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2013 Survey of Juvenile Law

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2013 SURVEY OF JUVENILE LAW

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I. INTRODUCTION

The Supreme Court of Florida decided three cases this past year involving juveniles, all in the delinquency field involving significant but technical matters.[1] In the first case, the court held that it was necessary to prove that a school police officer was the designee of the school principal in order for a juvenile to be adjudicated for committing trespass on school grounds.[2] In the second case, the court held, over a dissent, that a juvenile who committed several acts of indirect criminal contempt could be sentenced to consecutive periods of secure detention for each of the two offenses,[3] thus resolving a conflict in the district courts of appeal.[4] In the third case, the court held that a juvenile detention center falls within the criminal law definition of a detention facility.[5]

The intermediate appellate courts were quite busy in the juvenile delinquency field, deciding both important issues and also reversing regretful fundamental errors by the trial courts.[6] In the dependency and termination of parental rights ("TPR") field, the appellate courts were less busy, but

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1. J.M. v. Gargett (*J.M. II*), 101 So. 3d 352, 355 (Fla. 2012) (per curiam); Hopkins v. State (*Hopkins II*), 105 So. 3d 470, 471 (Fla. 2012); J.R. v. State, 99 So. 3d 427, 427–28 (Fla. 2012) (per curiam).

2. *J.R.*, 99 So. 3d at 428.

3. *Compare J.M. II*, 101 So. 3d at 356, *with J.M. II*, 101 So. 3d at 357 (Quince, J., dissenting).

4. *J.M. II*, 101 So. 3d at 353, 357. *Compare* J.M. v. Gargett (*J.M. I*), 53 So. 3d 1245, 1248 (Fla. 2d Dist. Ct. App.), *review granted*, 58 So. 3d 260 (Fla. 2011), (unpublished table decision), *aff'd*, 101 So. 3d 352 (Fla. 2012) (per curiam), *with* M.P. v. State, 988 So. 2d 1266, 1267 (Fla. 5th Dist. Ct. App. 2008).

5. *Hopkins II*, 105 So. 3d at 471.

6. P.R. v. State, 97 So. 3d 980, 981, 985 (Fla. 4th Dist. Ct. App. 2012); G.G. v. State, 84 So. 3d 1162, 1163–64 (Fla. 2d Dist. Ct. App. 2012).

nonetheless, decided several important cases.[7] And again, some of the opinions involved rudimentary trial court error.[8]

II. DEPENDENCY

Issues regarding non-offending parents come up regularly in the appellate decisions in Florida, including issues of due process.[9] In *A.S. v. Department of Children & Family Services* (*In re Interest of E.G-S.*),[10] a dependency petition was filed against a mother who was divorced and in which the petitioner made no allegation against the father.[11] After a trial on the petition, the court found the child dependent and ordered the child placed with the non-offending father, terminated its jurisdiction along with Department of Children and Families' ("DCF" or "Department") supervision.[12] The mother based her appeal on a violation of her due process rights, resulting in the court's termination of jurisdiction and supervision, without a hearing.[13] The appellate court agreed.[14] The mother was entitled to notice that the court would determine the child's permanent placement at the dispositional hearing, and further that "a court may not place [the] child permanently with [the] non-offending parent when the offending parent is either in substantial compliance with [the] reunification . . . plan or the time for compliance has not expired."[15] The court then remanded for an "evidentiary hearing to determine whether allowing the case to remain pending while [the mother] complete[d] her case plan would be detrimental to the child's interest, and . . . whether a preponderance of the evidence support[ed] changing the goal of [the] case plan" to custody for the father.[16]

In *F.O. v. Department of Children & Families*,[17] a father appealed an order after the adjudicatory hearing found no evidence that he abused, abandoned, or neglected the children, and entered the mother consent plea to the petition for dependency.[18] The problem was that the trial court nonetheless

7. *See infra* Parts II, III.
8. *See id.*
9. *See* Michael J. Dale, *2011 Survey of Juvenile Law*, 36 NOVA L. REV. 179, 180 (2011) [hereinafter Dale, *2011 Survey of Juvenile Law*].
10. 113 So. 3d 77 (Fla. 2d Dist. Ct. App. 2013).
11. *Id.* at 78.
12. *Id.*
13. *Id.* at 79–80.
14. *Id.* at 80.
15. *In re* Interest of E.G–S., 113 So. 3d at 79.
16. *Id.* at 80.
17. 94 So. 3d 709 (Fla. 5th Dist. Ct. App. 2012).
18. *Id.* at 709–10.

ordered the father to participate in the case plan.[19] Relying upon two earlier intermediate appellate court decisions, but without any discussion, the appellate court held that even when the parent had not been found to have abused, neglected, or abandoned the child at issue, the parent could be ordered to participate in the case plan.[20]

In *M.P. v. Department of Children & Family Services* (*In re Interest of T.B. & T.P.*),[21] the issue was whether temporary legal custody could be shared with DCF in a case where the dependency adjudication by consent was made as to the father, but an order of dependency was withheld as to the mother, except for the case plan for the children.[22] In its order, the trial court determined that remaining in the mother's custody, with protective supervision, was in the best interests of the children.[23] However, the order also determined that the mother "share temporary physical custody of the children" with the DCF.[24] Given the trial court's grant of legal custody of the children to the mother, it was reversible error to also order temporary physical custody of the children to the Department.[25]

Once parents have completed tasks assigned to them pursuant to a case plan after a finding of or consent to dependency, they may seek reunification with their children.[26] However, a trial court must determine if the parents "compli[ed] with the case plan" and if "reunification [is] detrimental to the child" before considering an order of reunification.[27] In addition, "[t]he court is also [obligated] to make written . . . findings as to the six statutory factors."[28] In *Department of Children & Families v. W.H.*,[29] the trial court failed to make findings on a number of the statutory factors.[30] Nor was there competent evidence in support of finding the factors; DCF did not have notice that a hearing may result in the possibility of reunification, and no evidence of the issue

19. *Id.* at 710.
20. *Id.*
21. 107 So. 3d 515 (Fla. 2d Dist. Ct. App. 2013).
22. *Id.* at 516.
23. *Id.*
24. *Id.*
25. *Id.* at 516–17.
26. FLA. STAT. § 39.522(2) (2013); *see also id.* §§ .521(d)(9), .6011(1).
27. *Id.* § 39.522(2); Dep't of Children & Families v. W.H., 109 So. 3d 1269, 1270 (Fla. 1st Dist. Ct. App. 2013) (per curiam) (quoting C.D. v. Dep't of Children & Families, 974 So. 2d 495, 500 (Fla. 1st Dist. Ct. App. 2008)).
28. FLA. STAT. § 39.621(10); *W.H.*, 109 So. 3d at 1270.
29. 109 So. 3d 1269 (Fla. 1st Dist. Ct. App. 2013) (per curiam).
30. *Id.* at 1270.

was presented at trial.[31] The appellate court reversed given the absence of both notice and "an evidentiary hearing on reunification."[32]

In *State Department of Children & Families v. B.D.*,[33] the trial court adjudicated the child dependent and placed the child with her maternal cousin as permanent guardian.[34] Subsequently, the mother's motion was granted and DCF was ordered to reinstate protective supervision, "without scheduling or holding an evidentiary hearing or setting out specific findings of fact."[35] From that order, the Department sought certiorari.[36] The appellate court issued a writ quashing the trial court's order.[37] The appellate court opined that the trial court order departed from the essential requirements of law as it "failed to make specific, required findings of fact addressing the child's best interest[s], stating the circumstances that caused the . . . dependency, and explaining [why the] circumstances [were] resolved."[38] The appellate court then added:

> "Time is of the essence for . . . children in [a] dependency system." . . . [T]he court's failure to comply with the express requirements of the law significantly disrupts what was supposed to be a permanent guardianship, leav[ing] the child's status in a continuing state of uncertainty, subject[ing] the child to [a] risk of harm, and requir[ing] immediate relief that cannot be provided at some uncertain future time on plenary appeal.[39]

In a third case, a mother appealed from an order granting the state's motion for reunification with her two children, closing the case as to a third child, and placing that third child with the father.[40] The appellate court held, quite simply, that an evidentiary hearing must be held where there are disputed facts concerning the "detriment to the child," allowing an offending parent to contest the issue.[41] As "the [trial] court made findings of fact without conducting an evidentiary hearing," this was a reversible error.[42]

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31. *Id.*
32. *Id.*
33. 102 So. 3d 707 (Fla. 1st Dist. Ct. App. 2012).
34. *Id.* at 708.
35. *Id.*
36. *Id.*
37. *Id.*
38. *B.D.*, 102 So. 3d at 710.
39. *Id.* at 711 (citation omitted) (quoting FLA. STAT. § 39.621(1) (2013)).
40. B.W. v. Dep't of Children & Families, 114 So. 3d 243, 244 (Fla. 5th Dist. Ct. App. 2013) (per curiam).
41. *Id.* at 249.
42. *Id.*

For over two decades, the Florida courts have dealt with dependency determinations based upon prospective neglect.[43] In the leading case, *Padgett v. Department of Health & Rehabilitative Services*,[44] the Supreme Court of Florida held that in order to make a finding of prospective neglect, there must be "a nexus between the parent's problem and the potential for future neglect."[45] The issue arose again in *J.V. v. Department of Children & Family Services* (*In re Interest of J.J.V.*).[46] In that case, a father appealed an order adjudicating his son dependent.[47] The basis for the petition to adjudicate the child dependent was that the father was a danger to the son because the father was a member of the Bloods gang; the police officer testified that the father's gang involvement was proven by his numerous tattoos.[48] The twenty-three year old father obtained some of the tattoos as a teenager.[49] Both the DCF and the Guardian Ad Litem ("GAL") Program conceded error, and the appellate court recognized that while tattoos may indicate previous gang association, there was nothing to indicate his involvement in any criminal activity since he was released from prison two years earlier; further, all other testimony was that he "had been . . . diligent in visiting his son and offering financial support."[50]

Finally, in a case of first impression, perhaps nationally, in *R.L.R. v. State*,[51] a seventeen-year-old minor in a dependency case sought a writ of mandamus to compel a reversal of the trial court's order, "directing the [child's] Attorneys Ad Litem [("AAL")] to disclose the [child's] whereabouts," to whom the child had formerly provided this information and requested that it not be shared.[52] The trial court "recognize[d] the attorney-client privilege, but [found] the disclosure [was] required 'for the proper administration of justice.'"[53] Finding no exception to the attorney-client privilege that would support the trial

43. *See* 1 MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT ¶ 4.14(4)(d) (2013); Dale, *2011 Survey of Juvenile Law*, *supra* note 9, at 182; Michael J. Dale, *2004 Survey of Florida Juvenile Law*, 29 NOVA L. REV. 397, 413 (2005).

44. 577 So. 2d 565 (Fla. 1991).

45. *See id.* at 568, 571; *see also* S.T. v. Dep't of Children & Family Servs. (*In re* Interest of K.C. & D.C.), 87 So. 3d 827, 833–34 (Fla. 2d Dist. Ct. App. 2012); R.M. v. Dep't of Children & Family Servs. (*In re* Interest of J.B.), 40 So. 3d 917, 918 (Fla. 2d Dist. Ct. App. 2010) (citing N.D. v. Dep't of Children & Family Servs. (*In re* Interest of T.B.), 939 So. 2d 1192, 1194 (Fla. 2d Dist. Ct. App. 2006)).

46. 99 So. 3d 578, 579 (Fla. 2d Dist. Ct. App. 2012).

47. *Id.* at 578.

48. *Id.* at 579.

49. *Id.*

50. *Id.* at 578, 580.

51. 116 So. 3d 570 (Fla. 3d Dist. Ct. App. 2013).

52. *Id.* at 571, 572 n.2.

53. *Id.* at 571.

court's order to disclose, the appellate court reversed.[54] In doing so, it relied in part on the brief of amicus curiae the Florida Association of Counsel for Children, the Juvenile Law Center of Philadelphia, the National Association of Counsel for Children, and the Youth Law Center of San Francisco[55] for the proposition that any exceptions to the lawyer-client privilege in certain lower court cases were inapposite.[56] Finally, the appellate court recognized that "[c]ourts and legislatures in other jurisdictions have recognized and enforced the attorney-client privilege in dependency proceedings."[57]

III. TERMINATION OF PARENTAL RIGHTS

Just as parents are statutorily entitled to counsel in dependency proceedings in Florida by statute, they are entitled to counsel in TPR proceedings as a matter of constitutional right.[58] The same court in Miami that failed to provide counsel in a dependency case in *G.W. v. Department of Children & Families*[59] during the course of a staccato-case shelter hearing—as discussed in last year's survey article[60]—was reversed in *F.M. v. State Department of Children & Families*,[61] when it defaulted a father in a termination of parental rights case when he failed to appear personally, although he appeared telephonically at the advisory hearing.[62] At that hearing, as quoted by the appellate court, both the mother and father appeared by telephone.[63] "When the judge discovered the father was appearing telephonically, the following brief exchange took place":

> The Court [calling]: Well that [is] not good enough. You're supposed to be here.
>
> The Father [calling]: I could [not] afford it.
>
> The Court [calling]: Well, that [is] really too bad.
>
> DCF [calling]: How is he on the phone?

54. *Id.* at 573–74.
55. Brief on file with the Nova Law Review.
56. *R.L.R.*, 116 So. 3d at 571, 573 n.5.
57. *Id.* at 574 n.8.
58. *In re* Interest of D.B. & D.S., 385 So. 2d 83, 87 (Fla. 1980); Dale, *2011 Survey of Juvenile Law*, *supra* note 9, at 179.
59. 92 So. 3d 307 (Fla. 3d Dist. Ct. App. 2012).
60. Michael J. Dale, *2012 Survey of Florida Juvenile Law*, 37 NOVA L. REV. 333, 334 (2013) [hereinafter Dale, *2012 Survey of Juvenile Law*].
61. 95 So. 3d 378 (Fla. 3d Dist. Ct. App. 2012).
62. *Id.* at 382–83.
63. *Id.* at 380.

> The Court [calling]: Okay, so go ahead.
>
> Counsel for the mother: With the mother?
>
> DCF [calling]: No, that [is the father]. Judge, well, [the father] is present via phone. There is publication. His attorney over there [in Louisiana] was noticed to be present.
>
> The Court [calling]: He is not present. I am granting the termination of parental rights and closing the case. Mr. M. has no contact with his children.
>
> . . . .
>
> The Court [calling]: . . . Well, he [is] not here, and a default has been issued. Mr. M., your parental rights have been terminated and you have no contact whatsoever with these children.[64]

Citing prior case law to the effect that the "'termination of parental rights [ought] never be determined on a default basis or by *gotcha* practices when [the] parent makes a reasonable [attempt] to be present at [the] hearing and is delayed by circumstances beyond [that parent's] control,'" the appellate court reversed the termination of parental rights.[65]

The issue of whether parental rights can be terminated based upon the abuse of a sibling or another child in the family, is predicated upon a showing of a totality of the circumstances surrounding the current petition by applying the *Padgett* nexus test.[66] The issue before the Fourth District Court of Appeal in *A.J. v. Department of Children & Families*[67] was whether a father's parental rights to five children should be terminated because, while there was proof of sexual abuse as to two daughters, the record did not provide support for a finding harm or a risk of harm with regard to their two brothers.[68] While there was evidence of mental health problems with the two boys, it was unclear if the issues stemmed from the domestic abuse.[69] On that basis, the appellate court reversed as to the brothers.[70]

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64. *Id.* at 380–81 (alteration in original).
65. *Id.* at 381, 382–83 (quoting B.H. v. Dep't of Children & Families, 882 So. 2d 1099, 1100 (Fla. 4th Dist. Ct. App. 2004)).
66. Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 571 (Fla. 1991).
67. 97 So. 3d 985 (Fla. 4th Dist. Ct. App. 2012) (per curiam).
68. *Id.* at 986.
69. *Id.* at 987–88.
70. *Id.* at 986.

In *G.O. v. Department of Children & Families*,[71] the appellate court reversed as a matter of statutory construction because the general magistrate who presided over the advisory hearing found that the parents gave constructive consent for TPR by not appearing, and later allowed the guardian ad litem to testify as to the child's best interest.[72] The trial court signed an order that conformed to the general magistrate recommendation for TPR.[73] Under Florida law, general magistrates are prohibited from presiding over advisory hearings.[74] The hearing at which the guardian ad litem testified "was an adjudicatory hearing on the petition for [TPR]."[75] The appellate court reversed, since the proper court presiding over the adjudicatory hearing should have been the trial court.[76]

The rights of putative fathers in TPR and adoption cases are limited in Florida by statute.[77] In only one case, *Heart of Adoptions, Inc. v. J.A.*,[78] has the Supreme Court of Florida addressed the constitutionality of the adoption statute as it relates to putative fathers.[79] In *S.C. v. Gift of Life Adoptions*,[80] an adoption agency filed a petition to terminate a father's parental rights as a precursor to an adoption involving a biological mother who intended to place the child up for adoption with the agency.[81] The appellate court affirmed and granted the petition to terminate the putative father's parental rights, but avoided any constitutional claim, finding that there was abandonment, which independently supported the granting of the petition.[82] The father had argued that he was not appointed counsel in a timely fashion "until the first hearing on the petition."[83] The court did recognize "that the filing requirements [were] very technical and might be a challenge to the nonlawyer biological father,"[84] and in his concurrence, Judge Davis expressed his concern that unwed biological fathers

71. 100 So. 3d 232 (Fla. 3d Dist. Ct. App. 2012).
72. *Id.* at 233.
73. *Id.*
74. FLA. R. JUV. P. 8.257(h); *G.O.*, 100 So. 3d at 233.
75. *G.O.*, 100 So. 3d at 233.
76. *Id.*
77. FLA. STAT. §§ 63.053(1), .054(1) (2013).
78. 963 So. 2d 189 (Fla. 2007).
79. *Id.* at 191. See Michael J. Dale, *2007–2008 Survey of Juvenile Law*, 33 NOVA L. REV. 357, 388 (2009) [hereinafter Dale, *2007–2008 Survey of Juvenile Law*] for a discussion of the possible constitutional infirmities in the Florida law.
80. 100 So. 3d 774 (Fla. 2d Dist. Ct. App. 2012) (per curiam).
81. *Id.* at 774–75.
82. *Id.* at 775.
83. *Id.*
84. *Id.*

should be entitled to all the due process rights of other parties, including the right to counsel.[85]

IV. JUVENILE DELINQUENCY

The question of how indirect criminal contempt applies in juvenile delinquency cases was before the Supreme Court of Florida in *J.M. v. Gargett* (*J.M. II*).[86] The specific issue was whether, when an adjudicated delinquent violates a single probation order on multiple occasions, that juvenile may be held in contempt and placed in a secure detention facility for consecutive periods.[87] In the case at bar, the juvenile was placed on probation and was held in indirect criminal contempt as a result of violating curfew, as well as violation of a second order to obey household rules.[88] The juvenile was placed in secure detention for both offenses; five days for the first offense and fifteen days for the second.[89] Specifically, after the first period was satisfied, the second period began.[90] The Supreme Court of Florida—recognizing a split in opinions between the Second and Fifth District Courts of Appeal—held that the consecutive sentences could properly be instituted.[91] Justices Quince and Pariente dissented on the grounds that there was "only a single act of indirect contempt" under the Florida dependency statute.[92]

In the second case before the Supreme Court of Florida this year, the issue involved a school-related matter.[93] Juveniles are often the subject of delinquency cases that arise out of events which occur at school.[94] The issue in *J.R. v. State*[95] was whether a juvenile could be found to have committed a trespass on school grounds without evidence that the juvenile had formerly been warned by the school principal's designee for trespassing.[96] The Supreme Court

85. *S.C.*, 100 So. 3d at 776 (Davis, J., concurring).
86. 101 So. 3d 352, 353 (Fla. 2012) (per curiam).
87. *Id.* at 355.
88. *Id.* at 353.
89. *Id.*
90. *Id.* at 353–54.
91. *J.M. II*, 101 So. 3d at 356–57. *Compare J.M. I*, 53 So. 3d 1245, 1247 (Fla. 2d Dist. Ct. App.), *review granted*, 58 So. 3d 260 (Fla. 2011) (unpublished table decision), *aff'd*, 101 So. 3d 352 (Fla. 2012) (per curiam), *with* M.P. v. State, 988 So. 2d 1266, 1267 (Fla. 5th Dist. Ct. App. 2008).
92. *J.M. II*, 101 So. 3d at 357 (Quince, J., dissenting).
93. J.R. v. State, 99 So. 3d 427, 427 (Fla. 2012) (per curiam).
94. *See* 2 MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT ¶ 10.07(1) (2013).
95. 99 So. 3d 427 (Fla. 2012) (per curiam).
96. *Id.* at 427 (citing D.J. v. State, 43 So. 3d 176, 177 (Fla. 3d Dist. Ct. App.), *review granted*, 47 So. 3d 1287 (Fla. 2010) (unpublished table decision), *and quashed*, 67 So. 3d

of Florida held that the failure to present evidence at trial that the individuals who warned the child were designees of the school's principal was reversible error.[97] In addition, the Supreme Court of Florida held that the trial court failed to properly comply with the conditions for taking judicial notice under Florida's rules of evidence.[98]

The third case in the Supreme Court of Florida was *Hopkins v. State* (*Hopkins II*),[99] in which the court decided the question of whether a detainee's act of battery at a juvenile detention center, and charged with battery falls under Florida's criminal law within this setting.[100] Resolving a question of conflict between the First and Fourth District Courts of Appeal—as a matter of statutory construction—the court found that a detention center does qualify as a detention facility for purposes of the criminal law.[101]

In what would seem like a simple proposition, juvenile court jurisdiction over a subject child in delinquency ends at age nineteen.[102] In *State v. E.I.*,[103] the appellate court—in a one-paragraph opinion—dismissed the State's appeal as moot, as the juvenile had reached his nineteenth birthday.[104] However, the court explained that the trial court was correct and that its jurisdiction ends over any child at any time after the juvenile's nineteenth birthday, "[u]nless [the] child is already under commitment, in a transition program, or subject to a restitution order."[105]

The rules concerning a determination of whether a juvenile is incompetent to proceed in a delinquency case are quite clear.[106] Among them is the provision that the court must base its competency determination on the evaluation of at least "two . . . experts appointed by the court."[107] In *State v. D.V.*,[108] following an unauthorized absence, the juvenile was charged with threatening school personnel.[109] The juvenile allegedly slapped another student

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1029 (Fla. 2011)).

97. *Id.* at 430.

98. *Id.*; *see also* FLA. STAT. § 90.201(1) (2013).

99. 105 So. 3d 470 (Fla. 2012).

100. *Id.* at 471.

101. *Id.*; *see also* State v. Hopkins (*Hopkins I*), 47 So. 3d 974, 975 (Fla. 4th Dist. Ct. App. 2010), *review granted*, 63 So. 3d 749 (Fla. 2011) (unpublished table decision), *aff'd*, 105 So. 3d 470 (Fla. 2012); T.C. v. State, 852 So. 2d 276, 276 (Fla. 1st Dist. Ct. App. 2003) (per curiam).

102. FLA. STAT. § 985.0301(5)(a).

103. 114 So. 3d 309 (Fla. 4th Dist. Ct. App. 2013) (per curiam).

104. *Id.* at 310.

105. *Id.*

106. *See* FLA. STAT. § 985.19.

107. *Id.* § 985.19(1)(b).

108. 111 So. 3d 234 (Fla. 4th Dist. Ct. App. 2013).

109. *Id.* at 235.

seven weeks later.[110] Formerly, the juvenile had been adjudicated incompetent to proceed after allegations were raised with respect to the commission other crimes.[111] The first expert appointed by the court evaluated the mental condition of the child and "determined that [the child] was not competent to proceed."[112] The court did not appoint a second expert, relying upon an earlier report from an expert who had been appointed by the Department of Children and Families, on the grounds that one could save money in so doing.[113] The appellate court reversed, finding that as a matter of statutory construction the trial court is required to base determinations of competency on the evaluations of *at least two court-appointed experts*.[114] As the court only appointed one expert, reversal was required.[115]

Issues of the suppression of inculpatory statements by juveniles have been the source of discussion in this survey on a number of occasions.[116] In *State v. M.R.*,[117] one of the issues on appeal was whether a statement that the juvenile—who was subsequently "charged in a petition for . . . possession with intent to sell, manufacture, or deliver cannabis within 1000 feet of a school"—made in front of his mother and in the presence of a police officer could be suppressed.[118] The police officer had called the mother, and when the mother arrived, the juvenile was sitting, handcuffed, in the rear of a police car in custody and in the presence of the officer.[119] The child said to his mother that he did not wish to talk to her in the presence of a police "officer and that she . . . knew why he was selling marijuana."[120] In this case, the respondent child did not request to speak with the third person—his mother—but rather, it was the police officer that brought the mother to the scene.[121] The court held that "these statements . . . were an exploitation of the initial illegality," citing a prior District Court of Appeal case as distinguishable in *Lundberg v. State*.[122]

This survey does not usually discuss evidentiary issues, as they are generic in nature and not necessarily specific to juvenile delinquency cases.

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110. *Id.*
111. *Id.*
112. *Id.* at 235–36.
113. *D.V.*, 111 So. 3d at 236–37.
114. *Id.* at 237.
115. *Id.*
116. *See* Michael J. Dale, *2010 Survey of Juvenile Law*, 35 NOVA L. REV. 137, 151 (2010); Dale, *2007–2008 Survey of Juvenile Law*, *supra* note 79, at 384–85.
117. 100 So. 3d 272 (Fla. 3d Dist. Ct. App. 2012).
118. *Id.* at 274, 279–80.
119. *Id.* at 275, 280–81.
120. *Id.* at 275.
121. *Id.* at 275, 280–81.
122. *M.R.*, 100 So. 3d at 280–81 (citing Lundberg v. State, 918 So. 2d 444, 445 (Fla. 4th Dist. Ct. App. 2006)).

However, on occasion, the issue is germane to juvenile delinquency law.[123] In *D.D.B. v. State*,[124] the State filed a delinquency petition alleging that the juvenile called "'*911* for the purpose of making a false alarm or complaint or reporting false information.'"[125] In an adjudicatory hearing, "the State . . . introduce[d] an audio recording of [the] two calls purportedly made."[126] The problem was quite simple.[127] The identification of the child's voice on the recording required "authentication, [which] would also require . . . evidence, including [the fact] that the recording was of a telephone call received and handled by the 911 system on the relevant date."[128] Since there was no such evidence under section 90.901 of the Florida Evidence Code, the court was obligated to reverse.[129]

The second evidentiary matter, also seemingly basic in nature, arose in *K.A.A. v. State*.[130] In that case a juvenile was adjudicated delinquent for the unlawful possession of gun on school property.[131] The trial court would not allow the respondent "to cross-examine the State's juvenile witness about criminal charges pending against the witness."[132] Citing an earlier case to the effect that "'[t]he right to cross-examine witnesses . . . outweighs the [interest of the State] in preserving the confidentiality of juvenile delinquency records,'"[133] the appellate court reversed.[134] It ought to have been obvious that the prosecution witness's credibility would be an issue.[135]

It has been forty-six years since the Supreme Court of the United States ruled in *In re Gault*[136] that children have the right to counsel in juvenile delinquency cases.[137] In *C.W. v. State*,[138] a juvenile appealed from an order adjudicating her as delinquent based upon a battery on a law enforcement officer.[139] The issue was the court's action in taking the case to trial in the

123. *See, e.g.*, D.D.B. v. State, 109 So. 3d 1184, 1185 (Fla. 2d Dist. Ct. App. 2013).
124. 109 So. 3d 1184 (Fla. 2d Dist. Ct. App. 2013).
125. *Id.* at 1184.
126. *Id.* at 1185.
127. *See id.*
128. *Id.*
129. *D.D.B.*, 109 So. 3d at 1185; *see also* FLA. STAT. § 90.901 (2013).
130. 109 So. 3d 1175, 1176 (Fla. 4th Dist. Ct. App. 2013).
131. *Id.*
132. *Id.*
133. *Id.* (quoting Tuell v. State, 905 So. 2d 929, 930 (Fla. 4th Dist. Ct. App. 2005)).
134. *Id.*
135. *See K.A.A.*, 109 So. 3d at 1176.
136. 387 U.S. 1 (1967).
137. *Id.* at 41, 55.
138. 93 So. 3d 514 (Fla. 2d Dist. Ct. App. 2012).
139. *Id.* at 515.

absence of a lawyer for the child.[140] At the child's arraignment, the child indicated that she hired an attorney.[141] The court asked if she was sure that she would have the attorney represent her, since the attorney had not yet filed any pleadings.[142] On the date of trial, the child indicated that she was not sure where her attorney was, and the court said that it was going to trial.[143] After the trial, but before the disposition, an attorney was hired and filed a motion for rehearing.[144] Incredibly, the court denied the motion for rehearing, noting that the child '"did indeed have a fair trial.'"[145] Citing to the Florida Rules of Juvenile Procedure which require notification of the right to counsel at each stage of the proceeding and—if the child chooses to waive counsel—conducting a thorough inquiry to determine if the waiver was freely and intelligently made, the appellate court reversed.[146]

In Florida, determinations of whether an alleged juvenile delinquent is to be securely detained are based upon the use of a Risk Assessment Instrument ("RAI").[147] In *J.L.B. v. Kelly*,[148] a juvenile petitioned for a writ of habeas corpus, challenging the validity of the detention during the course of the juvenile delinquency proceeding.[149] Although he was released from detention while his writ was pending—and thus the matter was moot—the court on appeal ruled that "improper scoring of [a RAI] . . . is capable of repetition yet evading review," and thus it resolved the issue.[150] The claim involved impermissible double scoring.[151] The trial court added points to the scoring process on the basis of two factors: "[T]he *high risk* nature of [a] prior commitment and the circumstances of the current burglary offense."[152] The problem was that by doing so, the court impermissibly double-scored by acknowledging circumstances that had already been taken into account by the RAI, there was nothing in the State statute that would allow the court to do so.[153]

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140. *Id.*
141. *Id.*
142. *Id.*
143. *C.W.*, 93 So. 3d at 515.
144. *Id.*
145. *Id.*
146. *Id.* at 515–16 (quoting FLA. R. JUV. P. 8.165(a), (b)(2)).
147. Dale, *2007–2008 Survey of Juvenile Law*, *supra* note 79, at 380–81.
148. 93 So. 3d 1137 (Fla. 2d Dist. Ct. App. 2012).
149. *Id.* at 1138.
150. *Id.* (citing T.T. v. Esteves, 828 So. 2d 449, 450 (Fla. 4th Dist. Ct. App. 2002)).
151. *Id.* at 1139.
152. *Id.* at 1138.
153. *J.L.B.*, 93 So. 3d at 1139 (citing FLA. STAT. § 985.24 (2013)).

The State charged a juvenile with felony criminal mischief—valued at $1000 or more—for $2600 of damage to an automobile.[154] The auto body shop owner testified in support of the value of the damage, based on an employee's estimate.[155] The estimate was made in the regular course of business, but the estimate was never admitted into evidence.[156] When the trial court refused to strike the oral testimony, trial counsel objected, and the matter in *A.S. v. State*[157] went up on appeal.[158] The appellate court reversed on the basis of the Florida Rules of Evidence, specifically section 90.803(6), regarding the business records exception to hearsay.[159] Here, the estimate itself would have qualified as a business record.[160] "[H]owever, the testimony explaining the contents of the estimate," where the estimate was not in evidence, did not fall within the exception.[161] As a result, there was no competent proof of the underlying felony crime and the court reversed.[162]

Restitution issues come up regularly at the dispositional stage of delinquency cases in Florida; issues also regularly discussed in this survey.[163] A blatantly obvious reversal took place in *X.G. v. State*,[164] where the juvenile appealed from the revocation of juvenile probation where the court's basis for revocation and probation was the failure to pay restitution.[165] The problem concerned a plea agreement, which stated that "no restitution would be ordered on the [underlying] charge."[166] Thus, the disposition order did not list restitution as a condition of probation.[167]

In *A.P. v. State*,[168] the issue was whether there was sufficient evidence to support a restitution order.[169] The source of the evidence resulting in an order of $220 in restitution was the victim's testimony, which was based upon the

154. A.S. v. State, 91 So. 3d 270, 271 (Fla. 4th Dist. Ct. App. 2012) (per curiam).
155. *Id.*
156. *Id.*
157. 91 So. 3d 270 (Fla. 4th Dist. Ct. App. 2012) (per curiam).
158. *See id.* at 271.
159. *Id.*; *see also* FLA. STAT. § 90.803(6)(a) (2013) (amended by Act effective May 30, 2013, ch. 2013-98, § 1, 2013 Fla. Laws 1, 1–2).
160. *A.S.*, 91 So. 3d at 271.
161. *Id.*
162. *Id.*
163. Dale, *2012 Survey of Juvenile Law*, *supra* note 60, at 346; Michael J. Dale, *2009 Survey of Juvenile Law*, 34 NOVA L. REV. 199, 216 (2009); Dale, *2007–2008 Survey of Juvenile Law*, *supra* note 79, at 378.
164. 106 So. 3d 90 (Fla. 2d Dist. Ct. App. 2013).
165. *Id.* at 91.
166. *Id.* at 90.
167. *Id.*
168. 114 So. 3d 393 (Fla. 4th Dist. Ct. App. 2013).
169. *Id.* at 395.

replacement value of the item, and the source of the testimony was unknown.[170] Thus, according to the appellate court, the State failed to present competent substantial evidence of the item's fair market value.[171]

Among the requirements at the dispositional stage of the delinquency proceeding in Florida, is that the court strictly comply with the statutory provisions governing proper procedure at a juvenile disposition hearing.[172] In *K.P. v. State*,[173] while the court ordered a predisposition psychiatric evaluation of the child, the court entered a dispositional order before the psychiatric evaluation was available.[174] That constituted failure to strictly comply with the statutory procedures, and the appellate court reversed.[175] Similarly, at the dispositional stage, the trial court is obligated to prepare a written dispositional order that complies with its oral pronouncements.[176] In *L.D. v. State*,[177] the trial court failed to do so.[178] It was conceded that the court's written dispositional order was not consistent with its oral pronouncements.[179] On the basis of the lower court's failure to comply with the statutory obligations, the appellate court reversed.[180]

Similarly, in *R.V. v. State*,[181] the appellate court reversed the dispositional order of the trial court because there had been no articulation regarding why the dispositional alternative of a moderate risk commitment program is more appropriate than the Department of Juvenile Justice's recommendation that the child's rehabilitative needs should result in the least restrictive setting.[182] The appellate court reversed, authorizing the "trial court [to] amend [its] disposition[al] order to include the required findings."[183]

Perhaps even harder to understand is the situation which required a reversal of a disposition in *M.A.L. v. State*.[184] In that case, the trial court

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170. *Id.*
171. *Id.*
172. K.P. v. State, 97 So. 3d 966, 967 (Fla. 4th Dist. Ct. App. 2012) (citing K.D. v. State, 911 So. 2d 885, 886 (Fla. 1st Dist. Ct. App. 2005)); *see also* FLA. STAT. § 985.43(2) (2013).
173. 97 So. 3d 966 (Fla. 4th Dist. Ct. App. 2012).
174. *Id.* at 967.
175. *Id.*
176. L.D. v. State, 107 So. 3d 514, 515 (Fla. 2d Dist. Ct. App. 2013); *see also* FLA. STAT. § 985.43(2).
177. 107 So. 3d 514 (Fla. 2d Dist. Ct. App. 2013).
178. *Id.* at 515.
179. *Id.*
180. *Id.*; *see also* FLA. STAT. § 985.43(2).
181. 107 So. 3d 535 (Fla. 4th Dist. Ct. App. 2013) (per curiam).
182. *Id.* at 536.
183. *Id.*
184. 110 So. 3d 493, 495–96, 499 (Fla. 4th Dist. Ct. App. 2013).

conducted a dispositional hearing outside of the appellant and her father's presence, in a sidebar.[185] The juvenile "claim[ed] that [the] sidebar conference violated her due process rights to be present and meaningfully heard prior to the disposition."[186] Shockingly, the State argued that this was harmless error.[187] The appellate court reversed, recognizing that the issue of disposition prior to determination, in noncompliance with the Florida statute governing how the hearing should be held, constituted fundamental error.[188]

Under Florida law, there is a variety of dispositional alternatives in addition to restitution;[189] such alternatives encompass placement in a various residential facilities, including those described as high-risk.[190] In *D.H. v. State*,[191] the trial court committed a youth to a high-risk facility for a misdemeanor offense in its dispositional order.[192] Florida law limits the trial court's commitment authority and placement of the juvenile misdemeanant in a high-risk facility.[193] Thus, the most restrictive facility to which the child could be sent was a moderate-risk facility; therefore, the appellate court reversed.[194]

In *G.W. v. State*,[195] juveniles in three consolidated appeals challenged the constitutionality of a *Florida Statute* governing sentencing enhancement when the crime committed was against a school officer.[196] The appeal was based on equal protection grounds and the appellants claimed that the statute created "'an elite class of untouchables'" because of the additional protection provided by the law to school employees.[197] Applying a rational basis equal protection test,[198] the appellate court affirmed, finding no constitutional infirmity in the statute.[199]

In two major cases decided over the past four years, the Supreme Court of the United States dealt with questions of appropriate punishment for

185. *Id.* at 495.
186. *Id.* at 496.
187. *Id.*
188. *Id.* at 496, 499; *see also* FLA. STAT. § 985.433(4)(d) (2013).
189. *Compare* FLA. STAT. § 985.437, *with id.* § 985.441.
190. *Id.* § 985.441(1)(b); *see also id.* § 985.03(46).
191. 114 So. 3d 496 (Fla. 1st Dist. Ct. App. 2013).
192. *Id.* at 497–98.
193. *Id.* (quoting FLA. STAT. § 985.441(2)).
194. *Id.* at 498.
195. 106 So. 3d 83 (Fla. 3d Dist. Ct. App.), *review denied*, 118 So. 3d 220 (Fla. 2013) (unpublished table decision).
196. *Id.* at 84; *see also* FLA. STAT. § 784.081(2).
197. *G.W.*, 106 So. 3d at 84.
198. *Id.* at 85 (citing Hechtman v. Nations Title Ins. of N.Y., 840 So. 2d 993, 996 (Fla. 2003)).
199. *Id.* at 86; *see also* FLA. STAT. § 784.081(2).

individuals who were juveniles at the time they committed their crimes.[200] In *Roper v. Simmons*,[201] the Court held that the death penalty for individuals who committed criminal offenses while juveniles was unconstitutional in violation of the Eighth Amendment prohibition against cruel and unusual punishment.[202] In *Graham v. Florida*,[203] the Court held that life without the possibility of parole for a juvenile was also unconstitutional in a felony murder setting where the juvenile did not commit the homicide.[204] Then, in *Miller v. Alabama*,[205] the Court ruled that state sentencing statutes making life imprisonment without parole appropriately mandatory for juvenile non-homicide offenders also violated the Eighth Amendment prohibition against cruel and unusual punishment.[206] In three intermediate appellate court opinions decided this past survey year, the courts dealt with the application of *Graham* and *Miller* to three juveniles tried as adults.[207] The first case is *Walling v. State*.[208] There, the defendant, who was sixteen at the time of the offense, was convicted of felony murder for participating in the planning of the robbery and supplying the gun, although he had been "waiting a few blocks away when the fatal shot was fired."[209] He was tried as an adult by a six-person jury.[210] The appellate court held that under *Roper*, *Graham*, and *Miller*, the juvenile was not entitled to a twelve-person jury because the twelve-person jury is required when death is a possible penalty and that death no longer controls the question of a jury's size when the case involves a juvenile.[211]

In *Reynolds v. State*,[212] the defendant had been found guilty by a jury and sentenced to life in prison on one count of robbery with a firearm in 2002.[213] The appellate court vacated the sentence of life without parole under *Graham*.[214]

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200. Graham v. Florida, 130 S. Ct. 2011, 2017–18 (2010); Roper v. Simmons, 543 U.S. 551, 555–56 (2005).

201. 543 U.S. 551 (2005).

202. *See id.* at 578.

203. 130 S. Ct. 2011 (2010).

204. *Id.* at 2034.

205. 132 S. Ct 2455 (2012).

206. *Id.* at 2475.

207. *See* Reynolds v. State, 116 So. 3d 558, 559 (Fla. 3d Dist. Ct. App. 2013); Young v. State, 110 So. 3d 931, 931–32 (Fla. 2d Dist. Ct. App.), *review denied*, 2013 Fla. LEXIS 2223 (Fla. Oct. 10, 2013); Walling v. State, 105 So. 3d 660, 661–62 (Fla. 1st Dist. Ct. App. 2013).

208. 105 So. 3d 660, 660 (Fla. 1st Dist. Ct. App. 2013).

209. *Id.* at 661–62.

210. *Id.* at 662.

211. *Id.*

212. 116 So. 3d 558 (Fla. 3d Dist. Ct. App. 2013).

213. *Id.* at 559.

214. *Id.*

The second issue before the court on remand was "'the concept of aggregate sentencing on interdependent offenses, as it relates to [the] trial judge's desire to effect the original sentencing plan.'"[215] The appellate court held that there is no right to "'modification, on remand after appeal, of [the] sentences on convictions [that were] not challenged on [the original] appeal.'"[216] The appellate court further acknowledged the lack of legal decisions on point with this issue after the Supreme Court of the United States' opinion in *Graham*, although it recognized general support for the proposition.[217] Finally, as the court noted that it was not unconstitutional for a juvenile to receive a life sentence for a non-homicide crime.[218] Rather, it "is unconstitutional . . . for the State not to give [the] juvenile offender[] . . . 'some meaningful opportunity to obtain release.'"[219]

In a third post-*Graham* decision, *Young v. State*,[220] the juvenile was sentenced to four consecutive thirty-year sentences and then was resentenced pursuant to *Graham*.[221] One of the issues the defendant raised on appeal was that the trial court violated *Graham* by "fail[ing] to consider [his] rehabilitation and newfound maturity."[222] The juvenile's claim was that he was entitled to a hearing to prove his change in circumstances.[223] The appellate court rejected this argument under *Graham*.[224] Under the facts of the case, because the juvenile was sentenced to a term of thirty years in prison, after which he would be released, he did have a sentence that specifically provided for his eventual release.[225] Therefore, *Graham* did not apply.[226] Finally, the appellate court held that a resentencing hearing does not require the opportunity to review rehabilitation.[227] On those bases, the court affirmed.[228]

215. *Id.* at 562 (quoting Fasenmyer v. State, 457 So. 2d 1361, 1366 (Fla. 1984)).
216. *Id.* (quoting *Fasenmyer*, 457 So. 2d at 1366).
217. *Reynolds*, 116 So. 3d at 562.
218. *Id.* at 563.
219. *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2030 (2010)).
220. 110 So. 3d 931 (Fla. 2d Dist. Ct. App.), *review denied*, No. 5C13-929, 2013 WL 5614109 (Fla. 2013).
221. *Id.* at 931–32 (citing *Graham*, 130 S. Ct. at 2034).
222. *Id.* at 932.
223. *Id.*
224. *Id.* at 933.
225. *Young*, 110 So. 3d at 934.
226. *Id.*
227. *Id.*
228. *Id.* at 936.

V. CONCLUSION

The Supreme Court of Florida decided three important technical matters in the delinquency field this past survey year.[229] In dependency and termination of parental rights cases, the intermediate appellate courts decided a large number of cases, a number of which involved obvious and basic failures to comply with Chapter 39 by the trial courts.[230] One case in particular, *R.L.R. v. State*, was particularly noteworthy, as it upheld the right of a juvenile to confidentiality with his volunteer AAL in a dependency case, over the objections of the GAL Program and the DCF.[231]

229. *See J.M. II*, 101 So. 3d 352, 353 (Fla. 2012) (per curiam); *Hopkins II*, 105 So. 3d 470, 471 (Fla. 2012); J.R. v. State, 99 So. 3d 427, 430 (Fla. 2012) (per curiam).

230. *See, e.g.*, A.J. v. Dep't of Children & Families, 97 So. 3d 985, 986–87 (Fla. 4th Dist. Ct. App. 2012) (per curiam).

231. R.L.R. v. State, 116 So. 3d 570, 574 (Fla. 3d Dist. Ct. App. 2013).