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2009 Survey of Juvenile Law

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2009 SURVEY OF JUVENILE LAW

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I. INTRODUCTION

For the past two years the Supreme Court of Florida has not been active in the juvenile law area. During the past survey year, it has only decided one case directly related to juvenile law.¹ On the other hand, the intermediate appellate courts remained active as they have for the past decade. As they usually do, the courts of appeal provide statutory interpretation of chapters 39 and 985 as well as oversee trial court evidentiary rulings in dependency, termination of parental rights, and delinquency cases.

II. DEPENDENCY

Under Florida law in a dependency proceeding, a party is defined as “the parent or parents of the child, the petitioner, the [Department of Children and Families], the guardian ad litem or the representative of the guardian ad litem program when the program has been appointed, and the child.”² Grandparents are not included in the statutory definition.³ Thus, where a father petitioned the appellate court for writ of certiorari to review a trial court order granting a motion to intervene by a grandparent, the appellate court held, in *J.P. v. Department of Children & Family Services*,⁴ that the grandmother was not included within the statutory definition of a party.⁵

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1. See generally *E.A.R. v. State*, 4 So. 3d 614 (Fla. 2009).
2. FLA. STAT. § 39.01(51) (2009); FLA. R. JUV. P. 8.210(a).
3. See FLA. STAT. § 39.01(51).
4. 12 So. 3d 253 (Fla. 2d Dist. Ct. App. 2009).
5. *Id.* at 254–55.

Therefore, she could not intervene.⁶ However, Florida law does allow a grandparent to intervene as a “participant.”⁷

There are often situations where one parent is charged with dependency and the other parent is viewed as non-offending. The issue of how the trial court goes about evaluating the transfer of custody to the non-offending parent was before the court in *T.S. v. Department of Children & Families*.⁸ The non-offending parent challenged the court order denying the Department of Children and Families’ motion to grant temporary custody to that parent.⁹ The court did so on the basis of the best interests of the child standard.¹⁰ The appellate court reversed, finding that under the *Florida Statutes*, the court is required “to place a child who is adjudicated to be dependent, as to one parent, with the non-residential parent upon request unless the court ‘finds that such placement would endanger the safety, well-being, or physical, mental, or emotional health of the child.’”¹¹ There having been no such showing, the parent’s appeal, viewed as a writ by the appellate court, was granted.¹²

Once children have been adjudicated dependent, and the parent is provided with a case plan and has substantially complied with it, “there is a presumption that the children should be returned unless it is [determined] that returning the children would endanger them.”¹³ The trial court’s obligation to make detailed findings regarding the relevant statutory standard for reunification was before the appellate court in *L.J.S. v. Department of Children & Families*.¹⁴ Florida law provides that in order to deny the motion for reunification, the court must find that if there was compliance with the case plan, reunification would be detrimental to the children, by addressing six subfactors found in the law.¹⁵ The statute is mandatory in that the court cannot deviate from the statutory requirement and must make detailed factual findings regarding the factors.¹⁶ In *L.J.S.*, the court had failed to make detailed factual

6. *Id.* at 255.

7. *See* FLA. STAT. § 39.01(50) (2009); FLA. R. JUV. P. 8.210(b).

8. 992 So. 2d 299, 299 (Fla. 5th Dist. Ct. App. 2008).

9. *Id.*

10. *Id.*

11. *Id.* at 300 (citing *M.M. v. Dep’t of Children & Families*, 777 So. 2d 1209, 1212 (Fla. 5th Dist. Ct. App. 2001); FLA. STAT. § 39.521(3)(b) (2009)).

12. *T.S.*, 992 So. 2d at 300. As the court in *T.S.* noted, appellate challenges to non-final trial court orders in Florida are often taken by writ of certiorari. *See id.*

13. *L.J.S. v. Dep’t of Children & Families*, 995 So. 2d 1151, 1153 (Fla. 1st Dist. Ct. App. 2008) (*per curiam*); *see* FLA. STAT. § 39.806(1)(e)(1).

14. *L.J.S.*, 995 So. 2d at 1152–53.

15. *See* FLA. STAT. §§ 39.522(2), .621(10)(a)–(f).

16. FLA. STAT. § 39.522(2); *L.J.S.*, 995 So. 2d at 1153.

finding regarding five of the six factors.¹⁷ The appellate court thus reversed.¹⁸

Under Florida law, a court need only make one order of dependency to maintain jurisdiction over a dependency case as the order establishes a legal status of the child for proceedings under the chapter.¹⁹ However, the court shall order evidentiary hearings to determine whether there is a separate state of events which also constitutes neglect.²⁰ In *P.S. v. Department of Children & Families*,²¹ the appellate court held that it was improper for the trial court to enter a second order of adjudication of dependency as it maintained jurisdiction over the dependency case once the initial order adjudicating the child was entered.²² Thus, it remanded for entry of a supplemental adjudicatory hearing finding and reversed the second order of dependency.²³

As an evidentiary matter in dependency proceedings, the Department of Children and Families (DCF), as the usual petitioner, is obligated to prove one of the statutory grounds for dependency by a preponderance of the evidence.²⁴ In two recent cases, the appellate courts reversed on grounds that there was not competent evidence for a finding of dependency.²⁵ In the first opinion, *M.C. v. Department of Children & Families*,²⁶ a mother appealed from a finding of dependency arguing DCF “failed to present competent, substantial evidence [to establish] prospective neglect or abuse.”²⁷ At the heart of the Department’s case was the allegation that the parent suffered from mental illness and that there was a nexus between her psychiatric disorder and potential harm to the children.²⁸ The appellate court held that there was no evidence, including expert testimony, as to “the existence, extent, or nature of [the mother’s] mental health problem,” nor whether there were any

17. *L.J.S.*, 995 So. 2d at 1153.

18. *Id.*; see also *C.S. v. Dep’t of Children & Families*, 12 So. 3d 309, 310–11 (Fla. 4th Dist. Ct. App. 2009).

19. FLA. STAT. § 39.507(7)(a).

20. See FLA. STAT. § 39.507(7)(b).

21. 4 So. 3d 719 (Fla. 5th Dist. Ct. App. 2009).

22. *Id.* at 720.

23. *Id.* at 721.

24. See FLA. STAT. § 39.507(1)(b).

25. *M.C. v. Dep’t of Children & Families*, 993 So. 2d 1123, 1124 (Fla. 5th Dist. Ct. App. 2008); *J.R. v. Dep’t of Children & Families*, 995 So. 2d 611, 612 (Fla. 4th Dist. Ct. App. 2008).

26. 993 So. 2d at 1123.

27. *Id.* at 1124.

28. *Id.* at 1124–25.

negative effects caused by her illness upon the children's well-being.²⁹ There was simply speculation.³⁰ The court thus reversed.³¹

In the second case, *J.R. v. Department of Children & Families*,³² a mother appealed from an order adjudicating her children dependent alleging insufficiency of the evidence.³³ Specifically, the mother argued that "DCF failed to present witnesses with firsthand knowledge of the allegations to support a finding of dependency based upon abandonment."³⁴ The only direct evidence was from the mother and the only substantive evidence from "DCF was uncorroborated hearsay evidence of an anonymous abuse report stating that the children had been abandoned at the great-grandmother's home."³⁵ The appellate court reversed finding that "an uncorroborated report and hearsay evidence is insufficient to support an adjudication of dependency."³⁶

Domestic violence is not only an important societal issue but it can be grounds for a finding of dependency.³⁷ In *C.W. v. Department of Children & Families*,³⁸ a mother appealed from a trial court order adjudicating a child dependent as well as a dispositional order withholding adjudication of dependency.³⁹ The basis for the proceeding was an allegation of an incident of domestic violence in "which the mother allegedly choked the father while he was holding the three-month-old child."⁴⁰ The father was also alleged to have "slapped the mother during the incident."⁴¹ The Department alleged that the "behavior demonstrated a wanton disregard for the presence of the child and could reasonably result in serious injury."⁴² The father consented to the finding but the mother did not.⁴³ Florida courts have repeatedly held that domestic violence can constitute harm when "it occurs in the presence of

29. *Id.* at 1125–26.

30. *See id.* at 1126.

31. *M.C.*, 993 So. 3d at 1126.

32. 995 So. 2d 611 (Fla. 4th Dist. Ct. App. 2008).

33. *Id.* at 611.

34. *Id.* at 612; *see also* FLA. STAT. § 90.604 (2009) (requiring personal knowledge for a witness to testify).

35. *J.R.*, 995 So. 2d at 612.

36. *Id.*

37. *See generally* Michael J. Dale, 2007–2008 *Survey of Juvenile Law*, 33 NOVA L. REV. 357, 357–63 (2009) [hereinafter Dale, 2007–2008 *Survey*].

38. 10 So. 3d 136 (Fla. 1st Dist. Ct. App. 2009).

39. *Id.* at 137.

40. *Id.*

41. *Id.*

42. *Id.*

43. *C.W.*, 10 So. 3d at 137.

a child.”⁴⁴ However, the courts have also held that there must be more than the child’s physical proximity to the events in order to make a finding of dependency.⁴⁵ There must be an evidentiary showing “that the child saw or was aware of the violence” that occurred and that the violence resulted “in some physical or mental injury to the child.”⁴⁶ In the *C.W.* case, “the trial court made no findings that the three-month-old child was aware of the incident or was physically or mentally harmed.”⁴⁷ Nor was there any evidence that the infant comprehended the incident.⁴⁸ The appellate court thus ruled that absent “any evidentiary finding that the child appreciated or suffered any physical or mental injury” or an evidentiary finding that the parent “posed a current threat of harm to the child, the . . . court’s finding of dependency [could not] stand.”⁴⁹ The court thus reversed.⁵⁰

The failure of the Department of Children and Family Services to comply with Florida’s dependency statutes when interacting with parents is reported regularly in the appellate case law. In *C.J. v. Department of Children & Family Services*,⁵¹ a parent appealed from an order adjudicating the child dependent.⁵² The district court of appeal affirmed.⁵³ However, it spoke at length about the actions of the Department in the case.⁵⁴ The appellate court found that the Department violated the spirit as well as the letter of the statute, worked at cross purposes with the mother, was in an adversarial relationship with the mother, and distorted the matter in which the goals of chapter 39 ought to be pursued.⁵⁵ In sum, the court said “[t]he actions and attitudes displayed by the Department in this case are ones we cannot and do not condone.”⁵⁶ Nonetheless, on the facts of the case, the court affirmed.⁵⁷

44. *Id.* at 138 (citing *R.V. v. Dep’t of Children & Family Servs.*, 939 So. 2d 200, 202 (Fla. 2d Dist. Ct. App. 2006); *M.B. v. Dep’t of Children & Family Servs.*, 937 So. 2d 709, 710–11 (Fla. 2d Dist. Ct. App. 2006); *D.D. v. Dep’t of Children & Families*, 773 So. 2d 615, 617 (Fla. 5th Dist. Ct. App. 2000)); see also Dale, *2007–2008 Survey*, *supra* note 37, at 357.

45. *C.W.*, 10 So. 3d at 138; *R.V.*, 939 So. 2d at 202; *M.B.*, 937 So. 2d at 711; *D.D.*, 773 So. 2d at 617–18; Dale, *2007–2008 Survey*, *supra* note 37, at 357–58.

46. *C.W.*, 10 So. 3d at 138.

47. *Id.*

48. *See id.*

49. *Id.* at 139.

50. *Id.*

51. 9 So. 3d 750 (Fla. 2d Dist. Ct. App. 2009).

52. *Id.* at 751.

53. *Id.* at 756.

54. *See id.* at 750–56 (describing the actions of the Department).

55. *Id.* at 756.

56. *C.J.*, 9 So. 3d at 756.

57. *Id.*

III. TERMINATION OF PARENTAL RIGHTS

Among the grounds for termination of parental rights (TPR) in Florida is incarceration of the parent.⁵⁸ The relevant statute provides that the termination is authorized when “the period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years.”⁵⁹ The appellate courts have dealt on a number of occasions with questions of just what the term “substantial portion” means. In *J.W.B. v. Department of Children & Families*,⁶⁰ a father who was incarcerated appealed from an order terminating his parental rights.⁶¹ The appellate court found that the father had been incarcerated since the child’s birth, had never seen the child or provided financial support, and was scheduled to be released from prison when the child was approximately twelve years of age.⁶² The court relied on a Supreme Court of Florida ruling in which the court applied a percentage to determine a substantial portion of time.⁶³ Applying that test, the court in *J.W.B.* found that the percentage was sixty percent of the time before the child turned eighteen and thus, together with other factors of noninvolvement by the parent, affirmed.⁶⁴

In *S.H. v. Department of Children & Family Services*,⁶⁵ DCF filed an amended petition to terminate parental rights “when the children, who included twins, were two, three, and four years old.”⁶⁶ When the parent was to be released from prison, the children would be eight, nine, and ten.⁶⁷ Recognizing that the time factor was incarceration in the future and not the time the parent had been incarcerated in the past, and finding further that precedent suggested that an eight year incarceration did not constitute clear and convincing evidence of incarceration for a substantial period of time, the court reversed.⁶⁸

58. FLA. STAT. § 39.806(1)(d) (2009).

59. *Id.*

60. 8 So. 3d 1191 (Fla. 5th Dist. Ct. App. 2009).

61. *Id.* at 1192.

62. *Id.* at 1193.

63. *Id.* at 1192 (citing *B.C. v. Dep’t of Children & Families*, 887 So. 2d 1046, 1052 (Fla. 2004)).

64. *Id.* at 1193.

65. 992 So. 2d 316 (Fla. 2d Dist. Ct. App. 2008).

66. *Id.* at 317.

67. *Id.*

68. *Id.* at 317–18 (citing *B.C. v. Dep’t of Children & Families*, 887 So. 2d 1046, 1055 (Fla. 2004) (per curiam); *J.P.C. v. Dep’t of Children & Family Servs.*, 819 So. 2d 264, 266 (Fla. 2d Dist. Ct. App. 2002)).

A second ground for termination of parental rights in Florida, as is the case in other jurisdictions, is abandonment.⁶⁹ Abandonment is defined in chapter 39 and, as most recently amended, provides that the parent “makes no provision for the child’s support and has failed to establish or maintain a substantial and positive relationship with the child.”⁷⁰ This includes frequent regular contact with the child and exercising parental responsibility.⁷¹ Marginal efforts are not enough.⁷² The issue before the appellate court in *T.G. v. Department of Children & Families*,⁷³ was whether termination was appropriate on abandonment grounds, where included among the factual information was the fact that the mother “failed to visit [the children] for over a year prior to the final hearing.”⁷⁴ Mississippi’s law includes a one year time frame and Missouri’s a six month time frame.⁷⁵ The court applied the one year time period as well as other facts presented to the trial court and affirmed the termination.⁷⁶

Another ground for termination of parental rights in Florida is when there is abuse of a sibling and a nexus is found between abuse of the sibling and the prospective abuse of the child who is the subject of the proceeding.⁷⁷ In addition, in any termination of parental rights case, the court must also find that the manifest best interests of the child requires termination and that termination is in the child’s best interests.⁷⁸ In *T.L. v. Department of Children & Family Services*,⁷⁹ a father appealed from termination of parental rights because the trial court failed to base its decision “on evidence demonstrating that the [f]ather posed a threat of prospective harm to” the child, but instead terminated parental rights because it thought that “offering services to the [f]ather would result in an unwarranted delay in achieving permanency

69. FLA. STAT. § 39.806(1)(b) (2009).

70. FLA. STAT. § 39.01(1).

71. *Id.*

72. *Id.*

73. 8 So. 3d 1198 (Fla. 4th Dist. Ct. App. 2009).

74. *Id.* at 1199.

75. *Id.* at 1199–1200 (citing *In re A.M.A.*, 986 So. 2d 999, 1010 (Miss. Ct. App. 2007), *cert. denied*, 987 So. 2d 451 (Miss. 2008); *In re J.W.*, 11 S.W.3d 699, 703 (Mo. Ct. App. 1999)).

76. *Id.* at 1200.

77. See *A.D. v. Dep’t of Children & Family Servs.*, 870 So. 2d 235, 238 (Fla. 2d Dist. Ct. App. 2004). The nexus issue also comes up in dependency cases. See Dale, 2007–2008 *Survey*, *supra* note 37, at 363–64. As to the nexus test in TPR cases, see Michael J. Dale, 2005–2006 *Survey of Juvenile Law*, 31 NOVA L. REV. 577, 594–95 (2007) [hereinafter Dale, 2005–2006 *Survey*].

78. FLA. STAT. § 39.810 (2009); *G.W.B. v. J.S.W.*, 658 So. 2d 961, 973 (Fla. 1995).

79. 990 So. 2d 1267 (Fla. 2d Dist. Ct. App. 2008).

for the child.”⁸⁰ The appellate court held that the trial court was correct in finding that there had been egregious abuse by the father of the sibling of the child who was before the court for failing to take appropriate steps to obtain necessary care for the other child.⁸¹ However, there was no competent evidence of the nexus requirement in the sense of a “predictive relationship between the past abuse of the injured child” and prospective abuse of the sibling before the court as required under Florida law.⁸² Specifically, the trial court had before it no psychological assessment that would show “that the [f]ather lacked self-control,” had a drug addiction problem, or suffered from “a mental or emotional condition” that would produce the nexus between the injury to the sibling and the threat of prospective harm to the child.⁸³ Finally, the appellate court found that “there was no evidence that the [f]ather would not benefit from court-ordered services,” and thus the trial court failed to show that termination was the least restrictive means to protect the child.⁸⁴ The appellate court thus reversed.⁸⁵

Evidentiary issues arise in TPR proceedings just as they do in dependency matters. In *F.B. v. Department of Children & Family Services*,⁸⁶ both the Department of Children and Family Services and the Guardian ad Litem Program, as parties to the proceedings, conceded “the court’s termination order [was] legally insufficient because it contain[ed] only a conclusory statement that termination of . . . parental rights would be in the manifest best interests of the child.”⁸⁷ However, the appellate court also reversed based on insufficient evidence.⁸⁸ The issue which the court discussed was hearsay.⁸⁹ At the termination hearing, the trial court took judicial notice⁹⁰ of a file which contained shelter documents, orders of the court including the dependency judgment and the case plan.⁹¹ It also “contained an assessment of the child” which the mother had “reported to have said that [the father] refused to acknowledge paternity.”⁹² Inexplicably, the father’s lawyer “did not make

80. *Id.* at 1270.

81. *Id.* at 1272.

82. *Id.* (citing *K.A. v. Dep’t of Children & Family Services*, 880 So. 2d 705, 709 (Fla. 2d Dist. Ct. App. 2004)).

83. *Id.* at 1273.

84. *T.L.*, 990 So. 2d at 1273.

85. *Id.*

86. 4 So. 3d 684 (Fla. 2d Dist. Ct. App. 2009).

87. *Id.* at 685.

88. *Id.*

89. *Id.* at 686.

90. See FLA. STAT. §§ 90.202, .203 (2009).

91. *F.B.*, 4 So. 3d at 686.

92. *Id.*

any hearsay objections to the documents encompassed within the request for judicial notice,” according to the appellate court.⁹³ More apparent was the objection to an improper request for judicial notice under the *Florida Rules of Evidence* although there is no reference to that in the opinion.⁹⁴ Despite these failures to object, the appellate court held that “the Department failed to show by clear and convincing evidence that [the father] was able [to] but failed to provide for the child” under the abandonment provision of chapter 39 of the *Florida Statutes*.⁹⁵ The court found that the only evidence presented by the Department was hearsay and thus inadmissible, and the only competent evidence was that of the father who claimed “he had never denied paternity and that he had tried without success to locate the mother.”⁹⁶ The appellate court therefore reversed.⁹⁷

The second evidentiary opinion at the TPR stage is *M.E. v. Department of Children & Families*.⁹⁸ In *M.E.*, the appellate court applied the clear and convincing evidence standard in reversing the finding of termination of parental rights.⁹⁹ It did so because the trial court had “found the evidence troubling” because of gaps of proof including a lack of any evidence or records of “any mental health professional treating [the] appellant” parent.¹⁰⁰ It also found “‘obvious’ errors in the testimony of the ‘only professional’ who testified and a ‘certain vagueness even on subjects where the [professional] appeared to be reasonably accurate.’”¹⁰¹ The appellate court reversed because it found that the trial court “was not convinced without hesitancy that the evidence warranted the termination of appellant’s parental rights,” and thus the appellate court could not “say that competent, substantial evidence support[ed] the court’s finding that the evidence was clear and convincing.”¹⁰²

During the course of child welfare proceedings, including dependency matters and TPR cases, a child’s placement may be changed under Florida law.¹⁰³ However, the test for that change is one of the child’s best interests.¹⁰⁴ Florida law further states that when the child is first placed with the

93. *Id.*

94. *See* FLA. STAT. §§ 90.201–204.

95. *Id.* at 686–87; *see* FLA. STAT. §§ 39.01(1), .809(1) (2007).

96. *F.B.*, 4 So. 3d at 686.

97. *Id.* at 687.

98. 1 So. 3d 268 (Fla. 1st Dist. Ct. App. 2009).

99. *Id.* at 268–69; *see Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

100. *M.E.*, 1 So. 3d at 269.

101. *Id.*

102. *Id.*

103. *See* FLA. STAT. § 39.521 (2009).

104. FLA. STAT. § 39.521(1)(b)(1), (1)(d)(8)(b).

Department because there is no suitable relative, there is no obligation to later place the child with a relative “if it is in the child’s best interest to remain in the current placement.”¹⁰⁵ In *Guardian Ad Litem Program v. R.A.*,¹⁰⁶ the guardian ad litem (GAL), according to the court, appealed from “an order granting [the] father’s motion to change the placement of his daughter” from the foster parent’s home to that of the grandmother.¹⁰⁷ While the appellate court describes the matter as an appeal by the guardian ad litem, it would appear, given the caption of the case, that the appeal was by the Guardian Ad Litem Program,¹⁰⁸ as the Guardian Ad Litem Program was a party to the proceeding pursuant to chapter 39 of the *Florida Statutes*.¹⁰⁹ When the trial court ordered a transfer of placement, the Guardian Ad Litem Program appealed.¹¹⁰ Treating the matter as a non-final order and thus describing the appeal as a petition for writ of certiorari, the appellate court reversed.¹¹¹ Finding that the evidence at the trial level was that it was in the child’s best interest to remain in the current foster home, the court reversed concluding that the trial court failed to follow the clear statutory directions which were based upon a best interest standard.¹¹²

In 2004, the Supreme Court of Florida decided *Florida Department of Children & Families v. F.L.*,¹¹³ which held that in an involuntary termination of parental rights case, the Department must prove by clear and convincing evidence that there was a substantial risk of significant harm to the child before the court then decides whether termination of parental rights “is the least restrictive means of protecting the child from . . . harm.”¹¹⁴ Application of the *F.L.* test was before the Fourth District Court of Appeal in *J.J. v. Department of Children & Families*.¹¹⁵ The appellate court first found that the trial court in *J.J.* made a series of errors by basing termination of parental rights in part on testimony that a parent failed to admit abuse, and that the parent lacked financial resources to provide for the child, as well as failing to

105. FLA. STAT. § 39.521(1)(d)(8)(b).

106. 995 So. 2d 1083 (Fla. 5th Dist. Ct. App. 2008).

107. *Id.* at 1083.

108. *See id.*

109. FLA. STAT. § 39.01(51).

110. *R.A.*, 995 So. 2d at 1083.

111. *Id.* at 1084 n.1, 1085. As to the proper method for raising an appeal from a non-final order, see FLA. R. APP. P. 9.040(b)(2)(C); *R.J. v. Guardian Ad Litem Program*, 993 So. 2d 176, 177 (Fla. 5th Dist. Ct. App. 2008) (per curiam).

112. *R.A.*, 995 So. 2d at 1083–84.

113. 880 So. 2d 602 (Fla. 2004) (per curiam).

114. *Id.* at 608 (quoting *Padgett v. Dep’t of Health & Rehabilitative Servs.*, 577 So. 2d 565, 571 (Fla. 1991)).

115. 994 So. 2d 496, 501 (Fla. 4th Dist. Ct. App. 2008).

“include the passage of time and positive changes in a parent’s circumstances.”¹¹⁶ Finally, the appellate court concluded that DCF had expedited termination of parental rights, “did not offer the mother a case plan for the” children before the court, “did not obtain a psychological evaluation of the mother to assist the court,” and thus failed to offer opportunities to the mother to prove her ability to care for the children.¹¹⁷ Failure to do so showed that there was a failure to prove that termination of parental rights was the least restrictive means to assist the parent.¹¹⁸

The least restrictive means test in the termination of parental rights cases was also before the Fifth District Court of Appeal in *C.A.T. v. Department of Children and Families*.¹¹⁹ In that case, “[t]he father was not offered a case plan for reunification prior to initiation of the . . . termination proceeding.”¹²⁰ In an earlier dependency case involving the child who was the subject of the TPR proceeding, the father had been found to be non-offending despite the fact that he had refused a case plan.¹²¹ In fact, he had not received any services from DCF “since his participation in the original case plan in 2002” in a prior proceeding.¹²² In the TPR proceeding, “he was never offered a case plan with services as an alternative to losing his parental rights in the current proceeding[.]”¹²³ Of course under Florida law, DCF does not have to provide a case plan for reunification.¹²⁴ DCF can show that the parent will not benefit from court-ordered services.¹²⁵ Because the Department did not prove “that the father was not amenable to remedy his problems through actual, appropriate services,” the court reversed.¹²⁶

In addition, however, in dicta, the court noted that the father was not “a model parent.”¹²⁷ Judge Sawaya, writing for the court, then made the following statement:

We are not aware of a precise definition that tells us what a model parent is. Perhaps it is nothing more than a mythical figure, much

116. *Id.* at 502.

117. *Id.* at 503.

118. *Id.*

119. 10 So. 3d 682 (Fla. 5th Dist. Ct. App. 2009).

120. *Id.* at 684.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See C.A.T.*, 10 So. 3d at 684; FLA. STAT. § 39.806(3) (2009).

125. *See, e.g., T.L. v. Dep’t of Children and Family Servs.*, 990 So. 2d 1267, 1273 (Fla. 2d Dist. Ct. App. 2008).

126. *C.A.T.*, 10 So. 3d at 685–86.

127. *Id.* at 685.

like the reasonable person in tort law, that good parents should seek to emulate. Although it may be inescapable that many will assume that mothers and fathers may not be model parents if DCF has intervened in their lives to protect their child[ren] from harm, the law does not profess to require parental perfection. Indeed, the provisions contained in chapter 39 reveal an acute awareness that many parents, like the father in the instant case, are in need of assistance to achieve the necessary skills to simply be adequate parents who do not harm, neglect or abuse their children.¹²⁸

The issue of whether ineffective assistance of counsel claims can be made in TPR proceedings remains undecided in Florida.¹²⁹ The issue was raised again during this survey year in *L.H. v. Department of Children & Families*.¹³⁰ The Fifth District Court of Appeal referred to the last reported opinion in the area, *E.T. v. State, Department of Children & Families*,¹³¹ decided by the Fourth District Court of Appeal in 2006, and recognized that the Supreme Court of Florida has still not ruled on this issue having “referred [the] issue to the Juvenile Court Rules Committee and the Appellate Court Rules Committee for consideration.”¹³² The appellate court in *L.H.* also recognized that trial and appellate courts around the country struggled with the issue, and encouraged the Supreme Court of Florida and the committees “to provide guidance on this important issue.”¹³³ On a motion for rehearing, clarification and certification, the district court of appeal certified the question of recognition of a claim for ineffective assistance of counsel to the Supreme Court of Florida.¹³⁴

The issue of a parent’s nonappearance at a termination of parental rights proceeding has come up regularly before the appellate courts.¹³⁵ Florida law provides that the failure to personally appear can constitute consent to terminate parental rights.¹³⁶ The issue arose again in *L.S. v. Department of Child-*

128. *Id.*

129. *See E.T. v. State, Dep’t of Children & Families*, 930 So. 2d 721, 729 (Fla. 4th Dist. Ct. App. 2006).

130. 995 So. 2d 583, 583–84 (Fla. 5th Dist. Ct. App. 2008).

131. 930 So. 2d 721 (Fla. 4th Dist. Ct. App. 2006).

132. *L.H.*, 995 So. 2d at 584 (citing *E.T. v. State*, 957 So. 2d 559, 599 (Fla. 2007) (per curiam)).

133. *Id.* at 585. *See also* 1 MICHAEL J. DALE, REPRESENTING THE CHILD CLIENT, § 4.06[1][c] (2009).

134. *L.H.*, 995 So. 2d at 585. *See also* Dale, 2005–2006 Survey, *supra* note 77, at 599; Michele R. Forte, *Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 193, 194–95 (2003).

135. *See* Dale, 2007–2008 Survey, *supra* note 37, at 371.

136. FLA. STAT. § 39.801(3)(a)(7) (2009).

ren & Family Services.¹³⁷ In this case, the mother argued on appeal “that the trial court abused its discretion in refusing to allow her to appear by telephone to explain her absence from the adjudicatory hearing” and concluding that “her nonappearance [was] consent to the termination of her parental rights.”¹³⁸ The appellate court agreed and reversed.¹³⁹ The mother’s counsel did appear “at the scheduled adjudicatory hearing and informed the court that the mother was out of state and unable to personally appear because of financial difficulties.”¹⁴⁰ The counsel further “advised the court that the mother was available to appear by telephone” and that she should be given that opportunity to explain why “she was unable to appear in person.”¹⁴¹ Both DCF and the guardian ad litem (GAL) objected.¹⁴² Specifically the GAL said that “there’s a history here of the mother not showing, and I think this is just indicative of a pattern.”¹⁴³ The appellate court held that the GAL statement “was disputed at the hearing by the mother’s counsel and [was] not supported by the record.”¹⁴⁴ Under these circumstances, the appellate court reversed concluding “the trial court should have allowed the mother the opportunity to appear by telephone to explain the reasons for her nonappearance instead of entering a default.”¹⁴⁵

In a second consent to TPR case, *J.M. v. Department of Children & Families*,¹⁴⁶ although the court had warned the parent at three prior hearings that “her failure to attend the adjudicatory hearing would constitute consent to the petition,” at the hearing when the court continued the matter for a third time, it “failed to advise the mother that she must personally appear at the reset date.”¹⁴⁷ She did not appear, sending “word that she was attending [to] matters regarding the recent death of her father.”¹⁴⁸ However, although never moving to vacate the consent, the mother then did participate with the approval of the court on the further days of the proceeding.¹⁴⁹ The trial court found that the DCF had proved termination by clear and convincing evi-

137. 995 So. 2d 516 (Fla. 2d Dist. Ct. App. 2008).

138. *Id.* at 517.

139. *Id.*

140. *Id.*

141. *Id.*

142. *L.S.*, 995 So. 2d at 517.

143. *Id.*

144. *Id.*

145. *Id.*; see Dale, 2007–2008 Survey, *supra* note 37, at 371 (collecting case law on this issue).

146. 9 So. 3d 34 (Fla. 4th Dist. Ct. App. 2009).

147. See *id.* at 36.

148. *Id.*

149. *Id.*

dence.¹⁵⁰ The appellate court thus ruled that the failure “to order the mother to appear on the hearing date at which the adjudicatory hearing actually commenced” was an “oversight” and thus “the court should not have entered a consent to the petition.”¹⁵¹ However, the court did not reverse because the mother was given a full opportunity to participate in the proceeding and the court ruled that DCF had met its burden.¹⁵²

Florida’s law regarding who is a party to a dependency in a termination of parental rights case is expansive.¹⁵³ It includes “the parent or parents of the child, the petitioner, the department, the guardian ad litem or the representative of the guardian ad litem program when the program has been appointed, and the child.”¹⁵⁴ In a termination of parental rights proceeding, the individuals who may appeal under Florida law are “[a]ny child, any parent or guardian ad litem of any child, any other party to the proceeding who is affected by an order of the court, or the department.”¹⁵⁵ Thus, a review of recent reported appellate opinions shows that parents, the Department, and the Guardian ad Litem Program regularly appeal. In *R.H. v. Department of Children & Family Services*,¹⁵⁶ the child’s grandparents, who were not parties to the proceeding below, sought to challenge the trial court order modifying placement of the granddaughter whose parents’ parental rights had been terminated, and which order placed the child “in the temporary legal custody of her paternal aunt and uncle.”¹⁵⁷ Reviewing the statutes in question concerning party status at the trial level and on appeal, the appellate court ruled that the grandparents lacked standing to challenge the order on appeal.¹⁵⁸

IV. SURRENDER OF PARENTAL RIGHTS

While most case law concerns involuntary termination of parental rights, a parent may voluntarily surrender parental rights pursuant to chapter

150. *Id.*

151. *J.M.*, 9 So. 3d at 36.

152. *See id.* at 36–37.

153. *See* FLA. STAT. § 39.01(51) (2009).

154. *Id.* Despite the statutory references to the Guardian ad Litem Program as a party to a proceeding in chapter 39, both the Fourth and Fifth District Courts of Appeal have raised the issue of the Guardian ad Litem Program’s standing as a party. *See* Dep’t of Children & Families v. S.T., 963 So. 2d 314, 315 (Fla. 4th Dist. Ct. App. 2007); Dep’t of Health & Rehabilitative Servs. v. Cole, 574 So. 2d 160, 163 (Fla. 5th Dist. Ct. App. 1990).

155. FLA. STAT. § 39.815(1).

156. 994 So. 2d 1153 (Fla. 3d Dist. Ct. App. 2008).

157. *Id.* at 1154.

158. *Id.* at 1154–55 (citing *C.M. v. Dep’t of Children & Families*, 981 So. 2d 1272, 1272 (Fla. 1st Dist. Ct. App. 2008); *D.M. v. State, Dep’t of Children & Family Servs.*, 980 So. 2d 498, 498 (Fla. 2d Dist. Ct. App. 2008)).

39 of the *Florida Statutes*.¹⁵⁹ The proper procedure for doing so was before the Fifth District Court of Appeal in *R.B. v. Department of Children & Families*.¹⁶⁰ A mother appealed “an order denying her motion to set aside the surrender of her parental rights to her two children.”¹⁶¹ After her two children were removed and sheltered and at an arraignment hearing, there was a representation that the mother was interested in signing paperwork to surrender parental rights.¹⁶² After conferring with her counsel, the mother was “placed under oath and signed the ‘Affidavit and Acknowledgment of Surrender of Parental Rights, Consent, and Waiver of Notice’ forms” which were witnessed by counsel and a bailiff.¹⁶³ Because the mother’s counsel suggested to the general master that his client “had indicated she might be mentally unstable, . . . the general master asked several pertinent questions.”¹⁶⁴ The master found that the surrender was “knowingly, freely, and voluntarily executed;” and the trial court accepted it.¹⁶⁵ “Five months later, with new counsel,” the mother moved to set aside the voluntary surrender.¹⁶⁶ The appellate court found, first, that the general master had authority to “‘administer oaths and conduct hearings’ [and thus] inherently had the power to take acknowledgment”; and, second, that there was no showing of fraud or duress.¹⁶⁷ The appellate court noted that the burden of proof by clear and convincing evidence to vacate the surrender rests on the parent.¹⁶⁸ The appellate court thus affirmed.¹⁶⁹

V. JUVENILE DELINQUENCY

Once a court in a juvenile delinquency case holds an adjudicatory hearing and finds that the child has committed an act, which if committed by an adult would be a crime under chapter 985, the court proceeds to a dispositional hearing.¹⁷⁰ States differ as to the degree of discretion that the juvenile court has in making a disposition.¹⁷¹ Florida’s dispositional statute contains a

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159. FLA. STAT. § 39.806(1)(a).
 160. 997 So. 2d 1216 (Fla. 5th Dist. Ct. App. 2008).
 161. *Id.* at 1217.
 162. *Id.*
 163. *Id.*
 164. *Id.*
 165. *R.B.*, 997 So. 2d at 1217.
 166. *Id.*
 167. *Id.* at 1217–18.
 168. *Id.* at 1218.
 169. *Id.*
 170. FLA. STAT. §§ 985.35, .43 (2009).
 171. 1 DALE, *supra* note 133, at § 5.03[13][a].

list of alternatives and further provides that the Department of Juvenile Justice (DJJ) shall recommend a disposition to the court.¹⁷² In *E.A.R. v. State*,¹⁷³ the issue before the Supreme Court of Florida was whether the juvenile court must “justify departures from the Department of Juvenile Justice’s (DJJ) recommended dispositions by explaining a judge’s ‘reasons’ for a departure.”¹⁷⁴ It must do so in terms of the “characteristics of the imposed restrictiveness level” under the *Florida Statutes* as compared to “the rehabilitative needs of the child.”¹⁷⁵ In a lengthy opinion, including a detailed exposition of the particular case before the Court, and with a strong dissent with two concurrences, the Court set out a test by which the juvenile court should “provide ‘reasons’ that explain, support, and justify why one restrictiveness level is more appropriate than another and thereby rationalize a departure disposition.”¹⁷⁶ The Supreme Court of Florida held that the trial court should:

Articulate an understanding of the respective characteristics of the opposing restrictiveness levels including (but not limited to) the type of child that each restrictiveness level is designed to serve, potential “lengths of stay” associated with each level, and the divergent treatment programs and services available to the juvenile at these levels; and [t]hen logically and persuasively explain why, in light of these differing characteristics, one level is better suited to serving both the rehabilitative needs of the juvenile—in the least restrictive setting—and maintaining the ability of the State to protect the public from further acts of delinquency.¹⁷⁷

*M.J.S. v. State*¹⁷⁸ and *D.B. v. State*¹⁷⁹ are cases the district courts of appeal decided after the opinion in *E.A.R.* *M.J.S.* described the opinion in *E.A.R.* as “a new, more rigorous analysis in which a trial court must engage before departing from the DJJ’s recommendation.”¹⁸⁰ In *D.B.*, the trial court failed to comply with the new standard and thus the appellate court reversed and remanded.¹⁸¹

172. See FLA. STAT. § 985.03(21); FLA. R. JUV. P. 8.115.

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

174. *Id.* at 616–17 (internal footnote omitted).

175. *Id.* at 617.

176. *Id.* at 638.

177. *Id.*

178. 6 So. 3d 1268 (Fla. 1st Dist. Ct. App. 2009) (per curiam).

179. 12 So. 3d 875 (Fla. 4th Dist. Ct. App. 2009).

180. *M.J.S.*, 6 So. 3d 12 at 1269.

181. *D.B.*, 12 So. 3d at 876.

In Florida, secure detention either pretrial or after adjudication, is specifically controlled by statute.¹⁸² When trial judges act in contravention of the time frames set forth in the statute, writs of habeas corpus are taken seeking discharge.¹⁸³ In *M.A.M. v. Vurro*,¹⁸⁴ a juvenile sought relief arguing that he could not be held in secure detention under the twenty-one day rule found in Florida law.¹⁸⁵ A situation in which a child who might “not otherwise meet the secure detention criteria” may be held in secure detention is when the court makes certain findings “that respite care is unavailable and that secure detention is required to prevent victim injury.”¹⁸⁶ The appellate court in *M.A.M.* concluded that under Florida law, the court may not order “a child charged with domestic violence [to] be held in secure detention for more than twenty-one days in total.”¹⁸⁷ The two separate sections may not be used in combination.¹⁸⁸ On this ground, the court granted the writ.¹⁸⁹

Where a child in a delinquency case is incompetent to proceed, after a hearing, the court may order the child placed in a secure residential facility.¹⁹⁰ Thus, the finding of involuntary commitment requires clear and convincing evidence that there is a substantial likelihood that the child would inflict serious bodily harm on himself or others.¹⁹¹ This was the issue in *A.L.M. v. Department of Children & Families*.¹⁹² The child sought certiorari and habeas corpus relief from the order committing him to DCF under the secure placement statute.¹⁹³ The appellate court reviewed the facts of the case finding that, “[a]lthough three psychologists testified, their testimony did not support, by clear and convincing evidence, the trial court’s finding that . . . there was a ‘substantial likelihood’” of infliction of serious bodily harm by the child upon himself or others.¹⁹⁴ The court thus granted the writ.¹⁹⁵

It would appear obvious that a juvenile delinquency case is not a matter in which a child is described as a criminal, nor one in which the child is con-

182. See FLA. STAT. §§ 985.24(1), .245(1), .25, .255 (2009).

183. See, e.g., *M.A.M. v. Vurro*, 2 So. 3d 388, 389 (Fla. 2d Dist. Ct. App. 2009).

184. 2 So. 3d 388 (Fla. 2d Dist. Ct. App. 2009).

185. *Id.* at 389.

186. *Id.* at 390; FLA. STAT. § 985.255(2).

187. *M.A.M.*, 2 So. 3d at 390.

188. See *id.*

189. *Id.* at 390–91.

190. Fla. R. Juv. P. 8.095.

191. See FLA. STAT. § 985.19(3).

192. 995 So. 2d 1085 (Fla. 4th Dist. Ct. App. 2008).

193. *Id.* at 1085.

194. *Id.* at 1086.

195. *Id.*

victed of a crime.¹⁹⁶ Nonetheless, in *D.A. v. State*,¹⁹⁷ a child was obligated to appeal from a trial order imposing the cost of prosecution pursuant to the criminal law cost payment statute in Florida.¹⁹⁸ The appellate court reversed, pointing to the variety of provisions in the Florida Juvenile Delinquency Statute and case law that stand for the proposition that an adjudicated delinquent has not been convicted and is not a criminal.¹⁹⁹ Conditions of probation are among the dispositional alternatives the court may impose upon a child.²⁰⁰ The issue in *J.W.J. v. State*²⁰¹ was whether special conditions of probation were both orally announced and whether they were permissible.²⁰² The court in *J.W.J.* held that where the special condition of probation is statutorily authorized, there is no obligation to orally announce the condition.²⁰³ The court reversed in part based upon the state's concession that certain aspects of the special condition did not comply with state law or were not orally pronounced.²⁰⁴

The dispositional alternative of restitution comes up regularly in the appellate courts in substantial numbers despite the fact that the matter is one of statutory construction.²⁰⁵ In *J.C. v. State*²⁰⁶ the order of restitution dealt with the theft of four pocket bikes from a store owner.²⁰⁷ On appeal, the child argued that the owner "purchased the bikes wholesale and could not sell them at their marked retail prices [and therefore] restitution should [be] limited to the wholesale price."²⁰⁸ The appellate court affirmed, finding "that the trial court did not abuse its discretion in valuing the bikes at a discounted retail price."²⁰⁹

A juvenile appealed a restitution award claiming that it should be reversed because it included the amount "for a purse, three pairs of sunglasses, and sixty CDs," in *G.P. v. State*.²¹⁰ Apparently, the petition for delinquency

196. See *In re Gault*, 387 U.S. 1, 17 (1967).

197. 11 So. 3d 423 (Fla. 4th Dist. Ct. App. 2009).

198. *Id.* at 423; see FLA. STAT. § 938.27(1) (2009).

199. *D.A.*, 11 So. 3d at 423–24 (citing FLA. STAT. § 985.35(6); *A.M.P. v. State*, 927 So. 2d 97, 100 (Fla. 5th Dist. Ct. App. 2006)).

200. See FLA. STAT. § 985.435.

201. 994 So. 2d 1223 (Fla. 1st Dist. Ct. App. 2008).

202. *Id.* at 1224.

203. *Id.* at 1226.

204. *Id.* at 1227.

205. See Dale, 2007–2008 Survey, *supra* note 37, at 378–79; Dale, 2005–2006 Survey, *supra* note 77, at 590–91.

206. 3 So. 3d 346 (Fla. 2d Dist. Ct. App. 2008).

207. *Id.* at 346.

208. *Id.*

209. *Id.*

210. 996 So. 2d 920, 921 (Fla. 4th Dist. Ct. App. 2008).

charged the child with “theft of miscellaneous jewelry and/or clothing” but did not list the particular items in the charging document.²¹¹ Finding that the jewelry and clothing may be included in the term miscellaneous jewelry and/or clothing but that the CDs could not, the court held that the latter could not be contained in the restitution award.²¹²

Finally, in *J.A.B. v. State*,²¹³ the child appealed an order requiring restitution “in the amount of \$1479.09 at the rate of \$50 per month, commencing on a specified date approximately four months after the entry of the restitution order.”²¹⁴ The child’s argument on appeal was that the “court abused its discretion in setting the amount and payment schedule for restitution.”²¹⁵ In *J.A.B.*, the appellate court sitting en banc, and receding from prior opinions in that district, ruled that a “trial court may set the restitution amount and payments in a reasonable amount based upon evidence [showing] the earnings [that] the [child] may reasonably be expected to make.”²¹⁶ The court may also “set a commencement date for the payments so long as the court provides a reasonable amount of time for the [child] to obtain employment.”²¹⁷ In so doing, the court in *J.A.B.* noted the conflict with the First District Court of Appeal decision in *J.A.M. v. State*.²¹⁸ On this basis, the court in *J.A.B.* certified the conflict.²¹⁹

VI. OTHER MATTERS

Several changes in the *Florida Statutes* in 2009 require brief discussion. Section 39.0016 was amended to provide dependency courts and district school superintendents with the ability to appoint surrogate parents for children under the Individuals with Disabilities Education Act.²²⁰ Under Florida law, where the child is suspected of having special education needs and where a parent cannot be located, the responsibilities of the surrogate parent under the federal law must be implemented.²²¹

211. *Id.*

212. *Id.*

213. 993 So. 2d 1150 (Fla. 2d Dist. Ct. App. 2008) (en banc).

214. *Id.* at 1150.

215. *Id.* at 1151.

216. *Id.*

217. *Id.*

218. 601 So. 2d 278, 278–79 (Fla. 1st Dist. Ct. App. 1992) (per curiam).

219. *J.A.B.*, 993 So. 2d at 1155.

220. Act effective July 1, 2009, ch. 2009-35, 2009 Fla. Laws 319 (codified as amended in FLA. STAT. § 39.0016, 402).

221. FLA. STAT. § 39.0016(3).

Chapter 39 has been amended by adding the “Give Grandparents and Other Relatives a Voice Act” which ensures that relatives are to be provided with notice of all dependency hearings and proceedings.²²² Chapter 39 also has been amended to require the court to ask the parent’s consent to provide access to a child’s medical and educational records, and to provide that information to the court, the lead community agency (CBC), the guardian ad litem, and any attorneys for the child.²²³ If the parent cannot do so or is unwilling to do so, the court may issue an order granting access.²²⁴

Significantly, Florida law was also changed to have the CBC and the local education agency work together to see to it that a child remain in the school where he or she was enrolled at the time of placement in the child welfare system, a matter that has first been institutionalized in Broward County in the settlement of a federal lawsuit in 2000.²²⁵

VII. CONCLUSION

The Supreme Court of Florida decided one significant case in the delinquency area explaining the test by which a trial court determines that it shall override a dispositional recommendation of the State Department of Juvenile Justice.²²⁶ The state’s intermediate appellate courts, on the other hand, were quite busy ruling in dependency, termination of parental rights, and delinquency cases on a number of statutory issues. In two cases, one involving the interpretation of the delinquency restitution statute and the other involving ineffective assistance of counsel in termination of parental rights cases, the appellate courts suggested that the Supreme Court of Florida should resolve those issues.²²⁷

222. Zahid Jones, Jr., Give Grandparents and Other Relatives a Voice Act, ch. 2009-43, 2009 Fla. Laws 343–44, 348 (codified as amended in scattered sections of chapter 39 of FLA. STAT.).

223. Ch. 2009-35 Fla. Laws at 322.

224. FLA. STAT. § 39.402(1).

225. Ch. 2009-35 Fla. Laws at 323; Order Approving Settlement Agreement, Ward v. Kearney, No. 98-7137- Civ-Moreno (S.D. Fla. May 31, 2000).

226. E.A.R. v. State, 4 So. 3d 614, 616–17 (Fla. 2009).

227. See, e.g., L.H. v. Dep’t of Children & Families., 995 So. 2d 583, 585 (Fla. 5th Dist. Ct. App. 2008).