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2012 Survey of Juvenile Law

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2012 SURVEY OF JUVENILE LAW

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MICHAEL J. DALE*

I. INTRODUCTION

The Florida intermediate appellate courts decided a series of cases in the child welfare field ranging from issues related to representation of parents in dependency proceedings and proper procedure at shelter hearings, to a range of issues in termination of parental rights (TPR) cases this past survey year. The intermediate courts ruled on a lesser number of delinquency area cases. As is true with each survey, decisions in the delinquency area that are linked to issues of criminal procedure, and which are not unique to the juvenile delinquency field, are not covered.¹ Finally, this article summarizes the symposium held at Nova Southeastern University, Shepard Broad Law Center regarding the American Bar Association Model Act Governing Representation of Children in Abuse, Neglect, and Dependency Proceedings.²

II. DEPENDENCY

Dependency proceedings often start when the child is removed from the home and taken into custody based upon a probable cause determination that the child is “abused, neglected, or abandoned or . . . is in imminent danger of [an] illness or injury as a result of abuse, neglect, or abandonment,” there is a violation of an order of the court, or there are no parents or other guardians available.³ When the law enforcement officer takes the child into custody, the officer may release the child to a parent or legal custodian or other re-

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1. See Michael J. Dale, *2010 Survey of Juvenile Law*, 35 NOVA L. REV. 137, 137 (2010) [hereinafter Dale, *2010 Survey of Juvenile Law*].

2. See generally Symposium, 36 NOVA L. REV. 309 (2012).

3. FLA. STAT. § 39.401(1)(b) (2012).

sponsible adult, or may place the child in the care of an authorized agent of the Department of Children and Families (DCF).⁴ The child may also be placed in shelter care under certain circumstances.⁵ When placement in a shelter occurs, the parent must be notified, and a shelter care hearing shall take place, generally speaking, within twenty-four hours after the placement.⁶ At that shelter hearing, the court will determine if there is probable cause to keep the child in shelter status pending further investigation of the case.⁷ Because parents are statutorily entitled to counsel at all stages of dependency proceedings in Florida, they must be advised of their right to counsel at the shelter hearing.⁸ Unfortunately, the intermediate appellate courts periodically must reverse on the grounds that the trial court failed to advise the parents of their right to counsel. In *A.G. v. Florida Department of Children & Families*,⁹ that is exactly what happened.¹⁰ At the shelter hearing, the court did not ask the father if he had representation, and the court did not “clarify whether the father wished to waive his right to counsel.”¹¹ Only at the conclusion of the hearing did the court appoint counsel for future hearings.¹² On that basis the appellate court granted the father’s writ of certiorari.¹³ In *G.W. v. Department of Children & Families*,¹⁴ the Third District Court of Appeal was faced with the same issue.¹⁵ The appellate court granted a father certiorari from an order at a shelter hearing in Miami in which the father claimed he was denied his rights to counsel.¹⁶ In granting the writ of certiorari, the appellate court was blunt in its reversal.¹⁷ The following description is instructive:

In the midst of the staccato-paced hearing conducted by the trial court in this case, the court stated, inter alia, “and I’m appointing counsel for the father.” Under the circumstance, the father missed the point. As the hearing continued, both the father and his family members begged to speak to the court. The father stated on

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4. *Id.* §§ 39.01(21), .401(2).
 5. *Id.* § 39.402(4).
 6. *Id.* § 39.402(5), (8)(a)–(b).
 7. *Id.* § 39.402(8)(d)1.
 8. FLA. R. JUV. P. 8.320(a)(1), 8.515(a)(1).
 9. 65 So. 3d 1180 (Fla. 1st Dist. Ct. App. 2011).
 10. *See id.* at 1183.
 11. *Id.* at 1181.
 12. *Id.* at 1182.
 13. *Id.* at 1181.
 14. 92 So. 3d 307 (Fla. 3d Dist. Ct. App. 2012).
 15. *See id.* at 308.
 16. *Id.*
 17. *See id.* at 310.

two occasions: “Can I say something?” “Can I say something, please?” Then, as the trial court indicated she was prepared to close down the hearing, he asked, “Why can’t I say anything?” to which the court finally acceded briefly. On the *last page* of the shelter hearing transcript, the . . . court stated, “And you call your lawyer, [G.W.], okay?” to which G.W. responded, “Hold on, I didn’t know I had one.” An unidentified speaker said, “They’re going to give [one] to you.” After scheduling dates for further proceedings, the hearing then concluded.¹⁸

After referencing the due process right to counsel at a shelter hearing describing the statute as “replete with language requiring counsel at this critical stage of the dependency process,” the appellate court in *A.G.* closed with the following statement: The trial court’s failure to provide the father the opportunity to have counsel present at the shelter hearing “constituted a clear departure from the essential requirements of the law amounting to a miscarriage of justice.”¹⁹

In *K.G. v. Florida Department of Children and Families*,²⁰ decided on the same day as *A.G.*,²¹ the First District Court of Appeal granted a petition for certiorari sought by the mother because, at a shelter hearing, the court would not allow the mother’s attorney to speak and directed that the child be placed with the maternal grandmother without allowing the mother to present any evidence or otherwise be heard.²² Florida law explicitly requires the trial court to provide an appearing party an opportunity to be heard and present evidence at all of the hearings.²³ The appellate court held that the failure to allow the mother to present evidence violated her due process right to be heard and was “a clear departure from the essential requirements of the law amounting to a miscarriage of justice.”²⁴

*S.M. v. R.M.*²⁵ is yet another case in which the court failed to allow evidence at a shelter hearing.²⁶ In *S.M.*, the appellate court treated the appeal as

18. *Id.* at 309 (alteration in original) (footnotes omitted).

19. *A.G. v. Fla. Dep’t of Children & Families*, 65 So. 3d 1180, 1182–83 (Fla. 1st Dist. Ct. App. 2011).

20. 66 So. 3d 366 (Fla. 1st Dist. Ct. App. 2011).

21. *A.G.*, 65 So. 3d at 1180; *K.G.*, 66 So. 3d at 366.

22. *K.G.*, 66 So. 3d at 367.

23. FLA. STAT. § 39.402(8)(c)(3) (2012); *see also* FLA. R. JUV. P. 8.305(b)(4); Dep’t of Children & Family Servs. v. Heart of Adoptions, Inc. (*In re Interest of J.T.*), 947 So. 2d 1212, 1215 (Fla. 2d Dist. Ct. App. 2007); *L.M.C. v. Dep’t of Children & Families*, 935 So. 2d 47, 47 (Fla. 5th Dist. Ct. App. 2006); *F.M. v. Dep’t of Children & Families*, 758 So. 2d 1262, 1264 (Fla. 5th Dist. Ct. App. 2000).

24. *K.G.*, 66 So. 3d at 368–69.

25. 82 So. 3d 163 (Fla. 4th Dist. Ct. App. 2012).

a writ of certiorari and reversed.²⁷ Contained in the opinion is the following statement from the transcript:

Mother's Attorney: I object to the entire lack of due process in this case, to the procedure that has been followed, the questioning, and my failure to be allowed to put on any witnesses, the sudden urgency of the hearing The guardian ad litem's report being admitted without any cross-examination and my [not being allowed] to put on one witness.²⁸

In granting the writ, the appellate court described the cases as being "indistinguishable" from *K.G.*²⁹

Chapter 39 of the *Florida Statutes* provides that a petition may be filed for dependency "by an attorney for the [DCF] or any other person who [is] knowledge[able] of the facts . . . or is informed of them and believes that they are true."³⁰ In *Florida Department of Children & Families v. Y.C.*,³¹ a mother filed a dependency proceeding naming herself as the respondent.³² Described as a private dependency petition,³³ the mother "alleged that . . . her children were at risk of harm based on [the father's] various acts of violence."³⁴ DCF had previously determined that intervention was not warranted.³⁵ The mother was upset with this finding and commenced the proceeding herself.³⁶ The Guardian Ad Litem (GAL) Program "moved to have the trial court order the [DCF] to file a case plan and provide services."³⁷ Then "DCF filed a limited appearance to object to [the] motion."³⁸ The trial court, without holding a trial or admitting any evidence, "entered an order of dependency."³⁹ As the appellate court explained, "[t]he sole basis then or ever asserted for the order was the fact that Y.C. had defaulted and thus 'ad-

26. *Id.* at 164.

27. *Id.*

28. *Id.* at 166 (alterations in original).

29. *Id.* at 170.

30. FLA. STAT. § 39.501(1) (2012).

31. 82 So. 3d 1139 (Fla. 3d Dist. Ct. App. 2012).

32. *Id.* at 1140.

33. *Id.*; Michael J. Dale, 2011 *Survey of Juvenile Law*, 36 NOVA L. REV. 179, 183 (2011) [hereinafter Dale, 2011 *Survey of Juvenile Law*].

34. *Y.C.*, 82 So. 3d at 1140.

35. *Id.*

36. *Id.*

37. *Id.* at 1140–41.

38. *Id.* at 1141.

39. *Y.C.*, 82 So. 3d at 1141.

mitted' her own allegations of dependency."⁴⁰ DCF sought a writ which the appellate court granted.⁴¹ In so doing, the appellate court explained that there was no "case or controversy and . . . therefore, [no] basis for court action."⁴² The court explained that one cannot file a lawsuit, admit the allegations, and thus control authority of the court to act.⁴³ Finally, the appellate court added the following: "We are bound to say that neither the trial court nor the GAL should have allowed itself to become involved in the combination charade-theatre of the absurd, which played itself out below."⁴⁴

Chapter 39 contains a number of grounds for findings of dependency.⁴⁵ One of them is that while there is no present abuse, neglect, or abandonment, one of the three can be made out upon the basis that the parent's behavior constitutes a present threat to the child which, although "prospective" in nature, is imminent.⁴⁶ The issue in *S.S. v. Department of Children & Families*⁴⁷ was whether allegations of chronic use of a controlled substance or alcohol, acts of violence, neglect of the children's dental health, and psychological instability were proven to be prospective and imminent.⁴⁸ The appellate court reversed, finding that while the mother drank a lot it was not sufficient to constitute "extensive, abus[e], and chronic use" and that a single item of evidence of alleged illegal substance abuse was the result of inadmissible hearsay evidence.⁴⁹ The child protective investigator "neither administered [a urine screen, nor] performed the chemical analysis, [n]or interpreted the results," and so could not testify "to lay the necessary predicate to introduce the lab report containing the drug test results."⁵⁰ There was no evidence that the children witnessed or that they were affected by incidents of domestic

40. *Id.* (emphasis omitted).

41. *See id.* at 1141 & n.6.

42. *Id.* at 1141 & n.7.

43. *Id.* at 1141-42.

44. *Y.C.*, 82 So. 3d at 1145 n.17.

45. *See* FLA. STAT. § 39.401 (2012).

46. *S.S. v. Dep't of Children & Families*, 81 So. 3d 618, 621 (Fla. 1st Dist. Ct. App. 2012) (quoting *J.B.M. v. Dep't of Children & Families*, 870 So. 2d 946, 951 (Fla. 1st Dist. Ct. App. 2004)); *see also* FLA. STAT. § 39.401(1)(b)(1); Dale, *2011 Survey of Juvenile Law*, *supra* note 33, at 182.

47. 81 So. 3d 618 (Fla. 1st Dist. Ct. App. 2012).

48. *Id.* at 621-23.

49. *Id.* at 621-22 (citing *J.B.M.*, 870 So. 2d at 949).

50. *Id.* (citing *J.B.M.*, 870 So. 2d at 949).

violence.⁵¹ Finally, there was no nexus between the mother's psychiatric disorder and the children's health.⁵²

A question upon which the intermediate appellate courts are split is whether a finding that a child who was "at substantial risk of imminent abuse, abandonment, or neglect"⁵³ may be made where there was a prior adjudication of dependency against the other parent.⁵⁴ The issue before the Third District Court of Appeal in *D.A. v. Department of Children and Family Services*,⁵⁵ was whether it should follow the opinion of the Fifth District Court of Appeal in *P.S. v. Department of Children and Families*,⁵⁶ which held that, as a matter of statutory construction, after a finding of neglect as to one parent, the only finding of dependency in the supplemental order against the second parent is that there be "actual" abuse, abandonment, or neglect.⁵⁷ The Third District Court of Appeal rejected this approach in a split opinion, finding that the word "actual" is not in the statute, that the Fifth District Court of Appeal hindered the purpose behind the statutory prohibition against more than one dependency adjudication, and that two different standards have no apparent rationale.⁵⁸

An interesting sidelight in *D.A.* is the fact that the DCF confessed error based upon the *P.S.* case, whereas the GAL Program took the position "that the trial court's supplemental adjudication [in the] dependency [was] correct."⁵⁹ Of interest here is the fact the GAL Program undertook the role of petitioner to prove the allegation of prospective neglect.⁶⁰ This action, taking on the role usually played by DCF—seeking to prove the allegation of neglect—is permissible under Florida law although the usual role of the GAL in a dependency case around the country is solely to represent the best interest of the child oftentimes as a non-party expert.⁶¹

51. *Id.* at 623.

52. *S.S.*, 81 So. 3d at 623 (quoting *B.D. v. Dep't of Children & Families*, 797 So. 2d 1261, 1264 (Fla. 1st Dist. Ct. App. 2001)) (citing *I.T. v. State, Dep't of Health & Rehabilitative Servs.*, 532 So. 2d 1085, 1088 (Fla. 3d Dist. Ct. App. 1988)).

53. FLA. STAT. § 39.01(15)(f) (2012).

54. Compare *D.A. v. Dep't of Children & Family Servs.*, 84 So. 3d 1136, 1138–39 (Fla. 3d Dist. Ct. App. 2012), with *P.S. v. Dep't of Children & Families*, 4 So. 3d 719, 720–21 (Fla. 5th Dist. Ct. App. 2009).

55. 84 So. 3d 1136 (Fla. 3d Dist. Ct. App. 2012).

56. 4 So. 3d 719 (Fla. 5th Dist. Ct. App. 2009).

57. *D.A.*, 84 So. 3d at 1139 (citing *P.S.*, 4 So. 3d at 720–21); *P.S.*, 4 So. 3d at 720–21.

58. *D.A.*, 84 So. 3d at 1140, 1141; see also FLA. STAT. § 39.01(15)(f).

59. *D.A.*, 84 So. 3d at 1138.

60. See *id.*

61. See Michael J. Dale, Reporting the Child Crisis § 406 [1] pp 4 - 67 - 70 (LexisNexis 2012), FLA. STAT. §§ 39.501(2), .807(2)(a)–(b); see also FLA. R. JUV. P. 8.215. In addition,

Another case involving the issue of prospective neglect is *S.T. v. Department of Children & Family Services (In re Interest of K.C. & D.C.)*.⁶² In that case, DCF alleged that there was “prospective abuse [and] neglect by the father and prospective neglect by the mother.”⁶³ The allegations were that the father’s use of alcohol was “chronic, extensive, and abusive [and] . . . would likely continue” and thus cause the children to be at “substantial risk of imminent abuse and neglect from the father . . . [and] that the mother was aware of the father’s use . . . but denied that he had a problem and allowed the father to transport the children home from school, despite his alcohol problem.”⁶⁴ In a heavily documented analysis of the allegations, the appellate court demonstrated why it is necessary that the petitioner should present any admissible evidence that may form the basis of the court’s finding.⁶⁵ DCF presented “[n]o representative of the [agency] who had contact with the family, . . . nor . . . either child, nor . . . any expert witness such as a psychologist or counselor.”⁶⁶ The individuals who testified were the parents, the elementary school principal, the assistant kindergarten teacher, and the surrogate grandmother.⁶⁷ The trial court discounted the parents’ testimony based upon credibility.⁶⁸ However, the Second District Court of Appeal stated, “it is difficult to discern the evidence the circuit court relied upon to support its determination of dependency as to the mother.”⁶⁹ As to the father, the independent witnesses did not provide evidence of the father’s alcohol use or that his use demonstrably affected the children as required by Florida law.⁷⁰ Further, there was no “competent evidence that the mother knew that the father was endangering the children by his conduct.”⁷¹ Thus the Second District Court of Appeal reversed.⁷²

In a dependency proceeding, after an adjudication and disposition involving the development of the case plan, when the parent complies with the case plan, the parent may file a motion for a reunification.⁷³ In *C.M. v. De-*

both DCF and the GAL Program are agencies of the executive branch. *See* FLA. STAT. §§ 20.19(2)(a), 39.8296(2)(a).

62. 87 So. 3d 827, 828 (Fla. 2d Dist. Ct. App. 2012).

63. *Id.*

64. *Id.* at 828–29.

65. *See id.* at 833.

66. *Id.* at 829.

67. *In re Interest of K.C. & D.C.*, 87 So. 3d at 834.

68. *Id.*

69. *Id.*

70. *Id.* at 834–35.

71. *Id.* at 835.

72. *In re Interest of K.C. & D.C.*, 87 So. 3d at 836.

73. FLA. STAT. § 39.621(10) (2012).

partment of Children & Family Services (In re Interest of G.M.),⁷⁴ the mother appealed from two final orders of the trial court.⁷⁵ The court “denied her motion for reunification and terminated protective supervision with her child [who was] in the custody of [a] nonoffending father.”⁷⁶ The child had been adjudicated dependent two years later and was reunified with his father in Georgia, where the child resided since that time.⁷⁷ Under Florida law, there are a set of standards that the court must apply on a motion by a parent for reunification or increased contact with a child.⁷⁸ In the case at bar, the trial court failed to include any of the findings required under either statute, and the Second District Court of Appeal was forced to reverse.⁷⁹

A second reunification case involved the obligation of the court not to select a better permanency option, but rather to determine that the parent has complied with the case plan and to allow reunification, unless the reunification would endanger the child.⁸⁰ This was the issue in *S.V.-R. v. Department of Children & Family Services*.⁸¹ A mother of two children appealed from an order denying her motion for reunification with the child following substantial compliance with the tasks in the case plan.⁸² The Third District Court of Appeal held, in reversing the trial court, that neither DCF nor the GAL proved endangerment of the safety, well-being, or health of the child.⁸³ It also held that the permanency determination granting custody to the father instead of the mother incorrectly applied the best interest factor.⁸⁴ The difficult issue described by the Third District Court of Appeal was how the law applies when a non-offending parent seeks to become the permanent custodial parent when a dependency proceeding ends with the offending parent seeking reunification.⁸⁵ The appellate court noted that the trial court charge was not to select the better dependency option, and that neither DCF nor the GAL program demonstrated that the health and well-being of the children

74. 73 So. 3d 320 (Fla. 2d Dist. Ct. App. 2011).

75. *Id.* at 321.

76. *Id.*

77. *Id.*

78. FLA. STAT. §§ 39.522(2), .621(10).

79. *In re Interest of G.M.*, 73 So. 3d at 323.

80. *S.V.-R v. Dep’t of Children & Family Servs.*, 77 So. 3d 687, 689–90 (Fla. 3d Dist. Ct. App. 2011) (per curiam).

81. 77 So. 3d 687, 688 (Fla. 3d Dist. Ct. App. 2011) (per curiam).

82. *Id.*

83. *Id.* at 689.

84. *Id.* (citing FLA. STAT. § 39.621(10) (2012)).

85. *Id.* at 690.

will be endangered by the reunification.⁸⁶ Thus the appellate court reversed.⁸⁷

The Florida Rules of Juvenile Procedure provide for discovery which in most respects follows the Florida Rules of Civil Procedure.⁸⁸ The issue in *Colaizzo v. Office of Criminal Conflict & Civil Regional Counsel*,⁸⁹ was whether the Office of Regional Counsel or DCF should pay the fee to an expert witness in a deposition taken in a TPR case.⁹⁰ “The doctor sent a bill for the deposition to” the Office of Regional Counsel.⁹¹ He had not been paid by an organization known as the “Child Protection Team, an independent, non-profit organization [that] investigat[ed] allegations of child abuse,” which was funded by the State, and operated under the Florida Department of Health for whom he worked.⁹² The Fourth District Court of Appeal held that under the Florida Rules of Civil Procedure, the party seeking to take an expert deposition is responsible for the fee.⁹³ Thus, the appellate court reversed and remanded to the trial court to hold a hearing under the Rules of Civil Procedure that provides “[u]nless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery.”⁹⁴

The issue of the court’s ability in a dependency proceeding to order parties to submit to a psychological evaluation was before the Fourth District Court of Appeal in *J.B. v. M.M.*⁹⁵ In a private dependency proceeding brought by the child’s paternal grandparent, the appellant brought a writ of certiorari to the Fourth District Court of Appeal in order to challenge the trial court’s order that she submit to a psychological evaluation.⁹⁶ Under Florida law, in order to require such an examination, there must be a finding that the mental health of the parent is in controversy and good cause must be shown.⁹⁷ While the mother suffered from a schizoaffective disorder, there was no finding of good cause because the only evidence of “the mother’s alleged inability to parent her daughter [was] over eight years old.”⁹⁸ Thus,

86. *S.V.-R.*, 77 So. 3d at 690.

87. *Id.* at 690–91.

88. Compare FLA. R. JUV. P. 8.245, with FLA. R. CIV. P. 1.280.

89. 82 So. 3d 195 (Fla. 4th Dist. Ct. App. 2012).

90. *Id.* at 195.

91. *Id.* at 196.

92. *Id.*

93. *Id.* at 197–98; see also FLA. R. CIV. P. 1.280(b)(5)(A), (C), 1.390(c).

94. *Colaizzo*, 82 So. 3d at 197–98 (quoting FLA. R. CIV. P. 1.280(b)(5)(C)).

95. 92 So. 3d 888, 889 (Fla. 4th Dist. Ct. App. 2012) (per curiam).

96. *Id.*

97. FLA. STAT. § 39.407(15) (2012).

98. *J.B.*, 92 So. 3d at 890.

the Fourth District Court of Appeal granted the writ.⁹⁹ Oddly, the GAL attorney assigned to the case took no position on the issue.¹⁰⁰

III. TERMINATION OF PARENTAL RIGHTS

Among the grounds for TPR in Chapter 39 is when a parent is involved in conduct that “threatens the life, safety, well-being, or physical, mental, or emotional health of the child.”¹⁰¹ In addition, it must be shown that termination is in the manifest best interests of the child.¹⁰² Applying this law to the facts in *Caso v. Department of Health & Rehabilitative Services*,¹⁰³ the Third District Court of Appeal found that the parent’s mental health problems made the parent unable to understand or appreciate the needs of the child.¹⁰⁴ Experiencing delusions which made the parent unable to appreciate the reality of the situation apparent to a child are grounds for a finding of TPR.¹⁰⁵

Issues involving proper application of the Supreme Court of Florida’s 1991 seminal opinion in *Padgett v. Department of Health & Rehabilitative Services*¹⁰⁶ come up regularly in the intermediate appellate courts.¹⁰⁷ In *Padgett*, the court had determined that if the termination was based solely on abuse of the sibling, the welfare department must also prove before the court that there was a substantial risk of significant harm to the child from the abuse of the sibling.¹⁰⁸ The issue in *Department of Children & Family Services v. K.D. & Z.H. (In re Interest of Z.C.(1) & Z.C.(2))*,¹⁰⁹ was whether applying the so-called “nexus test” for a prospective conflicted relationship between the past abuse of the child and prospective abuse of another child involves a totality of circumstance analysis.¹¹⁰ The court then applied the

99. *Id.*

100. *Id.*

101. FLA. STAT. § 39.806(1)(c).

102. *In re Interest of Baby Boy A.*, 544 So. 2d 1136, 1137 (Fla. 4th Dist. Ct. App. 1989); *see Caso v. Dep’t of Health & Rehabilitative Servs.*, 569 So. 2d 466, 468 (Fla. 3d Dist. Ct. App. 1990); *In re Interest of J.A.*, 561 So. 2d 356, 358 (Fla. 3d Dist. Ct. App. 1990) (per curiam); *In re Interest of M.J.*, 543 So. 2d 1323, 1324 (Fla. 4th Dist. Ct. App. 1989).

103. 569 So. 2d 466 (Fla. 3d Dist. Ct. App. 1990).

104. *See id.* at 470.

105. *D.B. v. Dep’t of Children & Families*, 87 So. 3d 1279, 1281 (Fla. 4th Dist. Ct. App. 2012).

106. 577 So. 2d 565 (Fla. 1991).

107. *See Dale, 2011 Survey of Juvenile Law, supra* note 33, at 182.

108. *Padgett*, 577 So. 2d at 571.

109. 88 So. 3d 977 (Fla. 2d Dist. Ct. App. 2012) (en banc).

110. *Id.* at 982–86.

totality of circumstances test developed in the series of cases following *Padgett*¹¹¹ and found that the nexus existed.¹¹²

Florida law provides that in dependency cases, a case plan is generally required.¹¹³ One of the grounds for TPR in Florida is the situation where the child is adjudicated dependent, the parent has been offered a case plan, and that the welfare department alleges that the “child continues to be abused, neglected, or abandoned.”¹¹⁴ This ground is evaluated in terms of whether the parent has substantially complied with the case plan.¹¹⁵ The question of whether the parent substantially complied with the case plan was before the Second District Court of Appeal in *N.F. v. Department of Children & Family Services (In re Interest of N.F.)*.¹¹⁶ Whether there has been substantial compliance is an evidentiary question.¹¹⁷ In reversing and remanding the finding of TPR, the appellate court in *In re Interest of N.F.* said: “In short, [DCF’s] position amounted to nothing more than parroted statutory phrases and bald incantations of buzzwords. Such conclusory assertions, devoid of factual support, were not competent [to stand as] substantial evidence—let alone clear and convincing evidence—of anything.”¹¹⁸

A second case dealing with TPR based upon an assertion that the parent failed to substantially comply with the case plan is *E.R.-J. v. Department of Children & Family Services (In re Interest of N.R.-G.)*.¹¹⁹ In that case, the Second District Court of Appeal also reversed.¹²⁰ The sole ground for termination was that “the [f]ather . . . [failed] to substantially comply with [the] case plan.”¹²¹ The appellate court noted that “failure to comply with [the]

111. *Id.* at 983–86 (citing Fla. Dep’t of Children & Families v. F.L., 880 So. 2d 602, 608, 611 (Fla. 2004) (per curiam); R.F. v. Fla. Dep’t of Children & Families (*In re Interest of M.F. & M.F.*), 770 So. 2d 1189, 1194 & n.13 (Fla. 2000) (per curiam); T.L. v. Dep’t of Children & Family Servs. (*In re Interest of D.L.H.*), 990 So. 2d 1267, 1272–73 (Fla. 2d Dist. Ct. App. 2008); K.A. v. Dept. of Children & Family Servs. (*In re Interest of K.A. & K.A.*), 880 So. 2d 705, 709–10 (Fla. 2d Dist. Ct. App. 2004); A.D. v. Dep’t of Children & Family Servs. (*In re Interest of G.D. & C.D.*), 870 So. 2d 235, 238 (Fla. 2d Dist. Ct. App. 2004); C.M. v. Dep’t of Children & Family Servs. (*In re Interest of C.M., C.M., & Z.M.*), 844 So. 2d 765, 766 (Fla. 2d Dist. Ct. App. 2003)); *see also Padgett*, 577 So. 2d at 571.

112. *In re Interest of Z.C.(1) & Z.C.(2)*, 88 So. 3d at 986.

113. FLA. STAT. § 39.806(1)(e) (2012).

114. *Id.* § 39.806(1)(e)1.

115. *Id.*

116. 82 So. 3d 1188, 1192 (Fla. 2d Dist. Ct. App. 2012).

117. *See id.*

118. *Id.* at 1195–96 (citing C.D. v. Dep’t of Children & Families, 974 So. 2d 495, 502 (Fla. 1st Dist. Ct. App. 2008); Norris v. Norris, 926 So. 2d 485, 488 (Fla. 2d Dist. Ct. App. 2006)).

119. 86 So. 3d 574, 575 (Fla. 2d Dist. Ct. App. 2012).

120. *Id.* at 582.

121. *Id.* at 579; *see also* FLA. STAT. § 39.806(1)(e) (2012).

case plan is not sufficient, in and of itself, to support [TPR].”¹²² The appellate court held that there was no evidence that the child’s welfare and safety was in danger by any of the father’s alleged abuses of the case plan such as lack of financial resources, completing the parenting plan, or moving to Oklahoma.¹²³ Finally, the court noted that the failure to comply with the case plan was “attribut[ed] to the [f]ather’s lack of financial resources” as well as DCF’s “failure to provide services.”¹²⁴ Thus the appellate court reversed.¹²⁵

Just because the parent fails to complete a case plan does not mean that his or her parental rights should be terminated.¹²⁶ In *A.H. v. Florida Department of Children & Family Services*,¹²⁷ the First District Court of Appeal agreed with the DCF’s concession that the evidence did not establish that the parent’s continuing involvement in his children’s lives threatened their safety or well-being because the DCF did not prove that the appellant failed to substantially comply with the case plan within the meaning of the *Florida Statutes*.¹²⁸ The *Florida Statutes* also require evidence that “the well-being and safety of the children would in any way be endangered if they were [with the] appellant.”¹²⁹

The parents appealed from an order terminating their parental rights based upon their failure to comply with the case plan in *D.M. v. Department of Children & Families*.¹³⁰ The Third District Court of Appeal affirmed as to the father but reversed as to the mother, finding that there was no “clear and convincing proof that [the mother’s] parental rights should be terminated.”¹³¹ Specifically, the evidence showed that the mother made consistent efforts to improve and was on track for additional progress.¹³² The first therapist’s testimony applied favorably to the mother, as did the testimony of the GAL.¹³³ In fact, the undisputed testimony was that the mother would not

122. *In re Interest of N.R.-G.*, 86 So. 3d at 580 (citing *In re Interest of N.F.*, 82 So. 3d at 1192; *I.Z. v. B.H.*, 53 So. 3d 406, 410 (Fla. 4th Dist. Ct. App. 2011); *R.F. v. Dep’t of Children & Family Servs. (In re Interest of S.F., P.F., & C.F.)*, 22 So. 3d 650, 654 (Fla. 2d Dist. Ct. App. 2009)).

123. *Id.*

124. *Id.*

125. *Id.* at 582.

126. *A.H. v. Fla. Dep’t of Children & Family Servs.*, 85 So. 3d 1213, 1217 (Fla. 1st Dist. Ct. App. 2012); *see also* FLA. STAT. § 39.806(1)(e)2.

127. 85 So. 3d 1213 (Fla. 1st Dist. Ct. App. 2012).

128. *Id.* at 1218–19; *see also* FLA. STAT. § 39.806(1)(c).

129. *A.H.*, 85 So. 3d at 1218; *see also* FLA. STAT. § 39.806(1)(c).

130. 79 So. 3d 136, 137 (Fla. 3d Dist. Ct. App. 2012).

131. *Id.* at 137, 139.

132. *Id.* at 139.

133. *Id.*

usually decline therapy.¹³⁴ In an interesting piece of dictum, the court rejected a challenge by one of the lawyers to the participation of the GAL.¹³⁵ That the GAL's recommendation regarding termination was contrary to the child's express wishes was not reversible error because, while a party, the child's wishes are not the sole governing factor in a TPR proceeding.¹³⁶

Thirty-three years ago, the Supreme Court of Florida held that parents were entitled to counsel in a TPR proceeding.¹³⁷ In *T.M.W. v. T.A.C.*,¹³⁸ the trial court failed to provide counsel to a father in a TPR proceeding.¹³⁹ In this case, the mother, rather than the DCF, filed a petition to terminate the father's parental rights.¹⁴⁰ The petition alleged that, *inter alia*, the father's rights should be terminated because he had been sentenced to life in prison for attempted first degree murder.¹⁴¹ "The trial court heard both [the father's *pro se*] motion to dismiss and the petition to terminate parental rights at a single telephonic hearing" as the father was in prison.¹⁴² Although there was no transcript of the hearing provided to the appellate court, the father, *pro se* before the appellate court, argued that "the trial court did not advise him that he had a right to counsel, and denied [him counsel] when he asked for representation even though he [told] the trial court that he was indigent."¹⁴³ The appellate court held that there was no evidence that the court appointed counsel for the father, nor was there evidence that the judge made "written findings indicating that [the father] waived that right."¹⁴⁴ The appellate court noted that, even in the context of a private TPR proceeding, under the state statute there is the right to counsel as the law makes no distinction in the type of proceeding.¹⁴⁵ Incredibly, "the trial court [also] held that [the father] did not have standing to contest the TPR because he was not listed on the putative father registry, was not on the child's birth certificate, [and] had never been named as the father by any court," nor had he ever paid child support.¹⁴⁶

134. *Id.* at 139–40.

135. *D.M.*, 79 So. 3d at 140.

136. *Id.* (citing FLA. STAT. § 39.810 (2012)); *see also* FLA. STAT. § 39.807(2)(b). It appears that one of the children was not represented by counsel. *See D.M.*, 79 So. 3d at 137.

137. *In re Interest of D.B. & D.S.*, 385 So. 2d 83, 91 (Fla. 1980).

138. 80 So. 3d 1103 (Fla. 5th Dist. Ct. App. 2012).

139. *Id.* at 1105.

140. *Id.* at 1104.

141. *Id.*

142. *Id.* at 1104–05.

143. *T.M.W.*, 80 So. 3d at 1105.

144. *Id.* at 1106.

145. *Id.* at 1105–06; *see also* FLA. STAT. § 39.807(1)(a) (2012).

146. *T.M.W.*, 80 So. 3d at 1105.

The appellate court found that there was “a final judgment of paternity in the record . . . establish[ing] that [the individual was] the father of the child.”¹⁴⁷

IV. JUVENILE DELINQUENCY

A juvenile appealed from a conviction of trespass on school grounds.¹⁴⁸ In *B.C. v. State*,¹⁴⁹ the issue on appeal was whether there was any evidence that the school principal or his designee ordered the respondent to leave the school grounds.¹⁵⁰ That requirement is part of the statute, and thus, the First District Court of Appeal reversed.¹⁵¹ The person who ordered the individual to leave was a deputy police officer who described himself as a “‘school board police officer’ assigned to [the] school.”¹⁵² The evidence demonstrated that the police officer “was not under the ‘command’ of the . . . principal and had no ‘connection’ with the principal’s office.”¹⁵³ In reversing the decision, the court recognized conflict with the Third District Court of Appeal’s decision in *D.J. v. State*.¹⁵⁴ To the extent that the opinion did not comport with the Third District opinion, the First District certified conflict.¹⁵⁵

As previous surveys have indicated, among the various dispositional alternatives available in Florida is an order of restitution.¹⁵⁶ In *D.W. v. State*,¹⁵⁷ the juvenile appealed the restitution order requiring her to pay \$400 to her grandmother.¹⁵⁸ The Second District Court of Appeal reversed based upon procedural irregularities.¹⁵⁹ The juvenile court ordered the restitution matter to be heard by a magistrate.¹⁶⁰ The appellate court reversed because first, it could “[find] no . . . authority that allowed the juvenile court to delegate its judicial determination of the amount of restitution to a magistrate,” and second, the magistrate relied upon a rule of juvenile procedure related to de-

147. *Id.*

148. *B.C. v. State*, 70 So. 3d 666, 668 (Fla. 1st Dist. Ct. App. 2011); *see also* FLA. STAT. § 810.097(2).

149. 70 So. 3d 666 (Fla. 1st Dist. Ct. App. 2011).

150. *Id.* at 669.

151. *Id.* at 671.

152. *Id.* at 668.

153. *Id.*

154. *B.C.*, 70 So. 3d at 669; *see also* *D.J. v. State*, 43 So. 3d 176, 177 (Fla. 3d Dist. Ct. App.), *review granted*, 47 So. 3d 1287 (Fla. 2010), *and rev’d*, 67 So. 3d 1029 (Fla. 2011).

155. *B.C.*, 70 So. 3d at 669, 671.

156. *See* Dale, *2010 Survey of Juvenile Law*, *supra* note 1, at 150; Michael J. Dale, *2009 Survey of Juvenile Law*, 34 NOVA L. REV. 199, 216 (2009).

157. 77 So. 3d 804 (Fla. 2d Dist. Ct. App. 2011).

158. *Id.* at 804.

159. *Id.*

160. *Id.*

pendency cases which would allow the child to file exception for the magistrate's ruling.¹⁶¹ Based upon this strange behavior—the appellate court also noted “that the magistrate usually [handles] dependency hearings and has little experience with . . . restitution,”—the appellate court reversed.¹⁶²

In a case involving a rather minor contretemps between a police officer and a juvenile, the juvenile appealed from adjudication on two grounds—providing a false name and resisting an officer without violence.¹⁶³ Under the facts of the case, the police officer saw a group of individuals standing near a “no loitering or soliciting” sign.¹⁶⁴ “There [is] no evidence that the officer in any way restrained [the] appellant's . . . movement . . . or in any way indicated to [the] appellant and his friends that they were not free to leave.”¹⁶⁵ Thus, when the appellant provided a false name to the officer, the two “were engaged in a consensual encounter.”¹⁶⁶ If there was no lawful detention or arrest, the juvenile could not be guilty of the crime of providing a false name.¹⁶⁷ Furthermore, evidence of the existence of the no trespassing sign was insufficient to establish that the property was posted in a way within the meaning of Florida law so that the officer would have probable cause to arrest the appellant for trespassing.¹⁶⁸

At the dispositional stage of a delinquency case, the court is given the authority to deviate from the recommendations of the Department of Juvenile Justice (DJJ) when the DJJ issues a predisposition report (PDR).¹⁶⁹ In *M.H. v. State*,¹⁷⁰ the juvenile “pled guilty to possession with intent to sell, manufacture, or deliver a controlled substance.”¹⁷¹ The trial court deviated from the recommendations of probation and placed the juvenile in a moderate-risk facility.¹⁷² The test for deviation is contained in *E.A.R. v. State*.¹⁷³ There, the Supreme Court of Florida set out a two-part test which makes deviation a

161. *Id.* at 805 (citing *Mansell v. State*, 498 So. 2d 604, 604 (Fla. 2d Dist. Ct. App. 1986)).

162. *D.W.*, 77 So. 3d at 805.

163. *D.T. v. State*, 87 So. 3d 1235, 1237–38 (Fla. 4th Dist. Ct. App. 2012).

164. *Id.* at 1237.

165. *Id.* at 1238.

166. *Id.* (citing *State v. Page*, 73 So. 3d 351, 353 (Fla. 4th Dist. Ct. App. 2011); *O.A. v. State*, 754 So. 2d 717, 718 (Fla. 4th Dist. Ct. App. 1998)).

167. *Id.* (citing *K.D. v. State*, 43 So. 3d 829, 829 (Fla. 1st Dist. Ct. App. 2010) (per curiam)).

168. *D.T.*, 87 So. 3d at 1240 (citing *Baker v. State*, 813 So. 2d 1044, 1045 (Fla. 4th Dist. Ct. App. 2002)).

169. *See* FLA. STAT. § 985.433(7)(b) (2012); *see also* *M.H. v. State*, 69 So. 3d 325, 326 (Fla. 1st Dist. Ct. App. 2011).

170. 69 So. 3d 325 (Fla. 1st Dist. Ct. App. 2011).

171. *Id.* at 326.

172. *Id.*

173. 4 So. 3d 614, 638 (Fla. 2009).

difficult matter.¹⁷⁴ The trial court must do more than place generalized reasons on the record.¹⁷⁵ Rather, it must engage in a well-reasoned and complete analysis of the PDR of the court and the type of facility to which the court intends to send the child.¹⁷⁶

A second case involving a deviation from a recommendation of the DJJ in a delinquency case is *B.L.R. v. State*.¹⁷⁷ There the First District Court of Appeal reversed a court order committing a child to a maximum-risk facility rather than a high-risk facility as suggested by the DJJ.¹⁷⁸ Applying *E.A.R.*, the appellate court held that the trial court may not deviate just because it disagrees with the disposition recommended by the DJJ, and it may neither “‘parrot’ [n]or ‘regurgitate’ the information in the PDR to support [the] departure” decision.¹⁷⁹

V. CONCLUSION

In the survey year, the Florida appellate courts focused heavily on dependency and TPR cases.¹⁸⁰ The Supreme Court of Florida was inactive regarding these issues.¹⁸¹ And finally, in February of 2012, the *Nova Law Review* sponsored a symposium on the implementation of the American Bar Association Model Act governing representation of children in abuse, neglect, and dependency proceedings, co-sponsored by the American Bar Association.¹⁸² *Nova Law Review* published eight articles from authors around the country.¹⁸³ Included are articles directed to the ABA Model Act¹⁸⁴ and

174. *See id.*

175. *See id.*

176. *See id.*; *see also* C.M.H. v. State, 25 So. 3d 678, 679 (Fla. 1st Dist. Ct. App. 2010) (per curiam) (quoting *E.A.R.*, 4 So. 3d at 638).

177. 74 So. 3d 173, 174 (Fla. 1st Dist. Ct. App. 2011) (per curiam).

178. *Id.*

179. *Id.* at 176 (quoting *E.A.R.*, 4 So. 3d at 633, 638); *see also* M.J.S. v. State, 6 So. 3d 1268, 1270 (Fla. 1st Dist. Ct. App. 2009) (per curiam) (quoting *E.A.R.*, 4 So. 3d at 638); N.B. v. State, 911 So. 2d 833, 835 (Fla. 1st Dist. Ct. App. 2005) (citing *K.M. v. State*, 891 So. 2d 619, 620 (Fla. 3d Dist. Ct. App. 2005)).

180. *See* S.T. v. Dep’t of Children & Family Servs. (*In re* Interest of K.C. & D.C.), 87 So. 3d 827, 828 (Fla. 2d Dist. Ct. App. 2012); D.A. v. Dep’t of Children & Family Servs., 84 So. 3d 1136, 1137 (Fla. 3d Dist. Ct. App. 2012); S.S. v. Dep’t of Children & Families, 81 So. 3d 618, 620 (Fla. 1st Dist. Ct. App. 2012); T.M.W. v. T.A.C., 80 So. 3d 1103, 1104 (Fla. 5th Dist. Ct. App. 2012); D.M. v. Dep’t of Children & Families, 79 So. 3d 136, 137 (Fla. 3d Dist. Ct. App. 2012).

181. *See Florida Supreme Court 2012 Opinions*, FLA. SUPREME CT., <http://www.floridasupremecourt.org/decisions/2012/index.shtml> (last visited Feb. 24, 2013).

182. Athornia Steele, *Introduction to the Symposium*, 36 NOVA L. REV. 309, 309 n.* (2012).

183. *See generally* Symposium, *supra* note 2.

the role of counsel or lack of counsel for children in Connecticut,¹⁸⁵ Florida,¹⁸⁶ Georgia,¹⁸⁷ New York,¹⁸⁸ and Washington.¹⁸⁹

184. Steele, *supra* note 182, at 309–11; *see generally* Amy Harfeld, *The Right to Counsel Landscape After Passage of The ABA Model Act—Implications for Reform*, 36 NOVA L. REV. 325 (2012); Andrea Khoury, *The True Voice of the Child: The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 36 NOVA L. REV. 313 (2012).

185. Steele, *supra* note 182, at 310; *see generally* Carolyn Signorelli, *Connecticut’s Road to “Real” Attorneys for Kids*, 36 NOVA L. REV. 391 (2012).

186. Steele, *supra* note 182, at 310–11; *see generally* Clark Peters & John Walsh, *Fiscal Returns on Improved Representation of Children in Dependency Court: The State of the Evidence*, 36 NOVA L. REV. 435 (2012); Michael J. Dale & Louis M. Reidenberg, *The Kids Aren’t Alright: Every Child Should Have an Attorney in Child Welfare Proceedings in Florida*, 36 NOVA L. REV. 345 (2012).

187. Steele, *supra* note 182, at 310; *see generally* Ira Lustbader & Erik Pitchal, *Implementation of the Right to Counsel for Children in Juvenile Court Dependency Proceedings: Lessons from Kenny A.*, 36 NOVA L. REV. 407 (2012).

188. Steele, *supra* note 182, at 310; *see generally* Gary Solomon & Tamara Steckler, *Perspective: New Era in Representing Children*, 36 NOVA L. REV. 387 (2012).

189. Steele, *supra* note 182, at 310; *see generally* Erin Shea McCann & Casey Trupin, *Kenny A. Does Not Live Here: Efforts in Washington State to Improve Legal Representation for Children in Foster Care*, 36 NOVA L. REV. 363 (2012).