Nova Law Review

Volume 31, *Issue* 3 2007 *Article* 10

2005-2006 Survey of Florida Juvenile Law

Michael J. Dale*

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MICHAEL J. DALE*

I. INTRODUCTION

This survey focuses on juvenile delinquency and child welfare cases and to a lesser extent on adoption matters as they relate to child welfare cases. It discusses several Supreme Court of Florida cases in these topic areas which have clarified important issues as well as a high court opinion on the subject of juvenile curfews. The courts of appeal were active in interpreting a variety of statutory issues and, as they have done for years, held the trial courts strictly accountable for compliance with statutory obligations in both child welfare and dependency cases.

II. JUVENILE DELINQUENCY

A. *Adjudicatory Issues*

In 2003, in a very widely followed case, *Tate v. State*,[1] which was the subject of a special issue of the *Nova Law Review*,[2] the Fourth District Court of Appeal established the procedural approach to be used in evaluating the competency of young defendants in the juvenile and adult criminal courts.[3]

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* Professor of Law, Nova Southeastern University, Shepard Broad Law Center, Fort Lauderdale, Florida. This article covers cases decided during the period from July 1, 2004 through June 30, 2006. The author thanks Ashley Jewell Dillman for her assistance in the preparation of this article.

1. 864 So. 2d 44 (Fla. 4th Dist. Ct. App. 2003).
2. Michael J. Dale, *Making Sense of the Lionel Tate Case*, 28 NOVA L. REV. 467 (2004).
3. *Tate*, 864 So. 2d at 51.

Since that time, a number of courts have ruled on a variety of procedural issues related to juvenile competency.[4]

Section 985.223 of the *Florida Statutes* contains a number of provisions regarding how courts should handle competency in delinquency proceedings.[5] One of the major focuses of the law is the distinction between a child who is incompetent because of mental illness or retardation and a child who is incompetent because of age or immaturity or any reason other than mental illness or retardation.[6] In *Department of Children & Families v. C.C. (C.C. II)*,[7] the issue was whether the trial court could commit a child to the Department of Children and Families (DCF) in the absence of evidence showing mental illness or retardation.[8] Ruling strictly as a matter of statutory interpretation, the court read the law to provide that a child who is determined to be mentally ill or retarded and who is adjudicated incompetent to proceed must be committed to DCF for treatment or training, whereas a child who is adjudicated incompetent because of age or immaturity may not be committed to either DCF or the Department of Juvenile Justice.[9] Because the child's lack of competence derived from age and lack of maturity, the appellate court quashed the order placing the child with DCF.[10] In *W.G. v. State*,[11] the issue was whether a trial court may order competency restorative services for an incompetent child charged with a misdemeanor by placement of the child in a private facility.[12] The appellate court said that the trial court lacked the authority to do so under the law because the statute stated that trial courts may not order any restorative services for an incompetent juvenile who was charged with what would be a misdemeanor.[13] The court recognized that there might be some difficulty in understanding the logic underlying the statutory scheme but that the law was clear on its face.[14] Chapter 985 also provides that where it appears that a child may never become competent, the court may dismiss the proceeding.[15] In *State v. J.L.M., III*,[16] an eight-

4. *See, e.g.*, Michael J. Dale, *2004 Survey of Florida Juvenile Law*, 29 NOVA L. REV. 397, 399 (2005) [hereinafter Dale, *2004 Survey*].
5. *See generally* FLA. STAT. § 985.223 (2006).
6. *Id.* § 985.19(2).
7. 889 So. 2d 965 (Fla. 1st Dist. Ct. App. 2004).
8. *Id.* at 966.
9. *Id.*
10. *Id.*
11. 910 So. 2d 330 (Fla. 4th Dist. Ct. App. 2005).
12. *Id.* at 331.
13. *Id.*
14. *Id.* at 332.
15. FLA. STAT. § 985.19(5)(c) (2006).
16. 926 So. 2d 457 (Fla. 1st Dist. Ct. App. 2006).

year-old was declared incompetent.[17] The evidence suggested that the child would not become competent in the next two years.[18] The appeals court reversed the trial court dismissal because the evidence showed only that it was unlikely that the eight-year-old "could be trained to [become] [competent] within the next 4 [to] 6 years."[19] The trial court did not find that the child would never become competent to proceed during the statutory period.[20]

The appellate courts have also ruled on several issues related to technical compliance with the involuntary commitment statute. First, in *M.H. v. State*,[21] the First District Court of Appeal held that when the trial court makes an order of involuntary commitment pursuant to chapter 985, it must make findings pursuant to three separate prongs of the state statute: 1) that the child is mentally ill or retarded; 2) that because of the mental illness or retardation the child is "manifestly incapable of surviving" or that "[t]here is a substantial likelihood that in the near future the child [would] inflict serious bodily harm on [him or her]self or others;" and 3) that "less restrictive alternatives" for treatment are inappropriate.[22] Finally, in *Department of Children & Families v. W.J.R.*,[23] the appellate court held that prior to a commitment of a minor to DCF for competency restoration, DCF must be properly served and given notice and allowed to participate in a meaningful manner in the dispositional proceeding.[24]

Issues relating to the waiver of the right to assistance of counsel in delinquency proceedings come up regularly throughout the country.[25] The juvenile's right to counsel was established by the Supreme Court opinion in *In re Gault*[26] in 1967, and cases interpreting the case are also heard by the Florida appellate courts each year.[27] In *K.E.N. v. State*,[28] the appellate court held, *inter alia*, that it had grave reservations concerning whether the specific guidelines established by the Florida Rules of Juvenile Procedure that govern the substantive right of the juvenile to counsel, can be complied with by a

17. *Id.* at 458.
18. *Id.* at 459.
19. *Id.* at 461.
20. *Id.*
21. 901 So. 2d 197 (Fla. 4th Dist. Ct. App. 2005).
22. *Id.* at 200 (quoting FLA. STAT. § 985.19(3) (2006)).
23. 915 So. 2d 245 (Fla. 5th Dist. Ct. App. 2005).
24. *Id.* at 246 (citing Dep't of Child. & Fam. v. J.F.C., 901 So. 2d 417 (Fla. 5th Dist. Ct. App. 2005)).
25. *See generally* MICHAEL J. DALE, ET AL., *Representing Children in Juvenile Justice Proceedings*, *in* REPRESENTING THE CHILD CLIENT ¶ 5.03(11)(d)(i) (2006).
26. 387 U.S. 1 (1967).
27. *See* Michael J. Dale, *2002 Survey of Florida Juvenile Law*, 28 NOVA L. REV. 1, 2 (2003) [hereinafter Dale, *2002 Survey*].
28. 892 So. 2d 1176 (Fla. 5th Dist. Ct. App. 2005).

"group rights advisory," or an announcement of the rights the children possess made by the court to a group of youngsters appearing before it.[29] The inquiry that the court must make includes a thorough analysis of each child's comprehension of the offer of the right to counsel and each child's capacity to make an intelligent and understandable choice to waive it.[30] In *C.K. v. State*,[31] "the trial court failed to make [the] thorough inquiry [necessary] . . . to obtain [a] waiver in writing," have the mother verify that the decision was discussed, and find that the waiver "appeared to be knowing and voluntary."[32] The checklist the court must run through has been rearticulated by the appellate courts on a number of occasions and yet, inexplicably the trial courts seem to have trouble complying as the court found in *C.V. v. State*.[33] In that case, at arraignment the trial court accepted an oral waiver of counsel and admission to the charges but failed to inform the child of his rights that would be relinquished.[34] The court did not warn the child of the danger and disadvantages of representing himself, nor did the court make any inquiries about whether the child's decision was voluntary and knowingly made.[35] Again, the court failed to obtain a written waiver of counsel.[36] On a more technical level, the Second District Court of Appeal reversed in *T.H. v. State (T.H. II)*,[37] where the child was not advised of his right to counsel at a hearing, and the error was not caught until six days after the dispositional hearing where the child refused counsel.[38] The appeals court held that was fundamental error and reversed.[39]

In *J.R.I. v. State*,[40] the child appealed from an order committing him to a residential facility on revocation of probation.[41] Because the waiver of counsel in the original delinquency proceeding was not knowingly or intelligently made, the appellate court held that the trial court could not commit the child upon revocation of probation.[42] Finally, in *D.K. v. State*,[43] an appeal was taken in a case involving representation by a certified law student in-

29. *Id.* at 1179.
30. *Id.*
31. 909 So. 2d 602 (Fla. 2d Dist. Ct. App. 2005).
32. *Id.* at 604 (internal quotations omitted).
33. 915 So. 2d 664 (Fla. 2d Dist. Ct. App. 2005).
34. *Id.* at 665.
35. *Id.*
36. *Id.*
37. 899 So. 2d 504 (Fla. 2d Dist. Ct. App. 2005).
38. *Id.* at 505.
39. *Id.*
40. 898 So. 2d 1093 (Fla. 1st Dist. Ct. App. 2005).
41. *Id.* at 1094.
42. *Id.*
43. 881 So. 2d 50 (Fla. 4th Dist. Ct. App. 2004).

tern.[44] The appeals court held that "because the name of the certified legal intern representing [the child was] not listed on the waiver form, it cannot be said that [the child] made a knowing and intelligent waiver of [the] right to legal representation."[45] Therefore, the court reversed.[46]

Issues relating to application of the United States Supreme Court ruling in *Miranda v. Arizona*[47] continue to come before the Florida appellate courts.[48] The cases deal both with issues of whether the individual is in custody and whether the confession given was voluntary under the totality of circumstances test set forth by the Supreme Court of Florida in *Ramirez v. State*.[49] In *J.G. v. State*,[50] the juvenile was adjudicated delinquent on a charge of sexual battery and appealed on grounds that he was in custody and the waiver of *Miranda* rights was not voluntarily, knowingly and intelligently made.[51] The appellant was thirteen years old and a seventh-grader enrolled in an exceptional student educational school setting at the time of the interview.[52] The youngster "was familiar with the juvenile justice system."[53] In addition to the failure to notify the appellant's parents or custodian that the child was in custody as provided by Florida law,[54] but which would not by itself dispose of the waiver issue, there was no evidence upon which the court could evaluate the voluntariness of the waiver.[55] Nor did the trial court make any factual findings.[56] The appellate court held that "[m]erely reading the *Miranda* rights form to a [thirteen]-year-old . . . or having [the child] read the rights form, by itself [did] not establish that [the child] understood and comprehended the rights he was giving up" as a consequence of the waiver.[57] Furthermore, the court found that a family friend, whose interests lay closer to that of the victim, assisted in obtaining the confession by tricking the child through an explanation that there was a video

44. *Id.* at 51.
45. *Id.* at 52.
46. *Id.*
47. 384 U.S. 436 (1966).
48. *See* Dale, *2004 Survey*, *supra* note 4, at 401.
49. 739 So. 2d 568 (Fla. 1999).
50. 883 So. 2d 915 (Fla. 1st Dist. Ct. App. 2004).
51. *Id.* at 917–18.
52. *Id.* at 924.
53. *Id.*
54. *See* FLA. STAT. § 985.207 (2003).
55. *J.G.*, 883 So. 2d at 924.
56. *Id.*
57. *Id.* at 925.

tape recording of the child "inappropriately touching the victim."[58] Under all these circumstances the appeals court reversed.[59]

A juvenile was charged with committing the offense of poisoning food or water with intent to kill in *B.M.B. v. State*.[60] The interrogation of the child occurred on school grounds by a police officer who had been called to the school.[61] The appellate court reversed the trial court finding that the child had knowingly and voluntarily waived *Miranda* warnings and further found that the child was in custody at the time of the police interview.[62] In so doing, the court noted that whether the law would have been applied differently had the case been handled by a school resource officer and an assistant principal was not before the court.[63] The police officer turned off the tape recorder and, in testimony at trial, said that he orally administered the *Miranda* warnings at that point in time.[64] The appellate court held that there was no doubt that the child was in custody.[65] Applying the *Ramirez* test governing totality of the circumstances and recognizing that "there is no bright line rule that would render a confession by juvenile involuntarily," the court held that a number of factors would produce a finding that the waiver was not voluntary.[66] The court found that the tape recording was turned off and thus there was no first hand evidence.[67] There was nothing in the record to show that the child clearly understood her rights.[68] In particular, the child's "age, experience and background did not allow her to appreciate the gravity of the situation" (the student was in middle school) nor was there any "indication that [the child] understood that serious criminal charges could result" (a felony).[69] Further, the child was not provided with an opportunity to consult with a parent before being questioned.[70]

Part of the test for the obligation to read a respondent *Miranda* warnings is that the person be in police custody for interrogation.[71] In *J.C.M. v.*

58. *Id.*
59. *Id.* at 927.
60. 927 So. 2d 219, 220 (Fla. 2d Dist. Ct. App. 2006).
61. *Id.* at 221.
62. *Id.* at 223.
63. *Id.* at 221. A number of courts have held that if a police officer is acting as a school resource officer, the *New Jersey v. T.L.O.* test will be applied. *See* discussion of *New Jersey v. T.L.O.*, *infra* nn. 110–11; *see also In re* W.R., 634 S.E.2d 923, 926–27 (N.C. Ct. App. 2006).
64. *B.M.B.*, 927 So. 2d at 222.
65. *Id.*
66. *Id.*
67. *Id.* at 223.
68. *Id.*
69. *B.M.B.*, 927 So. 2d at 223.
70. *Id.*
71. *See* J.C.M. v. State, 891 So. 2d 573, 576 (Fla. 1st Dist. Ct. App. 2004).

State,[72] a twelve-year-old was adjudicated to have committed an act of vandalism involving the windshield of an automobile.[73] The trial court denied a motion to suppress, and after an adjudication and disposition, the child appealed.[74] The sole witness in the case was a police officer who was called to the scene "in response to a report that someone had damaged [the victim's] car windshield by what appeared to be a BB gun shooting."[75] The police officer interviewed the child and, after two other officers arrested the father in the child's presence, told the child to wait until the youngster's brother came to get him.[76] During that period, the police officer fabricated a story that the victim had videotaped the event.[77] The child, in response, incriminated himself.[78] The appellate court held that the child was in custody when he made the admissions.[79] Applying an objective test of whether a reasonable person in the suspect's position would have perceived the situation as such, the appellate court held that the child was detained, albeit for his own safety, and that the police officer was clearly interrogating the child.[80] The appellate court therefore reversed.[81]

An interesting jurisdictional issue was before the Fourth District Court of Appeal in *State v. Jones*.[82] The issue was whether juveniles charged with traffic offenses, such as "driving without a valid license," should have their cases heard "in the traffic division of the county court" or "in the juvenile division of the circuit court . . . as delinquency matters."[83] On a petition for a writ of prohibition after several cases had been dismissed and then transferred to the juvenile division of the circuit court, the appeals court held that the Florida statute specifically exempts traffic offenses from circuit court jurisdiction, and therefore, "the county court has original jurisdiction over offenses allegedly committed by the . . . [juveniles]."[84] They are not statutorily viewed as acts of delinquency.[85]

72. *Id.* at 573.
73. *Id.* at 575.
74. *Id.*
75. *Id.*
76. *J.C.M.*, 891 So. 2d at 577.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *J.C.M.*, 891 So. 2d at 578.
82. 899 So. 2d 1280 (Fla. 4th Dist. Ct. App. 2005).
83. *See id.* at 1280.
84. *Id.* at 1281.
85. *Id.* (citing FLA. STAT. § 26.012 (2003)).

The parents of a victim appealed from a trial court order denying a motion to set aside a pretrial intervention agreement in a delinquency case.[86] In *S.K. v. State*,[87] the respondent had been charged with "lewd and lascivious molestation" of a minor child.[88] The amended petition "later filed chang[ed] the offense to a misdemeanor battery."[89] The court entered a negotiated agreement known as a "PAY agreement,"[90] which "is an acronym used to refer to [a] prosecution alternative[] . . . youth agreement[]."[91] The victim's parents, who disagreed with the disposition, sought to challenge the agreement on several grounds.[92] The appellate court held that "the decision to prosecute lies solely with the State [and] not with the victim of a crime," the juvenile rules of procedure do not provide "for the victim or the victim's parents to be involved in the submission of [the] treatment plan or in the decision to" hold or waive the hearing, and the victim's parents are not parties who will be "allowed to refuse consent to a waiver of a hearing."[93]

In delinquency cases involving child victims, issues of hearsay testimony by minors often come before the court.[94] Such was the case in *G.H. v. State*.[95] In a sexual abuse case, the child victim's mother testified that "the child told her . . . that someone with [the a]ppellant's first name [had] touched her, and the child was afraid to reveal [the] information because [of threats]."[96] The trial court, when asked to rule on the child's hearsay statements, allowed the testimony finding "specifically that the statements [were] reliable and trustworthy."[97] The appellate court held that the trial court was in error, because in all cases the court must make specific findings of fact on the record regarding the reliability of the statements.[98] However, on the facts of the case, because there was direct testimony from the child upon which the court could rely for its adjudication, the error was deemed harmless.[99]

The question of whether a juvenile has the right, through counsel, to make a closing argument in a delinquency case was before the appellate

86. S.K. v. State, 881 So. 2d 1209, 1210 (Fla. 5th Dist. Ct. App. 2004).
87. *Id.* at 1209.
88. *Id.* at 1210.
89. *Id.*
90. *Id.*
91. *S.K.*, 881 So. 2d at 1210 n.1.
92. *Id.* at 1210–11.
93. *Id.* at 1212.
94. The same is true in child welfare cases. *See generally* MICHAEL J. DALE, ET AL., *The Child Witness*, *in* REPRESENTING THE CHILD CLIENT ¶ 7 (2006).
95. 896 So. 2d 833 (Fla. 1st Dist. Ct. App. 2005).
96. *Id.* at 834.
97. *Id.* at 835.
98. *Id.*
99. *Id.*

court in *J.M.S. v. State*.[100] The child had been charged "with disorderly conduct . . . and disruption of an educational institution."[101] When the State rested, the child's "defense [counsel] moved for a dismissal arguing that yelling [and] cursing [was] not enough to prove disorderly conduct" and that "there was no inticement or encouragement."[102] "The court denied the motion[] and found [the child] guilty of both counts," whereupon the "defense . . . asked for a closing argument."[103] "[T]he court denied the request, citing the lateness of the hour and another pending case . . . [but] allowed [the] defense counsel to submit a memorandum" and also, at the dispositional hearing, some six weeks later, the right to make a renewed motion for judgment of acquittal and a closing argument.[104] Citing earlier case law, the appellate court held that "it is an absolute violation of the Sixth Amendment for [a] court to deny . . . defendant[s] the right to make [a] closing argument."[105] The appeals court held that the defense was denied the ability to "mak[e] an[] argument prior to the court's finding of guilt."[106] "[M]ak[ing] a written closing argument and [an oral] argument at the disposition hearing after the" determination of guilt had already been made "[did] not cure the prejudice."[107] The court reversed for a new adjudicatory hearing.[108]

Issues involving searches in schools come up regularly in Florida delinquency cases in the Florida courts as they do elsewhere.[109] Pursuant to the Supreme Court opinion in *New Jersey v. T.L.O.*,[110] the test for search and seizure in schools is reasonable suspicion.[111] The courts have also held that suspicion-less administrative searches of students are proper under certain circumstances.[112] In *C.N.H. v. State*,[113] a child "entered a plea of no contest"

100. 921 So. 2d 813, 814 (Fla. 5th Dist. Ct. App. 2006). *See also* S.S. v. State, 204 S.W.3d 512, 513 (Ark. 2005).

101. *Id.*

102. *Id.* at 815.

103. *Id.*

104. *Id.*

105. *J.M.S.*, 921 So. 2d at 816 (quoting M.E.F. v. State, 595 So. 2d 86, 87 (Fla. 2d Dist. Ct. App. 1992)).

106. *Id.*

107. *Id.*

108. *Id.*

109. *See* 2 MICHAEL J. DALE, ET AL., *Representing Students in School Related Matters, in* REPRESENTING THE CHILD CLIENT ¶ 6 (2006); Dale, *2004 Survey, supra* note 4, at 399–401; Dale, *2002 Survey, supra* note 27, at 6–7.

110. 469 U.S. 325 (1985).

111. *Id.* at 342.

112. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648, 664–65 (1995) (applying random drug analysis testing policy to a student athlete).

113. 927 So. 2d 1 (Fla. 5th Dist. Ct. App. 2006).

in a delinquency case having been charged with "possession of a weapon on school property."[114] The school in question was "an alternative middle school," which "ha[d] a policy of [carrying out] daily suspicionless pat-down searches of every student every morning before [the students were] permitted to go to . . . class[]."[115] The appeals court held that in the context of "an administrative search, the warrant and probable cause showing is replaced by [a] requirement . . . [of] a neutral plan for execution; a compelling governmental need; the absence of less restrictive alternatives; and reduced privacy rights."[116] Under the facts of the case, the appeals court held that the administrative searches were proper.[117]

Florida courts have held that a school resource officer—a police officer assigned to a school—when conducting a search in a school, need only have reasonable suspicion to search.[118] The court so held in *State v. J.H.*[119] In *J.H.*, "[a] police officer . . . at the school was told by another student [who had been] found with marijuana, that [the respondent] had possessed marijuana earlier [in the] day. The officer contacted the dean . . . [who] asked [the juvenile] to step out of class, and [when] the officer asked if [the youngster] had anything improper on him," the child offered up the marijuana.[120] "[A]cknowledg[ing] that the standard is a reasonable suspicion,"[121] the child argued, nonetheless, that because he was in custody, *Miranda* warnings should have been given.[122] The appeals court held that while it may be correct that in a "custodial interrogation by the officer" *Miranda* warnings were required, that issue was not dispositive "because the drugs would have been discovered inevitably without [the] interrogation."[123] It therefore reversed the trial court order upholding the suppression.[124]

114. *Id.* at 2.
115. *Id.*
116. *Id.* at 4.
117. *Id.* at 4–5.
118. State v. J.H., 898 So. 2d 240, 241 (Fla. 4th Dist. Ct. App. 2005) (citing State v. D.S., 685 So. 2d 41, 43 (Fla. 3rd Dist. Ct. App. 1996)).
119. *Id.*
120. *Id.* at 240.
121. *Id.* at 241.
122. *Id.* at 240.
123. *J.H.*, 898 So. 2d at 241.
124. *Id.*

B. *Dispositional Issues*

The Supreme Court of Florida has decided two significant cases involving dispositional issues during the most recent survey period. In *J.I.S. v. State*,[125] the question was whether a juvenile who received "an indeterminate residential commitment to the Department of Juvenile Justice (DJJ) [is] entitled to credit for time served in secure detention before the commitment?"[126] The Court held that in the case of "'indeterminate' commitment, which is a residential commitment [where the DJJ has] authority over the [defendant] until . . . [the youngster] reaches a statutorily prescribed age, . . . credit for time served in secure detention [pre-commitment] is not required by any court rule, statute, or constitutional provision."[127] Therefore, the child is not entitled to credit for time served.[128] However, the Court stated that "credit is required [in] a 'determinate' commitment" setting."[129] That is, "for an offense such as a misdemeanor that . . . necessarily conclude[s] before the juvenile reaches the age at which [the authority of DJJ ends]," credit for time served does apply.[130] The distinction between determinate and indeterminate sentences is as follows: "[C]ommitments circumscribed by the maximum adult punishment [are] 'determinate' and those limited only by the offender [obtaining] a certain age [are] 'indeterminate.'"[131] As the Court noted, because "[t]he juvenile justice system [focuses on] rehabilitat[ing] youth," youngsters "are committed for indeterminate lengths of time"[132] as a general proposition in the absence of a statute that states otherwise.[133] Thus, it is "generally impossible to [set] a date from which to deduct time spent in secure detention."[134]

The second Supreme Court of Florida case involving dispositions in delinquency cases is *N.C. v. Anderson*.[135] The issue before the Court was

125. 930 So. 2d 587 (Fla. 2006).
126. *Id.* at 589.
127. *Id.* at 590.
128. *Id.*
129. *Id.*
130. *J.I.S.*, 930 So. 2d at 590. For a discussion of the Supreme Court of Florida's view of entitlement to jail credit on an adult sentence, see Moore v. State, 882 So. 2d 977 (Fla. 2004).
131. *J.I.S.*, 930 So. 2d at 592.
132. *Id.* at 593 (quoting C.C. v. State (*C.C. I*), 841 So. 2d 657 (Fla. 4th Dist. Ct. App. 2003)).
133. *See id.* at 595.
134. *Id.* at 593 (quoting *C.C. I*, 841 So. 2d at 658).
135. 882 So. 2d 990 (Fla. 2004); *see also* D.G. v. State, 896 So. 2d 920, 921–22 (Fla. 4th Dist. Ct. App. 2005) (applying the *N.C.* holding to situations "where special conditions of probation [need] not [be] orally pronounced at [a] disposition hearing").

whether, in addition to being "entitled to a written order of disposition containing all the terms of disposition," a juvenile is entitled "to an oral pronouncement containing all of [those] terms?"[136] The Court held that as a matter of due process, there is no requirement "that the trial court issue an oral pronouncement of disposition," and that the relevant rule of juvenile procedure contains "adequate safeguard[s] for minors who wish to challenge their written dispositions."[137] The majority based its due process analysis on the flexibility in juvenile cases as distinguished from adult criminal cases.[138] The flexibility allows the State to act in its *parens patriae* role differently, and therefore, a balance is struck with respect to "informality" and "flexibility."[139] What is odd about this rationale is that flexibility is used by the Court as the predicate for providing less information to juveniles,[140] who it would seem, need more information.

Chief Justice Pariente concurred because of her desire to discuss a separate issue not before the Court, "but which nevertheless deserve[d] attention."[141] The issue was "the lack of adequate gender-specific programs and services for . . . delinquent girls"[142] "with a history of sexual abuse and depression, [who] acted out and committed a misdemeanor domestic battery."[143] The juvenile before the court in *N.C.*, who did not receive the services she needed "in a lower level program or . . . intensive home services," and thus, was placed in a higher level program, demonstrated the need of the governmental branches to "cooperate to ensure that [the] juvenile justice system can fulfill its mandate of providing rehabilitation [services] to children . . . most at risk and most [at] need."[144]

The issue of whether a fine can be part of a disposition, among other issues, was before the Fifth District Court of Appeal recently in *A.M.P. v. State*.[145] At disposition, the court held that "the fact that she went to trial cost the taxpayers in this community a greater amount. And [the court would] like to have fines [that] have some relationship to the impact on the community."[146] The appellate court held "that the trial court [had] no power to impose a fine on a juvenile in . . . delinquency proceeding[s] because [the]

136. *N.C.*, 882 So. 2d at 991.
137. *Id.* at 993 (citing FLA. R. JUV. P. 8.135).
138. *Id.* at 994.
139. *Id.* (citing Schall v. Martin, 467 U.S. 253, 263 (1984)).
140. *Id.*
141. *N.C.*, 882 So. 2d at 996 (Pariente, C.J., concurring).
142. *Id.*
143. *Id.* at 997.
144. *Id.*
145. 927 So. 2d 97, 98 (Fla. 5th Dist. Ct. App. 2006).
146. *Id.* at 99.

imposition of a fine is not included within the powers of disposition given to the trial court in a delinquency proceeding."[147]

In a second case involving the powers of the delinquency court, *B.R. v. State*,[148] among the issues was the question of whether or not the trial court could, at disposition, refuse to allow the juvenile's parent to speak.[149] The appellate court reversed on the basis of a state statute which required the Florida court to give all parties the right to comment before determining and announcing its disposition.[150] To make matters worse, as the appellate court explained, in addition to preventing the respondent's mother from speaking at the dispositional hearing, the trial court made statements which discouraged the child's right not to plead guilty in contravention of prior Florida case law.[151] The appellate court reversed, ordering that a new dispositional hearing be held before a different judge.[152]

An issue that comes up with some regularity is the question of the juvenile court's ability to order the DCF to provide certain services to children before the delinquency court. One such issue is treatment for a juvenile detained under the Jimmy Ryce Act.[153] Several courts have now held that the trial court exceeded its authority in ordering DCF to provide a specific treatment for such children including, most recently, the Fourth District Court of Appeal in *Department of Children & Families v. C.B.*[154]

In *R.D.W. v. State*,[155] a case involving an unusual factual scenario, a juvenile charged with possession of cannabis, who later entered a plea of no contest to the charge—and where the court withheld adjudication placing the youngster on probation—appealed from the dispositional order to the extent that it required him to remove a tattoo from his neck as a special condition of the probation.[156] The appellate court reversed, finding no legal basis upon

147. *Id.* at 100.

148. 902 So. 2d 333 (Fla. 5th Dist. Ct. App. 2005).

149. *Id.* at 334.

150. *Id.* at 335 (citing FLA. STAT. § 985.23(1)(d) (2004)). The opinion was also based on prior Florida case law which "held that a trial court's failure to allow a child's parents to testify at a disposition hearing constitutes reversible error." *Id.* (citing K.R. v. State, 584 So. 2d 1132 (Fla. 5th Dist. Ct. App. 1991) and T.H. v. State (*T.H. I*), 573 So. 2d 1090 (Fla. 5th Dist. Ct. App. 1991)).

151. *Id.* (citing A.S. v. State, 667 So. 2d 994, 995–96 (Fla. 3d Dist. Ct. App. 1996)).

152. *B.R.*, 902 So. 2d at 336.

153. *See* FLA. STAT. §§ 394.910-.932 (2006).

154. 884 So. 2d 1035 (Fla. 4th Dist. Ct. App. 2004); *see also* Dep't of Child. & Fams. v. Harter, 861 So. 2d 1274 (Fla. 5th Dist. Ct. App. 2003); Dep't of Child. & Fam. Servs. v. I.C., 742 So. 2d 401 (Fla. 4th Dist. Ct. App. 1999).

155. 927 So. 2d 195 (Fla. 5th Dist. Ct. App. 2006).

156. *Id.* at 195–96.

which the court could enter the order of tattoo removal.[157] The test for special conditions of probation is found in the Supreme Court of Florida opinion *Biller v. State*.[158] There was no evidence in the record in *R.D.W.* that the tattoo had anything to do with the condition of probation found in *Biller*, such as the "relationship to the crime which the defendant was convicted, . . . conduct that is in itself criminal, or . . . conduct which is reasonably related to the defendant's future criminality."[159] The State argued that state law provides that a minor may not be tattooed without written, notarized consent of the parent or guardian, and therefore it would violate the law for the juvenile to have a tattoo placed on his or her body unless parental permission is obtained.[160] The court rejected this argument, finding that it is "the person who tattooed the minor who breaks the law."[161] Judge Palmer dissented in the appellate court on the ground that having the tattoo was unlawful.[162]

Restitution-related issues come up repeatedly before Florida's intermediate appellate courts.[163] In *C.T.H. v. State*,[164] a juvenile had been charged with trespass to a structure and resisting arrest.[165] The child pleaded no contest.[166] At a restitution hearing, the complaining witnesses testified that the juvenile had trespassed on his property several times, sprayed a fire extinguisher, ransacked the house and that property was taken.[167] The trial court ordered $1,279 in restitution.[168] Because the loss must be connected causally to the offense charged and cannot be ordered for an unconnected offense, and where, in the case at bar, it was unclear what damage related to the trespass charges, the court on appeal reversed and remanded for a new restitution hearing.[169] The same issue was before the court in *S.M. v. State*.[170] The child pleaded no contest to trespass in a conveyance (a vehicle).[171] At the restitution hearing, the owner of the automobile testified to $2647.71 in dam-

157. *Id.* at 195.
158. 618 So. 2d 734 (Fla. 1993).
159. *R.D.W.*, 927 So. 2d at 196 (citing *Biller*, 618 So. 2d at 734–35).
160. *Id.*
161. *Id.*
162. *Id.* at 197 (Palmer, J., dissenting).
163. *See* Dale, *2004 Survey*, *supra* note 4, at 404–05.
164. 905 So. 2d 1031 (Fla. 5th Dist. Ct. App. 2005).
165. *Id.* at 1031.
166. *Id.* at 1032.
167. *Id.*
168. *Id.*
169. *C.T.H.*, 905 So. 2d at 1032–33; *see also* Glaubius v. State, 688 So. 2d 913 (Fla. 1997); Johnston v. State, 870 So. 2d 877 (Fla. 1st Dist. Ct. App. 2004); Faulkner v. State, 582 So. 2d 783 (Fla. 5th Dist. Ct. App. 1991).
170. 881 So. 2d 78 (Fla. 5th Dist. Ct. App. 2004).
171. *Id.* at 79.

age.[172] The appellate court reversed and remanded because there was no evidence showing the juvenile was responsible for the damage.[173] It, too, was reversed and remanded for a new restitution hearing.[174]

III. DEPENDENCY

One of the commonly litigated grounds for dependency in Florida is whether a child is at substantial risk of imminent abuse, abandonment, or neglect by a parent, legal custodian, or sibling.[175] In *M.W. v. Department of Children and Family Services (M.W. II)*,[176] a father appealed from a dependency finding as to three natural children based upon his sexual abuse of a step-sibling.[177] Despite the fact that a psychologist testified that the chances of the subject children being abused was "below base rates but . . . not zero by any means,"[178] the appellate court affirmed.[179] Because the nature of the harm was so great, the court ruled it was intolerable to allow even a low probability of abuse.[180]

Under Florida law, a dependency petition does not have to be filed against both parties.[181] A petition may allege acts by only one parent.[182] However, parents who are not respondents are nonetheless parties and, as such, are entitled to be served with pleadings, orders, and papers.[183] However, because they are not respondents, they have neither a statutory or constitutional right to counsel according to the court in *C.L.R. v. Department of Children & Families*.[184]

Under Florida law, gay and lesbian couples may not marry.[185] Florida does not recognize same sex marriages validly entered elsewhere.[186] While

172. *Id.*
173. *Id.* at 80.
174. *Id.*
175. *See* FLA. STAT. § 39.01(14), (34) (2006) (describing Florida's definition of dependency and legal custody); R.F. (*In re* M.F.) v. Dep't of Child. & Fams., 770 So. 2d 1189 (Fla. 2000).
176. 881 So. 2d 734 (Fla. 3d Dist. Ct. App. 2004).
177. *Id.* at 734.
178. *Id.* at 737 (emphasis omitted).
179. *Id.*
180. *Id.*
181. FLA. STAT. § 39.501(3)(c) (2006).
182. *Id.*
183. FLA. R. JUV. P. 8.225(c).
184. 913 So. 2d 764, 767 (Fla. 5th Dist. Ct. App. 2005).
185. FLA. STAT. § 741.212 (2006).
186. *Id.*

Florida law does allow gay and lesbian couples to act as foster parents,[187] they may not adopt.[188] In *D.E. v. R.D.B.*,[189] a mother's former gay partner commenced a dependency proceeding alleging the child born through artificial insemination was abused and/or neglected because the biological mother cut off visitation with the former partner.[190] Under Florida law, a non-parent cannot seek custody or visitation.[191] The appeals court held that a parent's decision to deny contact with someone who has no rights to custody or visitation with a "child is an inadequate ground upon which to base" dependency adjudication.[192]

DCF sometimes seeks to place dependent children in residential mental health treatment facilities.[193] In 2000, the Supreme Court of Florida decided *M.W. v. Davis (M.W. I)*[194] in which it held that an adjudicatory hearing, albeit one that did not comply with Florida's civil commitment statute (known as the Baker Act), was required prior to such a placement.[195] The question in *In re J.W.*[196] was what should be the proper standard of proof in such a proceeding.[197] Making reference to the child's substantial liberty interest "in not being confined unnecessarily for medical treatment," the Court in *J.W.* held that the standard was clear and convincing evidence.[198]

Florida law provides that a parent of sufficient means can be ordered to pay fees established by DCF for the care of a child who has been placed in shelter care as long as the parent is afforded notice and an opportunity to be heard about the amount of the assessment.[199] In *D.W. v. Department of Children & Families*,[200] a case indistinguishable from the opinions and involving the same judge, the Honorable Daniel Dawson, the appeals court reversed and remanded for a new hearing on notice to the parents because the support order had been entered without notice.[201] The circumstances under which the

187. *See* Lofton v. Sec'y of the Dep't of Child. & Fam. Servs., 358 F.3d 804, 808, 814 (11th Cir. 2004).
188. FLA. STAT. § 63.042.
189. 929 So. 2d 1164 (Fla. 5th Dist. Ct. App. 2006).
190. *Id.*
191. *Id.* (citing Wakeman v. Dixon, 921 So. 2d 669 (Fla. 1st Dist. Ct. App. 2006)).
192. *Id.* at 1165.
193. *See M.W. v. Davis (M.W. I)*, 756 So. 2d 90 (Fla. 2000).
194. *Id.*
195. *Id.* at 109.
196. 890 So. 2d 337 (Fla. 2d Dist. Ct. App. 2004).
197. *Id.* at 339.
198. *Id.* at 340.
199. FLA. STAT. § 39.402(11)(a) (2006).
200. 882 So. 2d 491 (Fla. 5th Dist. Ct. App. 2004).
201. *Id.* at 493; *see* R.M. v. Dep't of Child. & Fams., 877 So. 2d 797 (Fla. 5th Dist. Ct. App. 2004); L.O. v. Dep't of Child. & Fams., 876 So. 2d 1292 (Fla. 5th Dist. Ct. App. 2004).

payment orders were made are remarkable. As a matter of administrative convenience, they were "entered under [a] separate case number in the domestic relations division, not in the dependency" division by Judge Dawson.[202] As the appeals court noted, it is possible for the court to enter a support order other than through Chapter 39.[203] But to do so, without notice to the parent, some seventy years after the seminal United States Supreme Court ruling in *Mullane v. Central Hanover Bank & Trust Co.*,[204] which established the due process right to notice and an opportunity to be heard, where the government is involved in a taking of property, is inexplicable.[205]

The question of whether non-respondent custodians are entitled to payment of attorneys fees in a dependency proceeding was before the Fifth District Court of Appeal in *Department of Children & Families v. H.G.*[206] A child with multiple developmental and emotional problems was in the care of his uncle and aunt, his mother having died and his father having been incarcerated for most of the child's life.[207] When the aunt and uncle could no longer care for the boy and because he needed residential care, DCF commenced a dependency proceeding in which the custodians were notified but not named as respondents.[208] The custodians hired a lawyer for whom they later sought payment.[209] The appeals court overturned the trial court's award of attorney's fees.[210] It held that the custodians were merely participants in the proceeding and not parties.[211] Only parties are statutorily authorized to seek fees.[212]

A question involving the application of the constitutional right to confrontation and cross-examination of one's accuser in a dependency court was before the Third District Court of Appeal in *A.B. v. Department of Children & Families Services*.[213] The mother was charged with neglect for failure "to protect her [fifteen-year-old daughter] from the stepfather's sexual and physical abuse."[214] The child testified by deposition.[215] The appeals court

202. *D.W.*, 882 So. 2d at 493.
203. *Id.*
204. 339 U.S. 306 (1950).
205. *Id.* at 320.
206. 922 So. 2d 1072 (Fla. 5th Dist. Ct. App. 2006).
207. *Id.* at 1073.
208. *Id.*
209. *Id.*
210. *Id.* at 1075.
211. *H.G.*, 922 So. 2d at 1075.
212. *Id.* (citing FLA. STAT. §§ 39.01(49), 57.105 (2006)).
213. 901 So. 2d 324 (Fla. 3d Dist. Ct. App. 2005).
214. *Id.* at 325.

rejected the mother's constitutional claim for two reasons.[216] First, it held the dependency proceeding is a civil rather than criminal proceeding and, therefore, the Sixth Amendment right to confrontation did not apply.[217] Second, "the [respondent's] counsel was given [the] opportunity to cross-examine the child" at the deposition.[218]

IV. PROSPECTIVE ABUSE AND NEGLECT

Florida courts continue to be faced with vexing issues related to the interpretation of the Supreme Court of Florida's 1991 opinion in *Padgett v. Department of Health & Rehabilitative Services*,[219] in which the Court held that a trial court may constitutionally terminate parental rights to a child who had not yet been abused or neglected based upon past abuse by the parent of another child.[220] In *K.A. v. Department of Children & Family Services*,[221] the Second District Court of Appeal affirmed the termination of parental rights to a child who had been the subject of egregious abuse, but reversed as to two older siblings on grounds that there was no competent, substantial evidence that the parent posed a substantial risk of significant harm to those children.[222] The court found "no nexus or predictive relationship between the past abuse of the infant . . . and prospective abuse of the older children," under a test set forth in a number of earlier intermediate appellate court opinions.[223] In so doing, however, the court recognized a conflict among the district courts of appeal involving the proper analytic framework for determining whether or not another child may become a victim of prospective abuse.[224] It commented upon the difference between the Fifth District view that allows a presumption that past egregious abuse of one child is predictive of future abuse of another child[225] and the Fourth District position that a pre-

215. *Id.*; *see* FLA. R. JUV. P. 8.245(g)(3)(B)(ii) (providing that someone who is unavailable because he or she lives more than 100 miles from the place of hearing or is out of state may give testimonial evidence by deposition).

216. *A.B.*, 901 So. 2d at 326–27.

217. *Id.*

218. *Id.* at 327.

219. 577 So. 2d 565 (Fla. 1991).

220. *Id.* at 571.

221. 880 So. 2d 705 (Fla. 2d Dist. Ct. App. 2004).

222. *Id.* at 710.

223. *Id.* at 709 (citing A.D. (*In re* G.D.) v. Dep't of Child. & Fam. Servs., 870 So. 2d 235, 238 (Fla. 2d Dist. Ct. App. 2004)).

224. *Id.*

225. *Id.*; *see also* Dep't of Child. & Fam. Servs. v. B.B., 824 So. 2d 1000, 1007 (Fla. 5th Dist. Ct. App. 2002); A.B. v. Dep't of Child. & Fam. Servs., 816 So. 2d 684 (Fla. 5th Dist. Ct. App. 2002).

sumption is unconstitutional "because it relieves the state of its burden to demonstrate that the reunification of [a] parent and child poses a substantial risk of harm to that child."[226] The court in *K.A.* did not reach this question, because applying either test, it concluded, the State had not met its burden of showing that the parent posed a substantial risk of significant harm to the two older children, and thus far the trial court's position was not found to be erroneous.[227]

The issue referred to by the appellate court in *K.A.* on the question of proof in a termination of parental rights case involving harm to one child serving as the basis for a claim involving a second child finally reached the Supreme Court of Florida in *Florida Department of Children & Families v. F.L. (F.L. II)*[228] The Court analyzed the statute, finding it constitutional, but reversed the Fourth District opinion on the grounds that the State must prove, in such a case, both prior involuntary termination to a sibling and "a substantial risk of significant harm to the current child."[229] The opinion, over a dissent by Justice Weld with which Justice Cantero concurred, interpreted *Padgett* in light of the 1998 amendment to Chapter 39 as remaining unchanged in terms of its requirements.[230] Thus, in addition to being obligated to prove both a prior involuntary termination of the parental rights for a sibling and a substantial risk of significant harm to the child before the court, the State must also prove that termination of parental rights is the least restrictive methodology to protect the child from harm.[231] The Court explained that egregious abuse and neglect of another child tends to indicate a greater risk of harm to the current child, while the amount of time that has passed since the prior involuntary termination is also relevant.[232] Evidence of change of circumstances of the parent since the prior involuntary termination was also viewed by the court as being significant as past conduct necessarily has some predictive value regarding the parent's future conduct.[233] Finally, the court emphasized that the parent was "not required to show . . . changed circumstances to avoid a termination of rights under section 39.806(1)(i)."[234]

226. *K.A. (In re K.A.)*, 880 So. 2d at 709 n.1 (citing F.L. v. Dep't of Child. & Fams. (*F.L. I*), 849 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2003)).
227. *Id.* at 709.
228. 880 So. 2d 602 (Fla. 2004).
229. *Id.* at 611.
230. *Id.* at 609.
231. *Id.* at 610.
232. *Id.*
233. *F.L. II*, 880 So. 2d at 610.
234. *Id.*

Incarceration is another ground for termination of parental rights in Florida.[235] Interpretation of the termination statute in the context of the parent serving a prison sentence was before the Supreme Court of Florida in the fall of 2004.[236] The certified conflict issue before the Court was whether the incarceration provision, requiring a parent to be incarcerated for a substantial portion of the period of time before the child obtains the age of eighteen, requires consideration of the entire period of incarceration or only the period to be served after the termination petition has been filed.[237] In *B.C. v. Department of Children & Families (B.C. II)*,[238] the Supreme Court of Florida held that only the remaining period of incarceration is the appropriate standard.[239] Applying principles of statutory construction, and over a dissent by Justice Wells, the Court applied a narrow interpretation of the statutory language and a constitutionally-required focus on future harm to the child.[240]

The second case involving egregious conduct as grounds for termination of parental rights was *D.A.D. (In re D.A.D. II) v. Department of Children & Family Services*.[241] In that case, the child's father strangled a man to death in the family home while the mother and children were visiting relatives in another state.[242] There was also evidence that "the [f]ather had shot his brother-in-law in an unsuccessful murder-for-hire plot," although he was not charged with this attempt.[243] This evidence was presented at the adjudicatory hearing as well as evidence of what was described by the court as the children's "long [and] harrowing relationship with [their] [f]ather."[244] The children's "[f]ather was an alcoholic and [a] cocaine-abuser with an extensive criminal record who was frequently jailed" and "never contributed money [to] the household expenses" as well as an individual who exhibited "jealous and controlling behavior toward the [m]other."[245] The appellate court held that the "[f]ather's homicidal conduct was deplorable and outrageous." However, there was inadequate evidence to establish a "sufficient

235. FLA. STAT. § 39.806(1)(d) (2006).
236. B.C. v. Dep't of Child. & Fams. (*B.C. II*), 887 So. 2d 1046 (Fla. 2004).
237. *Id.* at 1051.
238. *Id.* at 1046; *see also* Dep't of Child. & Fam. Servs. v. B.C. (*B.C. I*), 884 So. 2d 995 (Fla. 4th Dist. Ct. App. 2003); J.W. (*In re* A.W.) v. Dep't of Child. & Fam. Servs., 816 So. 2d 1261 (Fla. 2d Dist. Ct. App. 2003); J.P.C. (*In re* J.D.C.) v. Dep't of Child. & Fam. Servs., 819 So. 2d 264 (Fla. 2d Dist. Ct. App. 2002).
239. *B.C. II*, 887 So. 2d at 1055.
240. *See id.* at 1057.
241. 903 So. 2d 1034 (Fla. 2d Dist. Ct. App. 2005).
242. *Id.* at 1036.
243. *Id.*
244. *Id.*
245. *Id.* at 1038.

nexus between [that] conduct and the specific harm to the children" in support of an egregious conduct finding.[246] Rather, the appellate court held the father's conduct which amounted to "an unrelenting pattern of abuse," neglect, and abandonment, did constitute egregious conduct.[247] Therefore, the court affirmed the termination of parental rights.[248]

As noted previously in a survey article in this law review, the parent's failure to appear at a hearing in a termination of parental rights case can result in a default and a termination of parental rights.[249] The issue arose again in *Department of Children & Families v. A.S.*[250] In an opinion which conflicted with courts in other districts, the Fifth District held that the failure to appear by a parent does not constitute consent to termination under one provision of the Florida Statutes rendering proceedings involuntary.[251] There are two separate provisions of the *Florida Statutes*—one governing involuntary termination and the other governing voluntary termination.[252] The court engaged in a process of statutory construction and concluded that the legislature did not intend that consent under the one provision governing an involuntary proceeding be turned into one that is voluntary.[253] For these reasons, it reversed noting its conflict with the Second District.[254]

A second failure to appear case resulting in termination of parental rights is *E.A. v. Department of Children & Families Services*.[255] In this case, the parent arrived at the termination hearing about twenty-two minutes after the testimony began, explaining that he had been "ensnarled in a traffic jam resulting from an automobile accident."[256] He further indicated that he had called the court and left a message relating to his tardiness.[257] The trial court, nonetheless, determined that the respondent had been defaulted and would not be permitted to participate in the proceeding.[258] Under Florida law, if the parent fails to appear at the appropriate time and place, both statute and the rules of juvenile procedure give the court the ability to consider the parent's

246. *D.A.D. (In re D.A.D. II)*, 903 So. 2d at 1037.
247. *Id.* at 1039.
248. *Id.* at 1041.
249. *See* Dale, *2002 Survey*, *supra* note 27, at 22–23.
250. 927 So. 2d 204 (Fla. 5th Dist. Ct. App. 2006).
251. *Id.* at 205.
252. *See* FLA. STAT. § 39.801(3)(d) (2006).
253. *A.S. (In re R.S.)*, 927 So. 2d at 208–09.
254. *Id.* at 209 (citing *In re* A.D.C., 854 So. 2d 720 (Fla. 2d Dist. Ct. App. 2002); and *In re* T.S., 855 So. 2d 679 (Fla. 2d Dist. Ct. App. 2003)).
255. 894 So. 2d 1049 (Fla. 5th Dist Ct. App. 2005).
256. *Id.* at 1051.
257. *Id.*
258. *Id.*

absence to constitute consent to the termination of his or her parental rights.[259] However, referring to prior case law, the appellate court in *E.A.* held that the purpose of the rule was "not to terminate parental rights on a 'gotcha' basis."[260] Concluding that implied consent based upon a late arrival to a hearing should be disfavored, the appellate court reversed.[261]

In the event a parent fails to appear and a termination is entered, a motion to vacate a default judgment terminating parental rights is appropriate, and if the parent has a meritorious defense, the motion should be granted.[262] This matter arose in *E.S. v. Department of Children & Family Services*.[263] Both the mother and her appointed counsel were absent at the final hearing on termination of her parental rights.[264] The next day the mother moved to set aside the default on the grounds that she was unable to attend the hearing because she had medical justifications and that appointed counsel had advised the judge's chambers that he was in another hearing and was therefore unable to be in attendance at the present trial.[265] Although the appellate court shared the trial court's skepticism about the sufficiency of the mother's medical excuse, the court held that the mother had acted with due diligence in filing the motion and given the fact that the mother had attended all of the previous hearings in the case, she should have been permitted to testify in opposition to the argument that her medical excuse was insufficient and she had no meritorious defense.[266] For these reasons the appellate court reversed.[267]

In *In re T.B. v. Department of Children & Family Services*,[268] the trial court granted termination of parental rights and denied a parent's request for a continuance resulting in a failure to appear at the adjudicatory hearing.[269] The appellate court concluded that the trial court abused its discretion in not granting the father's request for a continuance.[270] The father had driven nine hours to this hearing, but could not attend on the next day, which was when

259. *Id.* (citing B.H. v. Dep't of Child. & Fams., 882 So. 2d 1099, 1100 (Fla. 4th Dist. Ct. App. 2004)).
260. *E.A.*, 894 So. 2d at 1051.
261. *Id.* at 1051–52.
262. E.S. v. Dep't of Child. & Fam. Servs., 878 So. 2d 493, 497 (Fla. 3d Dist. Ct. App. 2004).
263. *Id.* at 493.
264. *Id.* at 494.
265. *Id.*
266. *Id.* at 496.
267. *E.S.*, 878 So. 2d at 497.
268. 920 So. 2d 170 (Fla. 2d Dist. Ct. App. 2006).
269. *Id.* at 171.
270. *Id.* at 174.

the case was rescheduled.[271] The court "ordered the father to appear the next day before [a different judge], and the father [had] responded that he could not."[272] The appellate court reversed on the grounds that the trial court "placed more emphasis on judicial econom[ic] . . . convenience than on the father's right to [care for] his child and . . . have his day in court,"[273] which constituted reversible error.[274]

One of the basic grounds for termination of parental rights is abandonment.[275] Another is failure to comply with the case plan.[276] Regardless of the grounds for termination of parental rights, the Department of Children and Family Services must plead the correct grounds and then offer proof.[277] In *T.M. v. Department of Children & Families (T.M. II)*,[278] the Department alleged that a father failed to comply with the case plan and his continued involvement with the child threatened the child's life and safety.[279] The appellate court found that the Department had not proved either ground, and thus a court finding of abandonment must be reversed because that was not one of the grounds pleaded.[280]

The right to counsel for parents in dependency and termination of parental rights proceedings in Florida is governed by statute.[281] The United States Supreme Court has never held that there is an absolute right to counsel for parents even in termination of parental rights cases.[282] Furthermore, the Supreme Court of Florida has held that the state constitutional due process clause does not create a right to appointed counsel in termination of parental rights cases.[283] The Court has spoken about the effectiveness of counsel in a dependency context.[284] That topic has been the subject of discussion in survey articles in this law review[285] and in an incisive student article.[286] The

271. *Id.* at 171.
272. *Id.*
273. *T.B.*, 920 So. 2d at 174.
274. *Id.* at 171.
275. FLA. STAT. § 39.806(1)(b) (2006).
276. *Id.* § 39.806(1)(e).
277. *See* T.M. v. Dep't of Child. & Fams. (*T.M. II*), 905 So. 2d 993, 998 (Fla. 4th Dist. Ct. App. 2005).
278. *Id.* at 993.
279. *Id.* at 995.
280. *Id.* at 998–99.
281. FLA. STAT. §§ 39.801-.817 (2006).
282. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).
283. *In re* D.B., 385 So. 2d 83, 87 (Fla. 1980).
284. *See* S.B. v. Dep't of Child. & Fams., 851 So. 2d 689, 690–92 (Fla. 2003).
285. Dale, *2004 Survey*, *supra* note 4, at 423.
286. Michele R. Forte, *Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 193 (2003).

question left unanswered by the Supreme Court of Florida was whether the statutory right to counsel for parents in TPR cases would generate a claim of ineffective assistance of counsel. That issue was before the Fourth District Court of Appeal in *E.T. v. State*.[287] In a detailed opinion by Judge May with a partial dissent by Judge Stevenson, the court held as a technical matter that the parent, who filed a petition for a writ of habeas corpus had used the incorrect methodology and instead should have been taken on appeal.[288] The court also certified the question of whether Florida recognizes a claim of ineffective assistance of counsel arising from a lawyer's representation of a parent in a termination of parental rights case and what procedures should be followed to pursue such a claim.[289] Judge Stevenson dissented, writing that he would hold that Florida's due process clause does guarantee a right to meaningful and effective assistance of counsel in a TPR proceeding.[290]

V. ADOPTION

The Supreme Court of Florida has recently spoken on the issue of the need of consent by the Department of Children and Family Services to adoption proceedings in *B.Y v. Department of Children & Families*,[291] clearing up a conflict between the district courts of appeal.[292] The Court reviewed the state statutes governing child welfare matters and analyzed the ongoing jurisdiction and obligations of the trial court.[293] The Court reviewed the *Florida Statutes* governing consent to adoption, finding that a court may finalize an adoption without consent of the Department if such consent is unreasonably withheld.[294] Thus, given the legislative mandates for the Court's continued jurisdiction to advance children's best interests, the Court has the authority to grant the adoption without the consent of the Department when such consent is unreasonably withheld.

The First District Court of Appeal recently held that there is a right to counsel for a parent in a Chapter 63 adoption case predicated upon the adverse parent's right to defend a petition to terminate parental rights pursuant to that chapter.[295] In *G.C. v. W.J.*,[296] the appellate court reversed the trial

287. 930 So. 2d 721 (Fla. 4th Dist. Ct. App. 2006).
288. *Id.* at 729.
289. *Id.*
290. *Id.* at 727 n.2, 729 (thirty-one states have addressed the issue); 1 MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT ¶ 4.06[1][c] (2006).
291. 887 So. 2d 1253 (Fla. 2004).
292. *Id.* at 1254.
293. *Id.* at 1255–56.
294. *Id.* at 1257.
295. G.C. v. W.J., 917 So. 2d 998, 999 (Fla. 1st Dist. Ct. App. 2005).

court holding that while Chapter 63 does not speak to express appointment of counsel, the entitlement was inherent or fundamental where parental rights are subject to termination.[297]

The issue of how courts hearing adoption cases and termination of parental rights cases relate to each other was before the appellate court in *In re S.N.W.*[298] The specific issue was whether the circuit court was required by statute to permit an adoption agency to intervene in a dependency proceeding.[299] Under the facts of the case, a dependency proceeding was brought against the birth mother who thereafter, independently, and without notice to DCF, contacted an adoption agency and adoption proceedings commenced.[300] "Prior to the adjudicatory hearing," the adoption agency filed a petition to terminate parental rights, but the petition was not filed within the dependency case.[301] While the TPR proceeding was pending, the agency "filed a request to intervene in the dependency action, . . . to dismiss [that] action, and [to] terminate the jurisdiction of the dependency court."[302] Although the issue was not strictly one of subject matter jurisdiction, the appellate court held that "[t]he court in which the adoption proceeding [was] pending and the court in which the dependency proceeding [was] pending are both circuit courts with jurisdiction to determine [the] issue[]."[303] Neither statute nor court opinion mandates how the circuit court may administer the reassignment of cases as long as the cases are within the jurisdiction of the circuit court.[304] However, Chapter 39 does say that the "orders of [a] dependency court 'shall take precedence over other custody and visitation orders' entered" in any other circuit court.[305] The appellate court concluded that the adoption agency was entitled to intervene in a dependency proceeding pursuant to the adoption law.[306]

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296. *Id.* at 998.

297. *Id.* For a more detailed explanation of the right to counsel for parents in termination of parental rights cases and dependency cases, see discussion *supra* p. 23. *See also* Michael J. Dale, *Providing Counsel to Children in Dependency Cases in Florida*, 25 NOVA L. REV. 769, 784 (2001).

298. Adoption Miracles, LLC (*In re* S.N.W.) v. S.C.W., 912 So. 2d 368 (Fla. 2d Dist. Ct. App. 2005).

299. *Id.* at 373.

300. *Id.* at 370.

301. *Id.*

302. *Id.* at 371.

303. *Adoption Miracles, LLC (In re S.N.W.)*, 912 So. 2d at 373–74.

304. *See id.* at 372.

305. *Id.* (quoting FLA. STAT. § 39.013(4) (2005)).

306. *Id.* at 374.

Finally, in *J.I. v. Department of Children & Family Services*,[307] the appellate court was faced with a procedural issue relating to whether DCF termination of parental rights permanency staffing meetings are subject to the Sunshine Law and whether failure to notify the public, the parents, and the attorneys of such a meeting violates the statute.[308] The court held that the Sunshine Law does not apply to termination of parental rights meetings that are carried out by DCF for the purpose of determining whether to file a petition to terminate the parental rights.[309] The court applied Florida case law, statutes, and the administrative code governing the Sunshine Law, concluding that nothing in the law provides that official action be taken at the staff meeting and further that Chapter 39 contains principles standing for the proposition that all information involving the child is to be confidential.[310]

VI. CURFEW

The issue of juvenile curfews has been before a variety of courts in a variety of jurisdictions for a number of years now.[311] The courts have generally upheld juvenile curfew ordinances where they are narrowly drawn and based upon documented evidence of the need for them to reduce crime.[312] The subject recently reached the Supreme Court of Florida for the second time.[313] The issue in *State v. J.P.*[314] was first, what level of constitutional analysis should be applied to two local Florida ordinances, second, whether the ordinances implicated juveniles' rights to free speech and assembly, and third, whether the ordinances were narrowly tailored to serve compelling governmental interests and therefore whether they violated the juveniles' constitutional right to freedom of movement and privacy.[315] First, the Court reaffirmed that strict scrutiny is applied in Florida.[316] Recognizing that a child's constitutional rights are not absolute, the Court held that the cities' assertion of a compelling interest in preventing victimization of youngsters can outweigh privacy right for the youngsters during curfew hours if the ordinances are narrowly tailored to achieve that end, and further, that the municipalities may have a compelling interest in protecting the juveniles and

307. 922 So. 2d 405 (Fla. 4th Dist. Ct. App. 2006).
308. *Id.* at 406.
309. *Id.* at 407.
310. *Id.*
311. *See* 1 DALE ET AL., *supra* note 290, ¶ 3.02[3][e][ii].
312. *Id.*
313. *See* State v. J.P., 907 So. 2d 1101, 1116–17 (Fla. 2004).
314. *Id.*
315. *Id.* at 1104–06.
316. *Id.* at 1109.

reducing juvenile crime, which would outweigh the juveniles' right to travel freely during this time period, again, as long as the ordinances are narrowly tailored.[317] Oddly, while the data supporting the compelling governmental interest was challenged by the juveniles, the Court held that statistical data is not necessary, nor is scientific analysis, to show the wisdom of the legislature's determination.[318] However, the Court concluded that the ordinances were not narrowly drawn because they imposed criminal sanctions for second and subsequent violations, and thus, did not meet strict scrutiny as they were antithetical to the municipalities' stated interest in protecting the juveniles from victimization.[319] Judge Wells and Judge Cantero dissented at length as to the strict scrutiny standard and other constitutional rights.[320]

VII. CONCLUSION

The Supreme Court of Florida has been quite active in dealing with several major issues involving the rights of children including curfews and standards for termination of parental rights, delinquency, and adoption. The intermediate appellate courts have also responded to important issues governing the rights of children. However, in addition, the intermediate appellate courts have continued their longstanding approach to juvenile justice and child welfare cases in which they hold the trial courts strictly accountable for compliance with both constitutional and state statutory obligations. On occasion, the appellate courts have been blunt in their response to errors of the trial courts that the appellate courts viewed as basic and obvious.

317. *Id.* at 1112–13.
318. *J.P.*, 907 So. 2d at 1117.
319. *Id.*
320. *Id.* at 1120–38 (Wells, J. and Cantero, J., dissenting).