunteer lay people. Attorneys also can volunteer as GALs. But when they do, they do not have an attorney-client relationship with the child, do not represent the child's legal interests, have no confidential relationship with the child, and may not provide legal advice to the child.[140] The GAL Program has staff attorneys who appear in court, but they represent the GAL Program, not the child.[141] Although Florida's

136. GAL 2008 REPORT, *supra* note 125, at 29. There are 22 foundations working with the GAL Program statewide. *See id.* at 29–30. For example, Voices For Children Foundation, Inc. of Miami, in its fundraising literature, states that: "[GALs] are trained, court-appointed adults who [represent the best interests of] abused, abandoned, and neglected children involved in dependency court proceedings." Press Release, Voices For Children Found., Voices for Children Foundation Welcomes Nelson F. Hincapie as Its New President & CEO (May 28, 2009) (on file with Nova Law Review). Voices for Children Foundation raises funds to support the GAL Program in their efforts to ensure our children have a voice in dependency court and that their immediate needs are met. *Id.*; *see* GAL 2008 REPORT, *supra* note 125, at 29. In 2009, the Foundation spent $30,657.00 on lobbyists. *See* Voices for Children 2009 Tax Return.

137. Nor does the Report contain any valuation of the economic amounts of the services provided by the volunteer GALs.

138. *See* FLA. STAT. §§ 39.402(c)(1), .820(1); *see also Volunteer: Frequently Asked Questions*, FLORIDA GUARDIAN AD LITEM PROGRAM, http://www.guardianadlitem.org/vol_faq.asp (last visited Apr. 20, 2011). Curiously, the mission of CLS is to "advocate in the best interests of children to achieve permanency, stability and security." *About the Department: Children's Legal Services and Counsel for Kids Reference Guide*, FLA. DEP'T OF CHILDREN & FAMILIES, http://www.dcf.state.fl.us/admin/cls/refGuides.shtml (last visited Apr. 20, 2011).

139. *See* M.W. v. Davis, 756 So. 2d 90, 96 n.16 (Fla. 2000), in which the GAL Program argued an amicus against application of increased due process protections through Baker Act requirements to located mental health facility placements for children in the dependency system. *But see* Florida Guardian Ad Litem 2010 Annual Report which states that the Program provides advocacy that pursues the child's "legal" interests as well as the child's "best" interests. FLA. GUARDIAN AD LITEM PROGRAM, FLORIDA GUARDIAN AD LITEM 2010 ANNUAL REPORT 4 (2010) [hereinafter GAL 2010 REPORT], *available at* http://www.guardianadlitem.org/documents/GALAnnualReport2010.pdf.

140. STATEWIDE GUARDIAN AD LITEM OFFICE, STANDARDS OF OPERATION 15 (2006) [hereinafter STANDARDS OF OPERATION] ("[GAL] staff and volunteers shall not . . . give legal advice or otherwise practice law in their capacity as a [GAL], unless the [GAL] is an attorney.").

141. GAL 2009 REPORT, *supra* note 22, at 4.

statutory scheme also allows for the appointment of an AAL to represent the child's legal interests, this is discretionary with the court and is rarely exercised, as this article demonstrates.[142]

The next concept to understand is the statutory scheme under which the GAL Program operates. Chapter 39 and the Florida Rules of Juvenile Procedure define a GAL in inconsistent and contradictory ways. First, a GAL is defined as:

> a certified [GAL] program, a duly certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney working on behalf of a [GAL] or the program; staff members of a program office; a court-appointed attorney; or a responsible adult who is appointed by the court to *represent the best interests* of a child in a proceeding . . . who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court.[143]

The next section of Chapter 39 inconsistently states: "A [GAL] shall be appointed by the court at the earliest possible time to *represent the child* in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal."[144] The section of Chapter 39 dealing with taking children into custody and shelter hearings states: "At the shelter hearing, the court shall . . . [a]ppoint a [GAL] to represent the *best interest* of the child, unless the court finds that such representation is unnecessary."[145] In addition to the definitional inconsistency, the section's reference to the court's authority to not appoint a GAL runs counter to CAPTA, the federal funding statute that makes the appointment mandatory.[146] Florida, of course, has never had a full assignment of GALs.[147] Under Florida law, the court can also discharge the GAL at the dependency dispositional hearing, also apparently in violation of CAPTA.[148] At the TPR proceeding, Chapter 39 states that, among the duties of the GAL, is to "represent the *best interests* of the child until the jurisdiction of the court over the child terminates or until excused by the court."[149]

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142. *Id.* at 20.

143. FLA. STAT. § 39.820(1) (2010) (emphasis added); *see also* FLA. R. JUV. P. 8.215(b) (stating "[t]he court shall appoint a [GAL] to represent the child in any proceeding as required by law.").

144. FLA. STAT. § 39.822(1) (emphasis added).

145. *Id.* § 39.402(8)(c)(1).

146. *See* Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(xiii) (2006).

147. GAL 2009 REPORT, *supra* note 22, at 12 (stating an 80% representation rate); *see also* Dale, *Providing Counsel*, *supra* note 2, at 791–92.

148. FLA. STAT. §§ 39.521(1)(d)(5), .621(10)(f).

149. *Id.* § 39.807(2)(b)(3) (emphasis added).

The GAL or GAL Program representative is to "review all disposition recommendations and changes in placements and must be present at all critical stages of the dependency proceeding or submit a written report of recommendations to the court."[150] GALs are either volunteers or members of the staff of the GAL Program acting as parties in child welfare proceedings.[151] In June 2009, the GAL Program had nearly 8000 volunteers who represent the best interests of 27,000 abused and neglected children throughout the state;[152] according to latest reports, in about 85% of the cases.[153]

Attorneys who volunteer for the GAL Program may

> represent the child's best interests as the [GAL], with support from a case coordinator and a program attorney; . . . utilize their area of expertise to assist the GAL Program, including probate, special education, guardianship, immigration, administrative law and appeals; [or they] can represent the child in a regular attorney-client relationship as the attorney ad litem (AAL).[154]

The Florida GAL Program materials state that attorneys who volunteer as GALs do "not owe a duty of confidentiality to the child, and [they advocate] for what [they] believe is in the child's best interest, rather than what the child wants."[155] As of August 2008, there were approximately 700 lawyers volunteering as GALs.[156]

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150. *Id.* § 39.822(4).

151. *See id.* § 39.820(1); GAL 2009 REPORT, *supra* note 22, at 4; GAL 2008 REPORT, *supra* note 125, at 5.

152. GAL First Six Months, *supra* note 119; *Volunteer: Frequently Asked Questions*, *supra* note 138.

153. *Government Program Summaries*, *supra* note 129.

154. *Pro Bono Attorneys: Frequently Asked Questions*, FLORIDA GUARDIAN AD LITEM PROGRAM, http://www.guardianadlitem.org/probono_faq.asp (last visited Apr. 20, 2011).

155. *Id.*

156. Jan Pudlow, *Attorneys Needed for Aging-out Foster Kids*, FLA. BAR NEWS (Aug. 1, 2008) http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf (search "Attorneys Needed for Aging-Out Foster Kids"; then follow hyperlink). In Orange County, GALs volunteer through the Legal Aid Society of the Orange County Bar Association rather than through the Florida GAL Program. *See Guardian ad Litem*, Legal Aid Soc'y of the Orange Cnty Bar Ass'n, http://www.legalaidocba.org/probono/Guardian.htm (last visited Apr. 20, 2011). Only attorneys are appointed as GALs in Orange County. *Id.* This is an anomaly. "By law, the GAL is actually a party to the dependency proceeding, so an attorney GAL is, in effect, an attorney representing himself or herself, not an attorney for the child." John R. Hamilton, Letters, *GALS*, 29 FLA. BAR NEWS 1, Jan. 1, 2002. *But see In Re Conservatorship For William J. Allen*, No.E2010-01625-COA-R10-CV (Tenn. App. 2010). There are currently 390 pro bono attorneys and 7 GAL staff attorneys representing 1200 children in Orange County. *See* Email from C. Nicholson, to Rebecca Rich, Reference and Instructional Services Librarian, Nova Southeastern Univ. Shepard Broad Law Ctr. (Jan. 19, 2011) (on file with Nova Law Review).

It is also important to understand how attorneys operate within the GAL Program. The Florida GAL Program employs approximately 145 staff attorneys.[157] According to its literature, "[P]rogram attorneys represent the best interests and protect the legal interests of children in all phases of court proceedings from trial through the appellate process."[158]

As this article demonstrates, as a matter of legal standing and legal ethics, the Florida GAL Program attorneys do not and cannot represent the legal interest of children in dependency or TPR proceedings. There is no statutory authority enabling them to act on behalf of the legal interests of children.[159] Curiously, however, substantial GAL Program literature says that they do.[160] For example, in a letter rejecting the First Star Report referred to earlier in this article, the then GAL Program Executive Director stated:

> The Report also fails to acknowledge that when the child's ability to make decisions in regard to representation is impaired, according to the Florida Bar Rules, an attorney may have to act as "de

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The pro bono attorneys are asked to accept 2 new cases per year. *Id.* Each case may have between 1 and 7 children. *Id.* The program receives $659,681.28 in GAL Program contracted services. *See* Email from C. Nicholson to Rebecca Rich, *supra.*

157. Telephone Conversation with Theresa Flury's Office, Former Exec. Dir., Guardian Ad Litem Program (Apr. 2009). For the past five years GAL Program lawyers have handled appeals. In one case, an appellate court commented on the role of the GAL lawyer. Dep't of Children & Families v. S.T., 963 So. 2d 314, 315 (Fla. 4th Dist. Ct. App. 2007) (raising the issue of whether the GAL Program had standing). In another appeal, the GAL Program described itself as "the child's lawyer." *See* Initial Brief of the Guardian Ad Litem Program at 4, D.O. v. S.M., No. 4D07-2663 (Fla. 4th Dist. Ct. App. Aug. 22, 2007).

158. GAL 25 YEARS OF CHILD ADVOCACY, *supra* note 82.

159. The GAL Program describes itself as "having a dedicated appellate division to represent the best interests of children whose cases are appealed." FLA. GUARDIAN AD LITEM PROGRAM, FLORIDA GUARDIAN AD LITEM 2010 ANNUAL REPORT 7 (2010) [hereinafter GAL 2010 REPORT], *available at* http://www.guardianadlitem.org/documents/GALAnnualReport2010.pdf. Apparently, "[t]he appellate team makes an appearance in every appeal in which the GAL Program is appointed in the trial court." *Id.* This may be the case even when the issue on appeal has nothing to do with best interests of the child. *See e.g.*, B.T. v. Dep't of Children & Families, 16 So. 3d 940 (Fla. 5th Dist. Ct. App. 2009).

160.

> In order to help guide the advocacy team and leave 'no stone unturned' regarding the child's *legal needs* and best interests, the Program utilizes a comprehensive tool called the Advocacy Framework. The Advocacy Framework is a critical checklist that ensures the advocacy team is reviewing all aspects of a child's case and making the best recommendations to the court regarding the child's placement; mental, physical, and educational needs; *and legal and best interests.*

GAL 2010 REPORT, *supra* note 159, at 4 (emphasis added).

> facto guardian" for that child. In this event, the attorney's representation would duplicate that of Florida's [GAL] Program.[161]

This statement by the former executive director, an attorney, mischaracterizes the concept of legal representation of a client. The child does not have an attorney in Florida. The child is not the client of the GAL Program. There is no simpler way to put it. To say the attorney for the GAL Program duplicates the attorney for a child as a "de facto GAL," demonstrates a fundamental misunderstanding of the Florida Rules of Professional Responsibility.[162] This fundamental misunderstanding has existed since the inception of the Program and continues to this day.[163] The GAL Program lawyer's client is the GAL Program, according to the GAL Program Attorney Standards of Practice.[164]

The Statewide GAL Office Standards of Operation state that:

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161. GAL Rejects Grade, *supra* note 42.

162. *See* FLA. R. PROF. CONDUCT 4-1.14 (1993). *But see* GAL Rejects Grade, *supra* note 42. A powerful example of the distinction is found in a recent Fourth District Court of Appeal case. *See* R.F. v. Dep't of Children and Families, 50 So. 3d 1243 (Fla. 4th Dist. Ct. App. 2011). A child in foster care, through his GAL, petitioned the court of appeal for a writ of certiorari to review a juvenile court order that the boy return to Florida because his continued stay in New York where he was living successfully with his paternal uncle and aunt violated the Interstate Compact on the Placement of Children. *Id.* at 1243. Despite the fact that the boy's GAL believed staying with the uncle was in the boy's best interest, CLS and the GAL Program, through its attorney, argued that "[m]aking an exception in this case would [be] contrary to this child's best interest as it would be contrary to the best interest of any child." *Id.* at 1244–45. The appellate court rejected this argument on the facts and the law. *Id.* at 1245. The case demonstrates first what could happen when a child does not have an independent attorney, and second why neither the GAL nor the attorney for the GAL Program can adequately represent the child.

163. At least one Florida appellate court has questioned, in dicta, the standing of the GAL Program on appeal. *See* Dep't of Children & Families v. S.T., 963 So. 2d 314, 315 (Fla. 4th Dist. Ct. App. 2007). "Because DCF has joined in this petition, we set aside any doubts we may harbor about GALP's standing or authority in its own name—rather than through the party represented by a [GAL]—to seek review of orders in these proceedings. *Id.* at 315; *see also* Job Posting for Florida GAL, Executive Director, (on file with Nova Law Review) (stating among other job qualifications, the ability to "ensure effective legal advocacy and increased representation of children," and the "[a]bility to determine the feasibility or desirability of new concepts of . . . service delivery designed to preserve the civil and constitutional rights and fulfill other needs of dependent children"). This statement is contradicted by the statutory mandate of section 39.820 of the *Florida Statutes*, which states that the GAL Program "is appointed by the Court to represent the best interests of a child in a proceeding as provided for by law." FLA. STAT. § 39.820(1) (2010).

164. STATEWIDE GUARDIAN AD LITEM OFFICE, GUARDIAN AD LITEM PROGRAM ATTORNEY STANDARDS OF PRACTICE 1.4.1 (2006) [hereinafter ATTORNEY STANDARDS OF PRACTICE].

> From a legal perspective, the volunteer or case coordinators are the authorized constituents for the GAL Program for purposes of Rule 4-1.13, Rules Regulating The Florida Bar. Therefore, the program attorney is bound by Rule 4-1.2, Rules Regulating The Florida Bar, and must abide by the decisions of the volunteer or case coordinator regarding the objectives of representation and must consult with them regarding the means by which the objectives are pursued.[165]

The Statewide GAL Program literature also states that GAL Program staff attorneys provide GALs with legal guidance and represent the GALs, not the children, at evidentiary hearings.[166] In fact, the GAL Program attorneys represent the GAL staff as employees or agents of the GAL Program and the volunteers as representatives of the program.[167]

C. *The Department of Children and Families and Its Lawyers*

In 1989, the Supreme Court of Florida required that the state agency, then known as the Department of Health and Rehabilitative Services (HRS), receive adequate legal representation at every stage of the dependency proceeding.[168] Prior to that time, contested dependency cases were handled by either the State Attorney or the HRS (now DCF) lawyers.[169] Uncontested proceedings, however, were handled by non-lawyer HRS caseworkers.[170] After studying the impact of allowing non-lawyer caseworkers to handle uncontested dependency proceedings, a Supreme Court of Florida committee determined that allowing non-lawyers to handle these proceedings created inadequate legal representation, "extensive delays, and the failure of the system to adequately meet the needs of abused and neglected children."[171] Following the Supreme Court of Florida committee investigation on the impact

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165. STANDARDS OF OPERATION, *supra* note 140, at 20 § 4.6 (2) (discussing FLA. R. PROF. CONDUCT 4-1.2 (2010)).

166. *See* ATTORNEY STANDARDS OF PRACTICE, *supra* note 164, at 1.4.1, 2.6.1.

167. *See id.* at 1.4.1.

168. OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, REPORT NO. 04-05, SPECIAL REPORT: CHILD WELFARE LEGAL SERVICES SHOULD BE PROVIDED BY DCF OR PRIVATE LAW FIRM 1 (2004) [hereinafter *OPPAGA Special Report*], *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0405rpt.pdf (citing *In re* Advisory Op. HRS Nonlawyer Counselor, 547 So. 2d 909, 911 (Fla. 1989)).

169. *See In re Advisory Op. HRS Nonlawyer Counselor*, 547 So. 2d at 909–10.

170. *See id.* at 911.

171. OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, REPORT NO. 96-44, EVALUATION OF CHILD WELFARE LEGAL SERVICES PILOT PROJECTS 2 (1997), *available at* http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/9644rpt.pdf.

of the use of non-lawyers, the Legislature created Child Welfare Legal Services (CWLS) overseen by the Attorney General.[172]

In May 2007, then DCF Secretary Robert Butterworth established a Legal Review Work Group—the Office of the General Counsel and CWLS—to examine the work of attorneys within the Department.[173] The latter, attorneys appearing in dependency and TPR cases, according to the Department, "should be the only attorneys representing the position of the State in dependency and termination of parental rights proceedings."[174] They are currently referred to as CLS attorneys.[175] As discussed previously, DCF's contracts with private providers, also known as lead agencies, provide that "CLS has legal decision making authority pertaining to any dependency and termination of parental rights proceeding from inception to completion."[176]

In August 2008, Secretary Butterworth's successor, George Sheldon, announced that DCF general counsel "would continue to represent the interests of the agency in . . . [most] matters," whereas "CLS [lawyers] would focus on what is best for children."[177] In furtherance of that mandate, CLS has repeatedly stated that it acts in a *parens patriae* role as set forth in Chapter 39.[178]

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172. *Id.* at 2–3.

173. LEGAL WORKGROUP, *supra* note 103, at 4.

174. *Id.* at 19.

175. *About the Department: Children's Legal Services*, *supra* note 138. The CLS budget for 2010 is $43,397,059.00. CHILDREN & YOUTH CABINET, 2010 FLORIDA CHILDREN'S BUDGET REPORT [hereinafter CHILDREN & YOUTH CABINET BUDGET REPORT] (on file with Nova Law Review).

176. Contract, *supra* note 12, at Exhibit B 45. This contractual approach appears to be at odds with LEGAL WORKGROUP, *supra* note 103, at 17 ("Providers have been contracted to make safety decisions regarding the child in all aspects of the dependency case."). An additional oddity is that as part of the private provider contract with DCF, the provider, although not the client of the CLS lawyer, shall pay for depositions, expert witnesses, service of process and costs among others. Contract, *supra* note 12, at Exhibit B 45–46.

177. George Sheldon, *Collaboration for Children, in The Department Launches Law Firm for Children* (Child.'s Legal Services, Tallahassee, Fla.), Aug. 2008, at 2.

178. Contract, *supra* note 12, at 44 Exhibit B. Indeed, in Exhibit B of its standard contracts with Florida's private lead agencies which have taken on DCF's responsibilities to provide services to children in the child welfare system, one finds the following description of CLS' role:

> CLS . . . [is] a statewide law firm within the Department. CLS attorneys are employed by the Department and represent the State of Florida, acting through the Department in its *parens patriae* role, in fulfilling the duties as set forth in Chapter 39, F.S. CLS's duty in representing the State is to ensure the health, safety and well being of children and the integrity of families when they come into contact with the Department as a result of an allegation of abuse, abandonment or neglect.

Id.

In 2007, Governor Crist established a DCF Task Force on Child Protection.[179] A Legal Services Subcommittee of the Task Force, among other things, was charged with "looking at best practices relative to the representation of children in the legal system."[180] The subcommittee first noted that all parties except the child have legal representation.[181] The subcommittee then recommended inter alia that "[c]hildren in the dependency system are parties to the case and should be represented by an attorney."[182] Recognizing limited resources, the subcommittee then suggested that the attorney for the child should come from resources in the GAL Program—specifically the GAL Program attorneys who would no longer represent the GAL Program.[183] The subcommittee also recommended, "The [GAL] should no longer be a party to the case."[184] At the request of DCF Task Force Chairperson, former Attorney General Butterworth, the Committee deferred these two recommendations.[185]

Despite the changes instituted by the two most recent DCF Secretaries, the role of CLS attorneys is confused and may adversely affect the unrepresented children.[186] CLS now describes itself on the one hand as "The Statewide Law Firm for Florida's Children."[187] Its business card even includes the phrase "Law Firm for Florida's Children."[188] A 2009 Florida Office of

179. Press Release, Dep't of Children & Families, Department of Children and Families Creates Task Force on Child Protection (July 12, 2007), http://www.dcf.state.fl.us/newsroom/pressreleases/archive/createstaskforceonchildprotection.shtml (last visited Apr. 20, 2011).

180. DEP'T OF CHILDREN & FAMILIES, TASK FORCE ON CHILD PROTECTION MEETING SUMMARY 6 (Mar. 9, 2009) [hereinafter DCF TASK FORCE MEETING SUMMARY] (on file with Nova Law Review); LEGAL SERVS. SUBCOMM., REPORT TO THE TASK FORCE ON CHILD PROTECTION 3 (on file with Nova Law. Review).

181. LEGAL SERVS. SUBCOMM., *supra* note 180, at 2.

182. *Id.* at 3.

183. *Id.*

184. *Id.*

185. DCF TASK FORCE MEETING SUMMARY, *supra* note 176, at 11.

186. *See About the Department: Children's Legal Service and Counsel for Kids Reference Guide*, *supra* note 138.

187. *Id.*

188. *See* CLS business card (on file with the Nova Law Review). The representation made on the card raises consumer protection issues. *See id.* Section 501.201 *et. seq.* of the *Florida Statutes* contains Florida's version of the Deceptive and Unfair Trade Practices Act, sometimes referred to as "UDTPA" or "The Consumer Protection Act." *See generally* Fla. Stat. § 501 *et. seq.* (2010). This statute in section 501.203(8) defines "trade or commerce" to include the offering by any means a service. *Id.* § 501.203(8). Further, section 501.212, which lists the acts or practices excluded from the application of this statute, does not exclude the activities of CLS from potential application of this statute. *See id.* § 501.212. A deceptive act or practice is defined in Florida to mean any act or practice that is a "representation, omission or practice that is likely to mislead [a] consumer acting reasonably in the circumstances, to the consumer's detriment." Millennium Commc'ns & Fulfillment, Inc. v. Office of the

Program Policy and Government Accountability research memorandum contains the following statement: "CLS attorneys, supervisors, and managers reported a substantial improvement in the quality of the *department's legal representation of dependent children* since restructuring CLS."[189] On the other hand, CLS also says in its descriptive literature that "[t]he CLS Model can be analogized to that of a prosecutor. Prosecutors and CLS attorneys have ethical obligations beyond that of other lawyers. Each is expected to pursue justice rather than simply seeking victory for their clients."[190] Each of these statements appears to be legally incorrect,[191] incongruent,[192] and in all

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Att'y Gen., 761 So. 2d 1256, 1263 (Fla. 3d Dist. Ct. App. 2000). Therefore, based on the enactment, prohibition, coverage, definitions, and exemptions provided in the Florida Deceptive and Unfair Trade Practices Act, the CLS's representation regarding its status as the law firm for children may constitute a violation of this statute. In a private right of action, as permitted by section 501.211 of this statute, children, as persons "aggrieved" would be entitled to receive as a remedy injunctive relief, actual damages and prevailing party attorney's fees and costs. *See* FLA. STAT. § 501.211(1) (2010).

189. OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENT ACCOUNTABILITY, REPORT NO. 09-S24, CHILDREN'S LEGAL SERVICES HAS MADE CHANGES TO ADDRESS RECOMMENDATIONS FOR IMPROVEMENT; SOME CHANGES REMAIN (2009), [hereinafter OPPAGA RESEARCH MEMORANDUM] (emphasis added), *available at* http://www.oppaga.state.fl.us/monitordocs/Reports/pdf/09-S24.pdf. In addition, the Florida Child and Family Services Plan 2010–2014, states: The Florida Department of Children and Families Child and Families Services "will act as legal advocates for the children and focus on each child's achieving timely permanency." CHILD & FAMILY SERVICES PLAN, *supra* note 121, at 25. Since 1995, the Office of the Attorney General of Florida has been handling dependency and TPR cases in these counties—Broward, Hillsborough and Manatee. *Children's Legal Services Bureau*, OFFICE OF THE ATT'Y. GEN. OF FLA., http://myfloridalegal.com (search "children's legal"; then follow "Children's Legal Services Bureau" hyperlink) (last visited Apr. 20, 2011). It describes its role differently as "legal counsel to the Department of Children and Families" in Chapter 39 proceedings. *Id.*

190. *About the Department: Children's Legal Services*, *supra* note 138. Some of the Department's literature makes no sense. For example, a research memo from the Office of Program Policy Analysis and Government Accountability includes the following statement:

> Both the workgroup and prior OPPAGA reports had concluded that the department needed to improve relationships with key stakeholders and better delineate the roles and responsibilities of the various entities involved in dependency proceedings. To address these issues, department and CLS administrators announced through written and oral communication that CLS attorneys represent the State of Florida, acting through the department, rather than the department or its contracted providers.

OPPAGA RESEARCH MEMORANDUM, *supra* note 189. Chapter 39 provides that the Department is a party in dependency and TPR cases. FLA. STAT. § 39.01(51) (2010); FLA. R. JUV. P. 8.210(a) (2010).

191. *See* R. REG. FLA. BAR 4-3.8, 4-1.13; *see also* Meghan Scahill, *Prosecuting Attorneys in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse and Neglect Cases*, 1 J. CENTER CHILD & CTS. 73, 76 (1999); JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES, 20–25, (Claire Sandt ed., 2004) (recognizing that some states use an office of the prosecutor without a client, a concept which is irreconcilable

likelihood not in conformity with the Florida Model Rules of Professional Responsibility.[193]

D. *Counsel for Parents*

A parent's right to counsel in a dependency case in Florida is purely statutory.[194] Whether the parent's right to counsel, including government funded counsel in a dependency case, is provided under the Florida Constitution, has not been decided by the Supreme Court of Florida.[195] However, the parent's categorical right to an attorney in a TPR case under the federal constitution was decided by the Supreme Court of the United States in *Lassiter v. Department of Social Services*[196] and by the Supreme Court of Florida in *In re D.B.*[197] In *Lassiter* the court rejected the concept that as a matter of due process under the Fourteenth Amendment every parent was entitled to a lawyer leaving it to the trial court to decide on a case-by-case basis.[198] However, in the *D.B.* case, which was decided one year before *Lassiter*, the Supreme Court of Florida held that all parents must be provided counsel in all TPR cases and, under limited circumstances, in dependency proceedings.[199] The Florida Legislature then enacted a statute codifying the opinion.[200] In a series of decisions relying on the new statute, the intermediate appellate courts reversed trial court decisions terminating parental rights because of the trial

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with the civil nature of the civil protection proceeding); *In re* Jonathan G., 482 S.E.2d 893, 909 (W. Va. 1996).

192. *See generally* FLA. STAT. § 501.201 *et seq.*

193. *See* R. REG. FLA. BAR 4-1.2; *see also* State *ex rel.* Diva P. v. Kaufman, 490 S.E.2d 642, 651 (W. Va. 1997). Another ethical issue is the procedure established by CLS with respect to referrals of children's cases to non-profit agencies who then, presumably, are charged with the task and responsibility of referring these cases to specific lawyers. *About the Department: Children's Legal Services and Counsel for Kids Reference Guide*, FLA. DEP'T. OF CHILDREN & FAMILIES, http://www.dcf.state.fl.us/admin/cls/refGuides.shtml (last visited Apr. 20, 2011). The lawyers then, presumably, represent children, in among other cases, litigation against the lead agencies whose legal decisions with respect to dependency and TPR cases are controlled by CLS. *See id.*; *see also* Contract, *supra* note 12.

194. FLA. STAT. § 39.402(5)(b)(2) (2010).

195. The Florida Supreme Court has said several times that "this Court and others have recognized a long-standing fundamental liberty interest of parents in determining the care and upbringing of their children . . . from the heavy hand of government paternalism." Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 570 (Fla. 1991); Beagle v. Beagle, 678 So. 2d 1271, 1275 (Fla. 1996).

196. 452 U.S. 18 (1981).

197. 385 So. 2d 83 (1980).

198. *Lassiter*, 452 U.S. at 31–32.

199. *In re D.B.*, 385 So. 2d at 90–91.

200. FLA. STAT. § 39.807.

courts' failure to assign counsel in the earlier dependency proceeding.[201] The repeated rationale for the reversals was the likelihood that a TPR proceeding would ensue.[202] As a result, in 1998 the Legislature amended Chapter 39 to statutorily authorize appointment of counsel for parents in dependency as well as TPR cases.[203] Since that time, all indigent parents have been appointed attorneys in dependency and TPR cases even when no charges are brought against one of the parties.[204] According to one recent appellate court opinion:

> [A]s a matter of common sense, the 'non-offending parent' may need, and indeed may be entitled, to take action based upon any possible relief afforded by DCF to the offending parent. . . . [A] 'non-offending' indigent, non-attorney parent can hardly be expected to navigate through such proceedings without counsel.[205]

Until recently the attorneys appointed to represent indigent parents in Florida were private practitioners chosen by the court and paid a statutory fee.[206] Then in 2006, the Legislature passed a law, effective October 1, 2007, setting up an entity entitled the Offices of Criminal Conflict and Civil Regional Counsel which now represents indigent parents in dependency and TPR cases.[207] The civil regional counsel offices are located in each one of the five state appellate court districts.[208] The Senior Regional Counsel is appointed by the Governor and confirmed by the State Senate for a four-year term.[209] Despite numerous problems establishing the new offices, including lawsuits by various complimentary agencies and disputes with county governments, the offices are now fully functional and are providing representa-

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201. Michael J. Dale, *Juvenile Law Issues in Florida in 1998*, 23 NOVA L. REV. 819, 828–29 (1999).

202. *See id.*

203. Act effective Oct. 1, 1998, ch. 98-403, 1998 Fla. Laws 42 (codified as amended in FLA. STAT. § 39.013(1) (1999)).

204. W.G. v. S.A. (*In re* A.G.), 40 So. 3d 908, 910 (Fla. 3d Dist. Ct. App. 2010); *But see* C.L.R. v. Dep't of Children & Families, 913 So. 2d 764, 767 (Fla. 5th Dist. Ct. App. 2005) (per curiam).

205. *In re A.G.*, 40 So. 3d at 910.

206. *See* Joseph P. George, Jr., *Cost Effective Representation for the Indigent*, OFFICE OF CRIMINAL CONFLICT & CIVIL REG'L COUNSEL THIRD REGION OF FLA., http://rc3fl.com/history/ (last visited Apr. 20, 2011).

207. FLA. STAT. § 27.511(1) (2010). This non-profit public organization also represents both criminal defendants and juvenile delinquent respondents when the Office of the Public Defender has a conflict. *Id.* §27.511(5).

208. *Id.* § 27.511 (1).

209. *Id.* § 27.511 (3).

tion to indigent persons in a much more cost-effective manner than previously.[210] In those cases where the regional counsel cannot serve indigent persons, such as in the case of two parties in a dependency/TPR proceeding where conflict exists, private court-appointed attorneys still continue to be assigned and are paid by the State Justice Administrative Commission.[211]

E. *Counsel for Children*

Children currently have no constitutional right to attorneys in Florida.[212] A very limited number of children are represented by independent attorneys in dependency cases. The attorneys come from several sources: legal aid programs, law school clinics,[213] attorneys hired by the statewide GAL Program, and pro-bono volunteers. The funding sources for attorneys who are paid include the Florida Bar through its IOLTA Program, County Children's Services Councils,[214] and the statewide GAL Program. Research does not disclose precisely how many attorneys actually represent children in dependency or TPR cases in Florida.

As stated previously, the legislative intent and goal for children in shelter and foster care is to have a GAL appointed to represent the child's best interests and an AAL appointed, where appropriate, to represent his or her legal interests.[215] At any stage of dependency proceedings, Florida Rule of Juvenile Procedure 8.217 allows the court to "consider whether an AAL is necessary to represent any child alleged to be dependent, if one has not already been appointed."[216]

In 2008, only $309,000 was appropriated by the GAL Program to AAL, allowing for representation of 600 of the more than 35,000 children in the dependency system.[217] In 2009, the GAL Program spent $397,000 on attorneys for children or approximately one percent of its $30 million state budg-

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210. *State Must Pay Cost of Regional Conflict Counsels*, HISTORIC CITY NEWS (July 17, 2009), http://www.historiccity.com/2009/staugustine/news/florida/state-must-pay-cost-of-regional-conflict-counsels-1475.

211. FLA. STAT. § 27.511(6)(c)(2).

212. *In re* D.B., 385 So. 2d 83, 87 (Fla. 1980); *see also* M.W. v. Davis, 756 So. 2d 90, 97 (Fla. 2000).

213. Marika Lynch, *Fostering Fairness*, UNIV. OF MIAMI MAGAZINE http://www6.miami.edu/miami-magazine/summer2010/featurestory4.html (last visited Apr. 20, 2011).

214. However, a recent bill in the State Legislature requires a review of these councils and may possibly cause the demise of these programs. Act effective July 1, 2010, Ch. 2010-210, 2010 Fla. Laws 43 (codified as amended at FLA. STAT. § 125.901(4)(a) (2010)).

215. FLA. STAT. § 39.4085(20); FLA. R. JUV. P. 8.217(a).

216. FLA. R. JUV. P. 8.217(a).

217. GAL 2008 REPORT, *supra* note 125, at 7–8.

et.[218] Thus, more often than not, if an AAL is appointed, he or she is a pro-bono attorney, a legal aid attorney, or legal intern in a law school clinic.[219]

A leading example of a legal-aid-based program developed since 2001 is in Palm Beach County.[220] The Foster Children's Project (FCP) of the Legal Aid Society of Palm Beach County's mission was to advocate for permanency within twelve months for all of its clients.[221]

In 2006, the Chapin Hall Center of the University of Chicago[222] conducted an evaluation of the program. Within its first two years of operation, the average length of stay in foster care for children represented by FCP was 12.5 months less than it was before FCP's inception.[223] FCP's success, among other things, has been attributed to "the filing of legal motions, the filing of termination of parental rights petitions and recruitment of adoptive homes, attendance at staffing and case plan meetings, and service advocacy."[224] Chapin Hall found that the number of motions filed in cases where

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218. *See* GAL 2009 REPORT, *supra* note 22, at 20.

219. *Id.*

220. LEGAL AID SOC'Y OF PALM BEACH CNTY., INC., *supra* note 19. The Legal Aid Society of Broward County also operates a grant-funded legal advocacy program, "The Dependency Law Project," for dependent children. *Children's Advocacy Project*, LEGAL AID SERVS. OF BROWARD CNTY.,INC. http://www.legalaid.org/broward/childrens_advocacy.htm (last visited Apr. 20, 2011). For a listing of legal services programs that represent the interests of children in a number of contexts, *see* Florida Legal Assistance to the Poor Programs: Personnel Directory (2010), *available at* http://www.floridalegal.org/Directory/2010DirectoryJuly.pdf.

221. FOSTER CHILDREN'S PROJECT, http://www.fosterchildrensproject.org (last visited Apr. 20, 2011).

222. ANDREW E. ZINN & JACK SLOWRIVER, CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHI., EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY 1 (2008), *available at* http://www.chapinhall.org/sites/default/files/old_reports/428.pdf; John Walsh, *Lawyers Make a Difference for Foster Children: Palm Beach Project*, FLA.'S CHILDREN FIRST, http://floridaschildrenfirst.org/fcf_RefDocuments_053_repr_of_children.htm (last visited Apr. 20, 2011). This is the first major report of its type evaluating outcomes in child welfare cases where children are represented by lawyers. For a recent study of the quality of legal representation by lawyers representing children in child welfare proceedings in Pennsylvania, *see* JOHNSTON-WALSH ET AL., *supra* note 28, at 9 (citing Stapleton v. Dauphin Cnty. Child Care Serv., 324 A.2d 562, 573 (Pa. Super. Ct. 1974, *overruled in part by In re* G.C., 673 A.2d 932, 939 (Pa. Super. Ct. 1996)), *aff'd per curiam*, 735 A.2d 1226 (Pa. 1999); SUSAN A. SNYDER, JUVENILE LAW CENTER, PROMISES KEPT, PROMISES BROKEN: AN ANALYSIS OF CHILDREN'S RIGHT TO COUNSEL IN DEPENDENCY HEARINGS IN PENNSYLVANIA (2001), *available at* http://jlc.org/publications/promises_kept_promises_broken/; *see also* Michael T. Dolce, *A Better Day for Children: A Study of Florida's Dependency System with Legislative Recommendations*, 25 NOVA L. REV. 547, 548 (2001); Daniella Levine, *To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals*, 64 FORDHAM L. REV. 2023, 2033 (1996).

223. Walsh, *supra* note 222.

224. ZINN & SLOWRIVER, *supra* note 222, at 9.

FCP was involved was 46.5% higher than in cases with similar situations where they were not involved.[225] Similarly, the number of status checks was 49.6% higher than comparison cases.[226] FCP children exited to permanency at rates between 1.38 and 1.59 times higher than comparison cases.[227]

IV. ETHICAL ISSUES IN THE FLORIDA SYSTEM

Much has been written and argued in Florida and nationally about the claimed inherent conflict regarding the "best interests" of a child client "represented" by a GAL and what the authors refer to in this article as the "legal interests" approach where the child client is represented by an attorney as all clients are represented.[228] This so-called dichotomy is first illustrated by a review of the relevant applicable ABA Model Rules of Professional Conduct, the Florida Rules of Professional Conduct which are based upon the ABA Model Rules, and the ABA Standards of Practice for Lawyers Who Represent Children In Abuse And Neglect Cases. Second, it is illustrated by an examination of the Florida approach, which the authors conclude is replete with irreconcilable ethical conflicts and contradictions for attorneys representing CLS and the GAL Program, that can only be rectified by the introduction of independent attorneys for children.

For almost a century, the ABA has been the leader in establishing the professional obligations of the legal profession.[229] The ABA Model Rules of Professional Conduct are intended to serve as the regulatory principles governing the legal profession as to the ethical considerations and professional responsibilities of American attorneys.[230] The basic duties, as they are set out—including knowledge, preparation, skill, and competence—apply equally to attorneys representing children as they do to attorneys representing adults. By reading both the Preamble and Scope to the Model Rules of Pro-

225. *Id.*

226. *Id.* at 9–10.

227. *Id.* at 15. In 2007, the program had an operating budget of $1.7 million. "Taking into consideration the estimated costs of substitute care, ongoing adoption subsidies, and FCP representation, the net cost of FCP associated with each additional day of permanency [post-permanency] was estimated to be as low as $32." ZINN & SLOWRIVER, *supra* note 218, at 1. However, the estimated daily per-child cost associated with FCP representation pre-permanency is only $13.31. *Id.* at 22. The total cost of the program is approximately $2,264 per child. Walsh, *supra* note 222. When compared to the money saved in foster care payments, caseworker time, court time, and emotional effects on children lingering in foster care, this cost seems very reasonable.

228. *See generally* Diane Geraghty, *Ethical Issues in the Legal Representation of Children in Illinois: Roles, Rules and Reforms*, 29 LOY. U. CHI. L.J. 289 (1998).

229. James Podgers, *Work in Progress*, A.B.A. J., Oct. 2008 at 25, 25.

230. *See generally* MODEL RULES OF PROF'L CONDUCT (2010).

fessional Conduct, one clearly can distinguish between the responsibilities of an attorney representing a child client and a GAL who is not bound by the same responsibilities.

The Preamble and Scope of the ABA Model Rules and the Florida Rules begin with the following statement: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[231]

The term "Representative" appears throughout both Rules. Here too, it is a term of art that has specific meaning in law, and it has meaning separate and apart from the term as used in Chapter 39 to apply to GALs. The term in the Model Rules describes a professional relationship with another individual or entity (the client) that includes being an advisor, advocate, negotiator, and evaluator as to that person or entity's legal rights, obligations, and position.[232] The Preamble also recognizes that in order to be a representative of a client, including a child, the attorney must have a confidential relationship with the client. As the Preamble states, "a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private."[233]

A discussion of certain Model Rules sheds further light on the distinction between best interests representation of a child, and representation of a child client's "legal interests." First, Model Rule 4-1.2, Scope of Representation, governing allocation of authority between client and attorney reads in significant part: "[A] lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued."[234]

Second, ABA Model Rule 1.14, amended most recently in 2002, is also crucial to the representation and requires careful review. It states:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

231. MODEL RULES OF PROF'L CONDUCT pmbl. (2003).
232. *Id.*
233. *Id.*
234. *See* RULES REGULATING FLA. BAR R. 4-1.2(a) (2010).

> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a [GAL], conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[235]

The earlier ABA Code of Professional Conduct did not provide any direct guidance for the attorney representing a child.[236] While the current Model Rules do not specifically state that they apply to child clients, Rule 1.14 does address the issue of dealing with a client with diminished capacity. The Commentary to Rule 1.14 does, however, reference children.[237] It provides: "Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. "For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[238]

The expected position, therefore, is for the child's attorney to maintain as normal an attorney-client relationship as possible. Florida's comparable Rule of Professional Conduct, Rule 4-1.2(a), reads as follows: "Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall *reasonably* consult with the client as to the means by which they are to be pursued."[239] The differing language, i.e., "reasonably," appears to heighten the obligation of an attorney to a client under a disability.

ABA Model Rule 1.14(a) is entitled "Client with Diminished Capacity."[240] The title of the Florida Rule is "Client Under a Disability."[241] In the

235. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2003) (addressing the client-lawyer relationship with a client possessing diminished capacity).

236. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-12 (1980).

237. RULES REGULATING FLA. BAR R. 4-1.14 cmt. (2010).

238. *Id.* at R. 4-1.2(a).

239. RULES REGULATING FLA. BAR R. 4-1.2(a) (2010) (emphasis added).

240. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2003).

241. RULES REGULATING FLA. BAR R. 4-1.14(a).

body of subpart (a), the only major difference appears to be the use of the word "diminished" in the ABA Rule instead of the word "impaired."[242] In the Florida Rule, the difference in terminology appears to be merely form over substance. Subdivision (b) of the ABA and Florida Rules differ to some degree in language and emphasis.[243] The ABA Model Rule provides greater latitude for attorneys to consult with others to protect the client before seeking appointment of a guardian.[244] The Florida Rule appears to limit the course an attorney can take prior to seeking a guardian when an attorney believes that the client cannot adequately act in his or her own interest.[245] The Comments to Rules 1.14 and 4-1.14 provide further guidance to the attorney but also differ in certain respects.

Comments 5, 6, and 7 to ABA Model Rule 1.14 in turn describe how the attorney may take what is referred to as "protective action" where the attorney reasonably believes the client is at risk of substantial physical or other harm.[246] Protective action includes employing third parties to assist the attorney. The attorney, of course, is obligated to carefully weigh the client's diminished capacity when considering protective action. The Comments speak to a process for considering and balancing the various factors in evaluating the child's decision making capacity. At the same time, the Comments urge the attorney to tread softly, "intruding into the client's decision making autonomy to the least extent feasible."[247] In so doing, the attorney is guided by the wishes and values of the client and the client's best interests.[248] These comments give guidance to the child's attorney who wishes to take action on behalf of the child client.

Model Rule 1.6 and the Comments to it even further amplify the ability of the attorney for a child to take protective action.[249] The ABA Model Rules and the Florida Rules differ in several significant ways with reference to the circumstances under which an attorney may reveal the child client's communications in order to take "protective action."[250] The Model Rules were

242. MODEL RULES OF PROF'L CONDUCT R. 1.14(a), *with* RULES REGULATING FLA. BAR R. 4-1.14(a).

243. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.14(b), *with* RULES REGULATING FLA. BAR R. 4-1.14(b).

244. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14.

245. *See* RULES REGULATING FLA. BAR R. 4-1.14.

246. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmts. 5–7.

247. *Id.* cmt. 5.

248. *Id.*

249. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. 5–6.

250. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6, *with* RULES REGULATING FLA. BAR R. 4–1.6.

amended in 1993 and are more expansive.[251] They allow an attorney to reveal information which may prevent substantial bodily harm—harm which may be caused by or to the client.[252] The older ABA Model Code had limited the disclosure to harm caused by the client.[253] The Florida Rule, which follows the older Model Code, should be amended to protect all clients, including children, from harm to themselves.

The Comments to ABA Model Rule 1.6 also stand in stark contrast to what opponents of providing attorneys to children in Florida argue—that attorneys will routinely carry out the harmful wishes of their young clients. The Comment says, "Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld."[254] Thus, Model Rule 1.6 and the Comments thereto specifically address the concerns and issues raised by many regarding the attorney's obligation to protect his or her child clients from harm of any kind after disclosure to the attorney of information, in confidence, which the child client does not and would not reveal otherwise to anyone, whether a GAL, caseworker, or attorney with whom the child does not have a confidential relationship.

Under the Florida Rules, which do not go as far as the ABA Model Rules, attorneys for children are still bound by ethical principles so that they may not carry out the harmful wishes of their child clients. First, attorneys have an advisory function, under Florida Rule 4-2.1, to give candid advice to their client.[255] Second, Florida Rule 4-3.3, Candor Toward the Tribunal, provides that an attorney shall not permit the child client to testify or provide evidence the attorney knows to be false, such as the child's denial of prior or future harm.[256] Third, Florida Rule 4-1.16, Declining or Terminating Representation, provides that an attorney may withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement."[257]

Finally, an ethical consideration for GAL Program attorneys, CLS attorneys and parents' attorneys is Florida Rule 4-4.3, Dealing with Unrepre-

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251. *See* Morgan Cloud, *Privileges Lost? Privileges Retained?*, 69 TENN. L. REV. 65, 68 (2001).

252. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1).

253. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002).

254. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2003).

255. RULES REGULATING FLA. BAR R. 4-2.1 (2006). "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." *Id.*

256. RULES REGULATING FLA. BAR R. 4-3.3 (2010).

257. RULES REGULATING FLA. BAR R. 4-1.16(b)(2) (2006).

sented Persons. These lawyers need to proceed carefully as the children are unrepresented parties in the Chapter 39 proceeding.[258]

In 1996, the ABA adopted Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases.[259] The Preface to the Standards states that all children in dependency proceedings should have an attorney.[260] The definitional section states: "The term 'child's attorney' means a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client."[261]

The Standards recognize that in a number of states an attorney is appointed as a GAL in a way that an attorney is not appointed in Florida.[262] The Standards state: "A lawyer appointed as [GAL] for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences."[263]

The Commentary to the Standards attempts to explain the dual role:

> Where the local law permits, the lawyer is expected to act in the dual role of [GAL] and lawyer of record. The chief distinguishing factor between the roles is the manner and method to be followed in determining the legal position to be advocated. While a GAL should take the child's point of view into account, the child's preferences are not binding, irrespective of the child's age and the ability or willingness of the child to express preferences. Moreover, in many states, a [GAL] may be required by statute or custom to perform specific tasks, such as submitting a report or testifying as a fact or expert witness. These tasks are not part of functioning as a "lawyer."[264]

While the Standards recognize the existence of these two roles, they do not discuss nor do they solve the problem of how to carry out the dual roles. First, the Standards do not discuss the full role of the GAL, which this article describes as standing in the shoes of the child as a fiduciary and carrying out

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258. *See* CANDICE L. MAZE, ADVOCATING FOR VERY YOUNG CHILDREN IN DEPENDENCY PROCEEDINGS: THE HALLMARKS OF EFFECTIVE, ETHICAL REPRESENTATION, 19 (2010), *available at* http://new.abanet.org/child/PublicDocuments/ethicalrep_final_10_10.pdf.

259. ABA STANDARDS OF PRACTICE, *supra* note 35, at 1.

260. *Id.*

261. *Id.* § A-1 at 1.

262. *See supra* Section III.B discussing the role of an attorney appointed as a GAL in Florida.

263. ABA STANDARDS OF PRACTICE, *supra* note 35, at § A-2 at 2.

264. *Id.*

the child's legal interests.[265] Second, to the extent that the child and the GAL are at odds over the child's legal interests, the Standards do not resolve this conflict.[266]

The problem with this approach is that an attorney may be obligated to take a position that produces an irreconcilable conflict with the attorney's ethical duty to his or her client. The answer is that an attorney should never be the child's GAL.[267] Furthermore, when the attorney is representing the child in the traditional role of independent counsel, the attorney should only seek the appointment of a GAL when ABA Model Rule 1.4, governing representation of a client with diminished capacity provides for such action, as well as the ABA Standard providing a detailed explanation of how the attorney should go about representing a child as a client under a disability relying heavily on the ABA Model Rule.[268]

The false conundrum, which has kept the area of law tied in knots in Florida for years, should be untied. Review and analysis of the principles enunciated by the ABA, in both the Model Rules and the ABA Standards, clearly demonstrate the justification for independent attorneys for children as opposed to GALs.

V. THE THINKING OUTSIDE FLORIDA

The Supreme Court of the United States has found that children are "persons" under the Constitution, and they possess "fundamental rights which the State must respect."[269] Consequently, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[270] The Supreme Court has not yet recognized a due process right to counsel for children in dependency or TPR

265. *See id.* § A-1, at 1. "A guardian, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party". BLACK'S LAW DICTIONARY 608 (9th ed. 2010).

266. *Id.* § B-2, at 3.

267. *See* RENNE, *supra* note 191, at 80–81; Ann. M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939, 941 (1995); DONALD N. DUQUETTE, ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR LAWYERS AND COURT APPOINTED SPECIAL ADVOCATES 23 (1990).

268. *See* ABA STANDARDS OF PRACTICE, *supra* note 35, at §§ B-3 to 4 at 4–6, § B-4 & attendant Commentary.

269. Tinker v. Des Moines Indep. Cmty. Schl Dist., 393 U.S. 503, 511 (1969); *see also* Morse v. Frederick, 551 U.S. 393, 396 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); *see* Bellotti v. Baird, 443 U.S. 622, 634 (1979); *In re* Gault, 387 U.S. 1, 22 (1967).

270. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

proceedings.[271] However, children's rights attorneys advocate that "children are citizens entitled to rights and . . . children need a voice through lawyer representation when their liberty and custody are at stake."[272] A growing body of professional literature supports this position.[273]

A. *Client-Directed Representation*

"A major question regarding the representation of children and youth is what interests children's attorneys serve and who defines those interests: the state, the attorney, the parents, or the children themselves."[274] Client-directed lawyers owe traditional duties of loyalty, confidentiality and competent representation to the child client.[275] They "ensure that the child's independent voice is heard" by advocating the child's position or the child's expressed wishes.[276] Opponents of the client-directed approach argue that children do not have capacity to form an attorney-client relationship or to

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271. ABRAMS & RAMSEY, *supra* note 115; Dale, *Providing Counsel*, *supra* note 2, at 782. *But see* Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1358 (N.D. Ga. 2005); Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976); *In re* Jamie TT, 599 N.Y.S.2d 892, 895 (App. Div. 1993) (recognizing a right to counsel).

272. Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, 27 PACE L. REV. 869, 870 (2007); *See generally* Kasey L. Wassenaar, Comment, *Defenseless Children: Achieving Competent Representation for Children in Abuse and Neglect Proceedings Through Statutory Reform in South Dakota*, 56 S.D. L. Rev. 182 (2011). The article goes into the debate on the proper role for attorneys representing children (best interests or client-directed).

273. *See generally supra* notes 28, 267–268; notes 315, 318 *infra*; DVD: Fostering the Future: Strengthening Courts for Children in Foster Care, Pew Commission on Children in Foster Care (Courter Films 2004) [hereinafter Fostering the Future DVD]; DONALD N. DUQUETTE & MARK HARDIN, DEP'T OF HEALTH & HUMAN SERVS. ET AL., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999), *available at* http://openlibrary.org/works/OL4781680W/Guidelines_for_public_policy_and_state_legislation_governing_permanence_for_children; Duquette, *Two Distinct Roles*, *supra* note 114, at 442.

274. Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 595 (2008); *see generally* Martin Guggenheim, *A Paradigm For Determining The Role of Counsel For Children*, 64 FORDHAM L. REV. 1399 (1996); ASTRA OUTLEY, REPRESENTATION FOR CHILDREN AND PARENTS IN DEPENDENCY PROCEEDINGS 5, *available at* http://pewfostercare.org/research/docs/Representation.pdf; Fostering the Future DVD, *supra* note 273; PETERS, *supra* note 28.

275. Elrod, *supra* note 272, at 906.

276. *Id.* at 905.

direct the representation.[277] However, proponents argue that whether a child has the capacity to form an attorney-client relationship and thereby direct the attorney should be determined on a case by case basis relying on the attorney's sound discretion under Rule 1.14 of the Model Rules of Professional Conduct.[278] Some even think that the presumption of incapacity should be reversed and that one should start with a presumption that minor children have capacity to direct their attorney.[279]

Determining an attorney's role when the child is too young to direct representation can be very challenging.[280] Advocates suggest that the "key to child-centered representation is to understand the wishes and needs of a particular child in the context of the child's family and the type of litigation."[281] However, this issue can be difficult to resolve because in "contrast to parents, attorneys are unlikely to share the same socio-economic background, [or] cultural values . . . as the children they represent; nor are they likely to know the children better than the children's parents."[282] Children's attorneys need to continuously consult with their clients on important decisions regarding their client's express wishes and "keep their clients apprised of case developments."[283]

B. *Best Interest Representation*

"Best interest attorneys" advocate for the child's best interests and, unlike client-directed attorneys, they can reveal confidential information that the child discloses.[284] The most common criticism of the best interests attorney, including a lawyer who is acting as GAL, is that "the attorney can substitute his or her view of what is in the child's best interest."[285] "[I]f the attorneys are inserting or substituting their own substantive values into the representation," they need to be careful not to displace "the values of the child or the parents, who are the traditional arbiters of children's lives and values."[286]

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277. Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 103, 104 (2008).

278. *Id.*

279. Elrod, *supra* note 272, at 912.

280. Appell, *supra* note 274, at 598.

281. Elrod, *supra* note 272, at 915.

282. Appell, *supra* note 274, at 595; *see generally* Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, *supra* note 270.

283. Appell, *supra* note 274, at 598, 633.

284. Elrod, *supra* note 272, at 910–11.

285. *Id.* at 911.

286. Appell, *supra* note 274, at 596.

C. *Recent Colloquia and Model Acts*

In 1995, Fordham Law School convened a conference entitled "Ethical Issues in the Legal Representation of Children."[287] The Conference made numerous recommendations with respect to child representation.[288] In 2006, the Law School at the University of Nevada, Las Vegas (UNLV) hosted a conference entitled "Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham," which reexamined the recommendations of the Fordham Conference.[289] The recommendations from the UNLV Conference reaffirmed the Fordham Conference's core principles. All children in child welfare proceedings should be represented by client-directed attorneys.[290]

A review of two Model Acts in the field support the proposition that attorneys should represent the legal interests of children in all dependency and TPR proceedings.[291] The ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings provides that a "[c]hild's lawyer—or lawyer for children—means a lawyer who provides legal services for a child and who owes all of the same duties that are due an adult client, including loyalty, confidentiality, diligence, client direction, communication, duty to advise . . ., and competent representation."[292] A second model law, the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (URCANCPA or The Uniform Act), which was adopted by the Uniform Law Commission in 2007, uses a dual

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287. *See generally Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996).

288. *Id.*

289. *See generally Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592 (2006).

290. *Id.* at 611.

291. *See* NAT'L ASS'N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 13–15 (2001), *available at* http://www.naccchildlaw.org/resource/resmgr/docs/nacc_standards_and_recommend.pdf; AM. BAR ASS'N MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 1 (Proposed Official Draft 2009); IJA-ABA JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 1.1 (Draft 1976).

292. AM. BAR. ASS'N MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS § 1(c). The model Act relies upon Rule 1.14 of the ABA Model Rules of Professional Responsibility. Nat'l Conference of Comm'rs on Unif. State Laws, *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act*, 42 FAM. L.Q. 1, 10 n.28 (2008).

approach.[293] It establishes two categories of attorneys for children—the child's attorney and a best interests attorney. The Uniform Act "does not endorse the hybrid category of attorney/GAL."[294] The child's attorney is described as having a traditional lawyer-client relationship rather than advocating what the attorney decides is in the child's best interests.[295] However, The Uniform Act provides for a limited setting in which the lawyer may exercise "substituted judgment" when the child client is "incapable of directing or refuses to direct representation as to a particular issue."[296] In addition, in the situation where "a child's expressed goals would put the child at risk of substantial harm, and the child persists in that position despite the attorney's advice and counsel," The Uniform Act requires that the attorney "request a best interests advocate or best interests attorney for the child or withdraw from representation and request the appointment of a best interests attorney."[297]

VI. MAKING THE CASE FOR INDEPENDENT LEGAL REPRESENTATION IN FLORIDA

There are many reasons why a child needs an independent attorney assigned to represent the child in Florida. First, there are practical reasons. The attorney should commence representation as soon as the child welfare proceeding begins because the adverse effect upon the child, other than the alleged abuse or neglect in the home, is greatest at the point of the initial disruption in the child's life by way of possible removal from the home.[298] The injury to the child caused by removal from the home can be irreversible, according to a substantial body of professional literature[299] and case law.[300]

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293. *See generally* Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L.Q. 63 (2008); Federle, *supra* note 32, at 103.

294. Nat'l Conference of Commr's on Unif. State Laws, *supra* note 292 at 10.

295. *Id.*

296. *Id.*

297. *Id.*

298. Comm. on Early Childhood, Adoption and Dependent Care, American Academy of Pediatrics, Abstract, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145 (2000); Joseph J. Doyle, Jr., *Children Protection and Child Outcomes: Measuring the Effects of Foster Care*, 95 AM. ECON. REV 1589 (2007).

299. MAZE,*supra* note 258 at 2–3; *In re* Nicholson, 181 F. Supp. 2d 182, 185 (E.D.N.Y. 2002); *See* Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724 (2000) (reviewing ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999) (arguing that studies show many children in foster care can safely remain at home)).

On the other hand, just the opposite may be true.[301] A child's attorney is necessary at the outset to make certain that initial intervention and removal by the State is required as tested against Chapter 39. The child's position as to removal should be presented by the child's attorney using the skills of examination and cross examination of witnesses based upon a level of understanding of the child's situation that can only be gained through a confidential relationship. Children often spend long periods of time out of home care while in the child welfare system.[302] Substantial literature and studies recognize this fact.[303] This is a particularly serious problem because, among other things, children's understanding of time is different than that of adults.[304] Thus, having an independent attorney to test the need for continued removal from the vantage point of the child is very important. The attorney has the ability to conduct discovery and then file motions with the court seeking expedited rulings. The child's attorney can also collect information that no one else can and maintain the child's right to privacy,[305] as well as build a unique relationship of trust with the child.[306]

Unlike volunteer GALs, who in Florida receive thirty hours of training,[307] attorneys for children are regulated by the ABA Model Rules and Florida Rules of Professional Responsibility must have the requisite skill and competence to represent children in cases that involve, among other matters, complex, sensitive, and diverse cultural, racial, moral, and religious issues.[308]

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300. *See In re* N.M.W., 461 N.W.2d 478, 482 (Iowa Ct. App. 1990) (Sackett, J. dissenting).

301. *DCF Launches Probe Into Death of Child Found in Cooler*, *supra* note 4.

302. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 501 (1980); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997); 42 U.S.C. § 671 *et seq.* A discussion of the "reasonable efforts" standard to return children to their parents and the time frame to move to permanency is beyond the scope of this article.

303. *See* Fostering the Future DVD, *supra* note 273.

304. *In re* Amendments to the Fla. Rules of Judicial Admin., 24 So. 3d 47, 52 (Fla. 2009) (Pariente, J., concurring).

305. *See* S.C. v. Guardian Ad Litem, 845 So. 2d 953, 956–57 (Fla. 4th Dist. Ct. App. 2003); *see also* E.C. v. Guardian Ad Litem Program, 867 So. 2d 1193, 1194 (Fla. 4th Dist. Ct. App. 2004) (recognizing that a child who is the subject of a dependency proceeding has the right to assert the psychotherapist/patient privilege pursuant to FLA. STAT. § 90.503 "to prevent a court-appointed [GAL] from having access to records covered by the privilege").

306. *See* M.W. v. Davis, 756 So. 2d 90, 108 (Fla. 2000) (discussing treating children with dignity so that they are listened to and their opinion is taken into account).

307. STANDARDS OF OPERATION *supra* note 140, at 12; *see also* Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 240 (2002).

308. KAREN AILEEN HOWZE, MAKING DIFFERENCES WORK: CULTURAL CONTEXT IN ABUSE AND NEGLECT PRACTICE FOR JUDGES AND ATTORNEYS 7–8 (1996); Martin Guggenheim, *Texas*

In addition, the child's attorney has ongoing responsibilities to protect the child client's interests while the child is in and out of the home care.[309] A detailed discussion of the quality of attorney representation of children in dependency proceedings is beyond the scope of this article. It is, nonetheless, a very important issue that has been the subject of analysis in other states.[310]

Second, the introduction of attorneys for particularly young children can have significant benefits beyond the technical contours of the dependency proceeding.[311] There is substantial evidence of benefits that accrue to young children from investment in early education occurring as a result of stable and supportive parenting that can be enabled by effective children's attorneys.[312] Third, if attorneys for the other parties and the judge fail to properly discharge their responsibilities, the solution lies in improving their performance, not in twisting out of shape their roles and ethical responsibilities, as this article suggests is happening in Florida. Moreover, independent attorneys for children need to hold CLS, parents' attorneys and their clients, as well as the CBC's accountable. CLS attorneys and parents' attorneys, while they may have opposing positions, do not fully protect children either on the question of whether there is proof of dependency or TPR or on questions of services and safety to children once they are in state care.[313] DCF and CLS do not always properly carry out their *parens patriae* role, and even when they do, their obligation, both legally and ethically, is not to represent the child's position.[314] And parents' attorneys have a singular obligation to their client, not to the child. Indeed, "'[i]f the strength of the adversary process lies in the full presentation and consideration of different points of view, then

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Polygamy and Child Welfare, 46 HOUS. L. REV. 759, 762 (2009) (discussing state officials' authority to regulate on notions of morality).

309. *See* 31 Foster Children v. Bush, 329 F.3d 1255, 1270–71 (11th Cir. 2003); *see also supra* note 28 and accompanying text; 1 MICHAEL J. DALE, REPRESENTING THE CHILD CLIENT, ¶ 2.03(2)(a) (Matthew Bender 3d ed. 2010) [hereinafter 1 DALE, REPRESENTING THE CHILD CLIENT]. Conditions in and out of home care, for Florida's children specifically and children in general, have been the subject of numerous lawsuits.

310. *See generally* JOHNSTON-WALSH ET AL., *supra* note 28; ERIK S. PITCHAL ET AL., *supra* note 66.

311. *See* MAZE, *supra* note 258.

312. *See* WIS. COUNCIL ON CHILDREN AND FAMILIES, THE ECONOMIC BENEFITS OF INVESTING IN EARLY LEARNING 1 (2009), *available at* http://www.wccf.org/pdf/great_start_investment_ece.pdf. [hereinafter ECONOMIC BENEFITS].

313. *See supra* Part I (discussing the historical inadequacies in the Florida child welfare system).

314. Santosky v. Kramer, 455 U.S. 745, 760 (1982). The Supreme Court of the United States said that "[a]t the factfinding, the State cannot presume that a child and his parents are adversaries." *Id.*

giving a greater voice to the child should not impair either fact-finding or decision-making.'"[315] GAL Program attorneys represent the Program.[316] They have no attorney-client relationship with the child. Their ability to even speak with the child, as an unrepresented party, is limited by ethical constraints.[317] The same, of course, is true for CLS attorneys and parents' attorneys. Thus, the child should have the right to be heard and be present in court with and through his or her own attorney.[318]

Fourth, children have basic state and federal constitutional rights that require enforcement. Their constitutional rights emanate from the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Article I, Sections 21 and 23 of the Florida Constitution. This article posits that children possess these separate constitutional rights entitling them to attorneys in dependency and TPR cases: A right of privacy in their home, a liberty interest in their freedom from or while in state care and control, and the equal right of access to court.

On the one hand, it may be difficult to make out a federal constitutional claim under the Due Process Clause of the Fourteenth Amendment for children because the Supreme Court of the United States in *Lassiter*, held that, despite the significance of the interest at stake, parents did not have an absolute and categorical right to counsel in a TPR case.[319] The Supreme Court has never ruled on whether or not children have a federal due process right to counsel in dependency and TPR cases. The right to an attorney for a child under the Due Process Clause of the Fourteenth Amendment would be based upon the privacy right of the child, similar to the privacy right of the parent, which is only penumbral in nature under the federal constitution.[320]

However, on the other hand, the argument under the Florida Constitution is different and persuasive as to the right to privacy. The Florida electo-

315. GARY SOLOMON, LEGAL AID SOCIETY, GIVING THE CHILDREN A MEANINGFUL VOICE: THE ROLE OF THE CHILD'S LAWYER IN CHILD PROTECTIVE, PERMANENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS 23 (2010), *available at* http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf (alteration in original) (quoting Ann M. Haralambie, *Response to the Working Group on Determining the Best Interest of the Child*, 64 FORDHAM L. REV. 2013, 2017 (1996)).

316. *See supra* notes 165–167 and accompanying text. The positions of the GAL and the child may also be adversarial.

317. RULES REGULATING FLA. BAR R. 4-4.3(a) (2006).

318. *See generally* Erik S. Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 233 (2008).

319. Lassiter v. Dep't of Soc. Servs,, of Durham Cnty., N.C., 452 U.S. 18, 33–34 (1981).

320. *Id.* at 24. "For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined. '[U]nlike some legal rules,' this Court has said, due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Id.* (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

rate in 1980 voted for a constitutional amendment—Article I, Section 23—which provides that all natural persons in Florida have a right of privacy.[321] The Supreme Court of Florida has interpreted this provision on a number of occasions in a way that supports the argument that children in dependency proceedings in Florida are entitled to an attorney. In *In re T.W.*,[322] the Supreme Court of Florida ruled that, as a matter of constitutional law under Article I, Section 23, a parental consent statute governing a minor's right to obtain an abortion in Florida was unconstitutional.[323] In so doing, the Court held that it need not apply the federal Constitution, that the Florida constitutional provision regarding the right of privacy was more expansive than the federal right of privacy,[324] and most importantly, that the right applied to minors because the Florida Constitution referenced all natural persons as within its ambit.[325] At least in the context of the right to make a decision regarding pregnancy, the court found, "In proceedings wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy, counsel is required under our state constitution."[326] The court then added: "Requiring an indigent minor to handle her case all alone is to risk deterring many minors from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try."[327]

The analysis is comparable to the dependency and TPR setting.[328] The Supreme Court of Florida has applied the expanded right of privacy in several other contexts, including the grandparent visitation statute.[329] As the Court

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321. FLA. CONST. art. I, § 23. *See also* Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 26 (1997) for a discussion of the expansive nature of Article I, § 23.

322. 551 So. 2d 1186 (Fla. 1989).

323. *Id.* at 1188.

324. *Id.* at 1192.

325. *Id.* at 1193.

326. *Id.* at 1196.

327. *In re T.W.*, 551 So. 2d at 1196 (quoting Ind. Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1138 (7th Cir. 1983)).

328. J.C. v. Dep't of Children & Family Servs., 26 So. 3d 665, 665 (Fla. 3d Dist. Ct. App. 2010) (describing TPR as a "drastic remedy as to either child[ren] or either parent.").

329. *See also* N. Fla. Women's Health & Counseling Servs. Inc. v. State, 866 So. 2d 612, 619 (Fla. 2003); Saul v. Brunetti, 753 So. 2d 26, 28 (Fla. 2000) (per curiam); Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998); Beagle v. Beagle, 678 So. 2d 1271, 1275 (Fla. 1996); Winfield v. Div. of Pari-Mutuel Waging, 477 So. 2d 544, 548 (Fla. 1985); Burton v. State, 49 So. 3d 263, 265 (Fla. 1st Dist. Ct. App. 2010); S.C. v. Guardian Ad Litem, 845 So. 2d 953, 958 (Fla. 4th Dist. Ct. App. 2003).

said in one of a series of cases addressing this issue, in *Von Eiff v. Azicri*,[330] "The potential harm to a child flowing from the death of a parent does not constitute the kind of harm this Court has previously found to authorize government[al] intervention."[331] Thus, in the absence of harm to the child, the State cannot intervene against the wishes of a parent.[332] Similarly, the child has a right to privacy within his or her natural home that is protected by the Florida Constitution.[333]

A child also possesses a second separate and independent liberty interest under the Florida Constitution that requires protection by an attorney. That second liberty interest is the right to freedom from unnecessary and harmful confinement in out of home care.[334] In *M.W. v. Davis*,[335] the Supreme Court of Florida did not decide the issue, but after discussing the statutory framework in the context of placement of a dependent child in a residential institution, stated in dicta:

> We are thus concerned that, although there are various procedures in Chapter 39 that could be construed to require a hearing before a trial court orders a commitment, neither Chapter 39 nor our own procedural rules adequately address whether an attorney for the child should . . . have the right to put on evidence before the court orders a placement in a residential psychiatric facility.[336]

The second due process claim arises from the Supreme Court of the United States opinions in *Estelle v. Gamble*[337] and *Youngberg v. Romeo*.[338] In these cases the Court recognized the state's obligation to grant people held against their will—incarcerated prisoners in *Estelle* and involuntarily committed patients in *Youngberg*—some adequate assurance of safety.[339] This right is premised upon the concept that when individuals are taken into state custody and thus lose liberty,[340] they are entitled to reasonably safe condi-

330. 720 So. 2d 510 (Fla. 1998)

331. *Id.* at 515.

332. *Id.* at 514.

333. *In re* T.W., 551 So. 2d 1186, 1193 (Fla. 1989).

334. Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

335. 756 So. 2d 90 (Fla. 2000).

336. *Id.* at 106–07, not deciding the issue of the right to counsel in the context of a dependent child committed to a residential facility because counsel was appointed to represent the child in that case; *see also* Parham v. J.R., 442 U.S. 584, 600, 611 n.18 (1979).

337. 429 U.S. 97, 106 (1976).

338. 457 U.S. 307, 309 (1982).

339. *Youngberg*, 457 U.S. at 309; *Estelle*, 429 U.S. at 102–05.

340. An argument may also be made that when a father's parental rights are terminated, the child loses a due process property interest—as in the estate of the parent—as a result of

tions and general freedom from undue bodily restraint.[341] In a number of cases involving children in the foster care system, federal courts have extended the right to these children including those in Florida.[342] There is ample evidence that conditions in foster care in Florida can constitute a deprivation of liberty, create harm for young people, and thus may violate children's Fourteenth Amendment and Article I, Section 23 due process rights.[343]

A subpart of the due process constitutional right to freedom from harm at issue here is the right to family integrity. The federal court in *Marisol A. ex rel. Forbes v. Giuliani*[344] said:

> Plaintiff's family integrity claims are closely related to those pertaining to the duration of foster care and, by extension, [are found] within the concept of harm for substantive due process purposes. Indeed, [P]laintiffs suggest that [D]efendants unnecessarily place[d] children in foster care and allow[ed] children properly in foster care to languish without taking steps to reunite them with their biological famil[ies] where appropriate.[345]

Because two liberty interests are at stake, the question becomes what procedures are necessary to protect that child. The analysis of what procedures are necessary in a proceeding in Florida under the State Constitution is evaluated using the well-known tripartite test that originated in the Supreme Court of the United States in 1976 in *Mathews v. Eldridge*.[346] The Supreme Court recognized that procedural due process imposes constraints on decisions by governments that deprive individuals of liberty interests within the Due Process Clause.[347] The Florida state courts have followed this think-

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state action. *See* C.A. v. Dep't of Children & Families, 16 So. 3d 888, 889–90 (Fla. 4th Dist. Ct. App. 2009).

341. *Youngberg*, 457 U.S. at 318.

342. *See* Schall v. Martin, 467 U.S. 253, 263, 265 (1984); Norfleet v. Ark. Dep't. of Human Servs., 989 F.2d 289, 292 (8th Cir. 1993); Meador v. Cabinet for Human Res., 902 F.2d 474, 476 (6th Cir. 1990); Taylor v. Ledbetter, 818 F.2d 791, 794, 797 (11th Cir. 1987); Doe v. N.Y.C. Dep't of Soc. Servs., 649 F.2d 134, 141 (2d Cir. 1981); Roes v. Fla. Dep't of Children & Family Servs., 176 F. Supp. 2d 1310, 1318–19 (S.D. Fla. 2001); Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 674 (S.D.N.Y. 1996), *aff'd by* 126 F.3d 372 (2d Cir. 1997).

343. *See supra* notes 1, 309.

344. 929 F.Supp. 662 (S.D.N.Y. 1996), *aff'd by* 126 F.3d 372 (2d Cir 1997).

345. *Id.* at 677.

346. 424 U.S. 319, 335 (1976). The tripartite test from *Matthews* has been applied in several cases. *See* M.L.B. v. S.L.J., 519 U.S. 102, 120–21 (1996); Santosky v. Kramer, 455 U.S. 745, 754–68 (1982); *see also* Lassiter v. Dep't of Soc. Servs., of Durham Cnty., N.C., 452 U.S. 18, 27–31 (1981).

347. *Mathews*, 424 U.S. at 334–35.

ing.[348] So did a federal court in Georgia which employed the *Mathews* analysis in finding that dependent children in that state were entitled to counsel.[349] The three elements of the *Mathews* test are:

> [T]he private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that [an] additional or substitute procedural requirement would entail.[350]

First, the degree of potential deprivation is obvious here. The loss to a child of a parent is immeasurable; the professional literature in support of that proposition is voluminous.[351] The length of the possible loss can be a lifetime.[352] The loss of freedom occasioned by placement in foster care, group homes, or institutions, is clear beyond peradventure.[353] Second, the fairness and reliability of the procedures involved are significant, and the best possible safeguard known in the American system is the right to an attorney. While one may argue that the CLS attorney and the attorney for the parent together with the GAL Program adequately protect the child's legal and best interest, the evidence in Florida, as described in this article, is to the contrary.

Holdings in two cases involving class action challenges to the Florida child welfare system, and a state appellate case in dicta,[354] also support the proposition that lawyers for children are necessary and that the other lawyers in the case will not adequately protect the child. In *31 Foster Children v.*

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348. N.S.H. v. Fla. Dep't of Children & Family Servs., 843 So. 2d 898, 903 (Fla. 2003).

349. Kenny A. *ex rel* Winn v. Perdue, 356 F. Supp. 2d 1353, 1360, (N.D. Ga. 2006), *vacated by*,, Perdue v. Kenny A., 130 S. Ct. 1662 (2010).

350. *Mathews*, 424 U.S. at 335.

351. *See generally* CHILD WELFARE INFORMATION GATEWAY, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT (2008), *available at* http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.pdf; Duquette, *Two Distinct Roles*, *supra* note 114, at 446, 448.

352. *See* Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 27 (1981); *id.* at 39–40 (Blackmun, J., dissenting).

353. Conditions of out-of-home care have been the subject of substantial litigation and literature. 1 DALE, REPRESENTING THE CHILD CLIENT, *supra* note 309, at ¶ 2.03(2); *see generally supra* notes 177, 342.

354. W.G. v. S.A. (*In re* A.G.), 40 So. 3d 908, 910 (Fla. 3d Dist. Ct. App. 2010) (providing an attorney to a non-offending parent in a dependency proceeding and stating that "a 'non-offending' indigent, non-attorney parent can hardly be expected to navigate through such proceedings without counsel.").

Bush[355] and *Ward v. Kearney*[356] the Court of Appeals for the Eleventh Circuit and the District Court for the Southern District of Florida abstained from class action challenges to the conditions in out of home care for Florida's foster children.[357] The courts did so, in major part, upon the ground that the children had an adequate remedy in the dependency court.[358] The children, the Eleventh Circuit held in *31 Foster Children* and the District Court held in *Ward*, could get relief for their claims in a dependency court.[359] Although the plaintiffs' counsel in both cases argued that relief in a dependency court was illusory, the plaintiff children were denied the right to proceed in class action form in the federal courts.[360] Included in the arguments made by counsel in these cases was the fact that the children did not have lawyers in the dependency court.[361] Thus, to protect the children before the dependency court, as the federal courts said could be done, lawyers are necessary to independently represent the children. No other form of third party "representation" is viable.

Finally, Florida's Constitution specifically guarantees a citizen's access to courts.[362] The purpose of this section is to give vitality to the maxim that "for every wrong there is a remedy."[363] Indeed, the Supreme Court of Florida has a duty to ensure access to the courts for every citizen[364] and has itself made clear that "[t]he right to access is specifically mentioned in Florida's constitution. Therefore, it deserves more protection than those rights found only by implication."[365] The right to go to court to resolve a dispute is a fun-

355. 329 F.3d 1255 (11th Cir. 2003).

356. Settlement Agreement at 3, Ward v. Kearney, No. 98-7137-CIV-MORENO (S.D. Fla. 26, 2000) [hereinafter *Ward* Settlement Agreement].

357. 31 Foster Children v. Bush, 329 F.3d 1255, 1274 (11th Cir. 2003); *Ward* Settlement Agreement, *supra* note 356, at 3.

358. *31 Foster Children*, 329 F.3d at 1279; *Ward* Settlement Agreement, *supra* note 356, at 3.

359. *Id.* at 1–15.

360. *Id.*

361. *Id.* at 1.

362. FLA. CONST. art. I, § 21; Mitchell v. Moore, 786 So. 2d 521, 527 (Fla. 2001) (per curiam).

363. Holland v. Mayes, 19 So. 2d 709, 711 (Fla. 1944).

364. Lussy v. Fourth Dist. Court of Appeal, 828 So. 2d 1026, 1027 (Fla. 2002) (per curiam); Peterson v. State, 817 So. 2d 838, 840 (Fla. 2002) (per curiam); State v. Spencer, 751 So. 2d 47, 48 (Fla. 1999); Rivera v. State, 728 So. 2d 1165, 1166 (Fla. 1998); Henriquez v. State, 774 So. 2d 34, 35 (Fla. 3d Dist. Ct. App. 2000) (per curim).

365. *Mitchell*, 786 So. 2d at 527 (citation omitted).

damental right,[366] and access to the courts guaranteed to every person must not be unreasonably burdened.[367]

Florida's "courts are generally opposed to any burden being [imposed] on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access."[368] In accordance with this opposition, any restrictions on the constitutional right of access "should be construed so as to favor the constitutional right."[369] Before access to the courts may be restricted by the state legislature, "a reasonable alternative remedy or commensurate benefit" must be provided; otherwise, the legislature "must make a showing of an overpowering public necessity justifying a restriction with a finding that there is no alternative method of meeting such public necessity."[370]

Article I, Section 21 is violated if a "statute obstructs or infringes that right to any substantial degree."[371] To find that the right of access has been violated, it is not necessary for a statute to present an impossible procedural obstacle—just a significantly difficult one.[372] If a statute significantly infringes upon the right of access to courts, it is in violation of the state constitutional mandate.[373]

Article I, Section 21 also severely curtails the state's ability to impose financial obstacles to the assertion of claims in court.[374] Although reasonable financial requirements, such as filing fees, have been upheld, Florida courts frown upon financial prerequisites that amount to a substantial financial burden on a person's right to have his case heard.[375] Likewise, certain procedural hurdles may violate the constitutional guarantee of access.[376] For example, a dismissal with prejudice as a result of a failure to comply with discovery orders burdens the right of access in nearly all cases, unless egregiousness is present; because of this, explicit findings of willful or flagrant disregard are requisite.[377]

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366. Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992).

367. Preferred Med. Plan, Inc. v. Ramos, 742 So. 2d 322, 323 (Fla. 3d Dist. Ct. App. 1999); Swain v. Curry, 595 So. 2d 168, 174 (Fla. 1st Dist. Ct. App. 1992).

368. Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976).

369. Westside EKG Assocs. v. Found. Health, 932 So. 2d 214, 218 n.2 (Fla. 4th Dist. Ct. App. 2005), *aff'd by* 944 So. 2d 188 (Fla. 2006) (citing Hicks v. Hicks, 715 So. 2d 304, 306 n.2 (Fla. 5th Dist. Ct. App. 1998)).

370. *Westside EKG Assocs.*, 932 So. 2d at 218 n.2.

371. Mitchell v. Moore, 786 So. 2d 521, 527 (Fla. 2001).

372. *Id.*, *quoted in* T.A. Enters., Inc. v. Olarte, Inc., 931 So. 2d 1016, 1018 (Fla. 4th Dist. Ct. App. 2006).

373. *Id.*

374. Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992).

375. *Id.*, *quoted in T.A. Enters.*, 931 So. 2d at 1018

376. *Mitchell*, 786 So. 2d at 527.

377. Kinney v. R.H. Halt Assocs., Inc., 927 So. 2d 920, 921 (Fla. 2d Dist. Ct. App. 2006).

However,

> "a classification having some reasonable basis does not offend [the state constitution simply because] . . . it is not made with mathematical nicety or because in practice it may result in some inequality; also, one who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[378]

"[I]f the classification being challenged is based on a suspect classification . . . , then the means or method employed by the statute to remedy the asserted problem must meet not only the rational basis test, but also the strict scrutiny test."[379]

The third *Mathews* element is societal costs and administrative burdens.[380] The financial cost of providing attorneys is not insignificant, although money is available.[381] For example, as noted earlier, the State of Florida spends over $30 million on the GAL Program, which includes paying 145 lawyers to represent the Program[382] at the trial and appellate level, with no objective proof that this approach successfully protects children. These GAL attorneys could represent children as their attorneys at a comparable cost to the amount spent by the State to pay for CLS and regional counsel attorneys.[383] While the Court in *Mathews* recognized that "[a]t some point the benefit of an additional safeguard to the individual affected by the administer[ed] action and to society in terms of increased assurance that the action is just, may be outweighed by the cost,"[384] the Court also said that "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision."[385] Thus, the balancing test applied in *Mathews*, as the material found throughout this article demonstrates, weighs heavily in favor of attorneys for the child in these proceedings. A careful reading of *Lassiter* suggests that under the Fourteenth Amendment due process clause, a parent at least was entitled to an attorney on a case-by-case basis in a TPR case, indicating the strong interest at stake and the balance of costs. Where, here in Florida, the constitutional provision is explicit, more expansive than the fed-

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378. McMillan v. Nelson, 5 So. 2d 867, 870 (Fla. 1942).
379. *Mitchell*, 786 So. 2d at 527.
380. Mathews v. Eldridge, 424 U.S. 319, 347 (1976).
381. *Id.*
382. *See supra* notes 129, 130 and accompanying text.
383. *See* CHILDREN & YOUTH CABINET BUDGET REPORT, *supra* note 175. The CLS budget for 2010 is $43,397,059.00. *Id.*
384. *Mathews*, 424 U.S. at 348.
385. *Id.*

eral provision which is unstated in the federal Constitution, and which has been explicitly applied to children, the right to an attorney should be recognized.

It should be noted that, in *M.W. v. Davis*,[386] the case in which the Supreme Court of Florida established evidentiary obligations where a child was to be placed in a closed mental health setting as part of a dependency proceeding, the Court did not reach the question of the right to an attorney for the child.[387] It failed to do so because, while it was asserted that the child had a right to privacy, the right to an attorney argument was not raised in the petition for a writ of habeas corpus and thus was not preserved for review.[388] In the *M.W.* opinion, the Court did recognize that "[a]lthough in *D.B.* [indeed] we discussed the constitutional rights of parents whose parental rights the Department sought to terminate, we did not discuss the nature and extent of the child's constitutional rights in a dependency proceeding except to find that there was 'no constitutional right to counsel.'"[389] The Court also noted in a footnote that "[t]he issue of whether a child who was being committed to a residential facility would be entitled to counsel is not before us because in this case counsel was appointed to represent M.W.'s 'express preferences' and 'actual positions.'"[390]

While neither *T.W.* nor *M.W.* involved the question of a right to an attorney for children whose parental rights were being terminated, or for children who were being taken away from their parents in a dependency proceeding, the right of privacy, given the explicit nature of the Florida Constitution, is the signal factor that mandates an attorney for children in these cases.[391] Adding the constitutional rights of freedom from harm and loss of liberty in the child welfare system as well as equal access to the court only magnifies the child's right to counsel.

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386. 756 So. 2d 90 (Fla. 2000).

387. *Id.* at 97 n.18.

388. *Id.* at 97 n.17.

389. *Id.* at 97 (quoting *In re* D.B., 385 So. 2d 83, 91 (Fla. 1980)). In making this statement and citing *In re* D.B., the court made no referral to Article I, Section 23. *See id.*

390. *M.W.*, 756 So. 2d at 97 n.18.

391. Such children have explicit statutory rights that require enforcement. *See* Individuals With Disabilities Education Improvement Act, Pub. L. No. 108-446, §601(d)(B), 118 Stat. 2647, 2651 (codified as amended at 20 U.S.C. § 1400 (2006)); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553, 3554 (2008) (codified as amended at 42 U.S.C. §§12101–13 (2006)); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504(a), 87 Stat. 394 (1973) (codified as amended at 88 Stat. 1617 (1974)); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 3, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901–63 (2006)).

VII. CONCLUSION

Child advocates continue to debate the most appropriate form of representation for children in dependency and TPR proceedings. The majority favors client-directed attorneys who represent the child's expressed wishes under an attorney-client relationship and are bound by ethical rules. Others argue for a form of best interest representation, whether it is by an attorney or a traditional GAL standing in the child's shoes. Florida uses none of these approaches. It employs a convoluted GAL model of representation that meets no constitutional, pragmatic, best thinking, or ethical standard. Florida's system does not even comply with federal and state mandates that each child in dependency proceedings be represented by a GAL, despite expenditures in excess of $30 million per year. Florida's system is in need of immediate and fundamental reform. The authors of this article propose the following:

1. That Chapter 39 be amended to provide that every child in every dependency and TPR proceeding have an independent attorney acting in the role of a traditional attorney from inception to completion of the case.

2. That the GAL Program no longer be a party in dependency or TPR proceedings, but may be appointed by the court as a non-party advisor to assist the court in determining the child's best interests and that almost all GAL Program attorneys be separately housed in an organization similar to the Civil Regional Counsel and independently represent the legal interests of children.

3. That Florida's Rules of Professional Conduct, particularly 4-1.14 and 4-1.6, be amended to conform to the ABA Model Rules, so that children are entitled to ethical protection as clients with diminished capacity and that lawyers for children may reveal information to prevent substantial harm to the child client.

4. That CLS lawyers represent their client, DCF, as a party in a civil proceeding, and not in the role of a clientless quasi-prosecutor.