Nova Law Review

Volume 29, *Issue* 2 2005 *Article* 10

2004 Survey of Florida Juvenile Law

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2004 SURVEY OF FLORIDA JUVENILE LAW

MICHAEL J. DALE*

I. INTRODUCTION

The Supreme Court of Florida was active this year, ruling on two very important cases in the child welfare field. In the area of termination of parental rights, it held that Florida's termination statute, providing that parental rights of a child may be terminated when the rights to a sibling have already been terminated,[1] does not create a rebuttable presumption that the parent must overcome to avoid transmission.[2] In other words, the burden of proof is not shifted to the parent. The State must prove a substantial risk of significant harm to the current child and do so by clear and convincing evidence.[3] In a second case, *S.B. v. Department of Children and Families*,[4] the Supreme Court of Florida ruled that where a parent's right to counsel in a dependency

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1. FLA. STAT. § 39.806(1)(i) (2004).
2. Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 609 (Fla. 2004).
3. *Id.* at 609–10.
4. 851 So. 2d 689 (Fla. 2003).

proceeding arises solely from statute,[5] the parent may not raise ineffective assistance of counsel in a collateral proceeding by writ of habeas corpus.[6]

At the intermediate appellate court level, the courts spent a substantial period of time dealing with a number of child welfare issues involving both dependency and termination of parental rights. The appellate courts applied the so-called "nexus" test, holding that in finding for termination, the trial court must tie harmful behavior by the parent to the particular child who is the subject of the proceeding.[7] The appellate courts also dealt with cases involving incarcerated parents[8] and the obligations of the trial court to properly handle situations where a parent fails to appear.[9]

Florida's intermediate appellate courts were less active in the delinquency area, with one major exception: *Tate v. State*.[10] *Tate* is the highly publicized ruling from the Fourth District Court of Appeal on the court's role in determining competency of a juvenile to stand trial.[11] In addition, the appellate courts ruled on several cases involving delinquency issues arising in the school setting.[12]

II. JUVENILE DELINQUENCY

A. *Adjudicatory Issues*

Tate, the competency case which drew national attention, involved the death of a six-year old playmate at the hands of a twelve-year old boy.[13] The case initially resulted in a conviction in adult court and a life sentence for the

5. *See* § 39.013(1). The court previously held that a parent has a constitutional, as opposed to statutory, right to counsel in a dependency proceeding only when the proceeding could result in termination of parental rights or if a parent could potentially be charged with child abuse. *In re* D.B., 385 So. 2d 83 (Fla. 1980).

6. *S.B.*, 851 So. 2d at 691.

7. J.F. v. Dep't of Children & Families, 866 So. 2d 81, 87 (Fla. 4th Dist. Ct. App. 2004); N.S. v. Dep't of Children & Families, 857 So. 2d 1000, 1001 (Fla. 5th Dist. Ct. App. 2003).

8. *In re* A.D.C., 854 So. 2d 720 (Fla. 2d Dist. Ct. App. 2003); C.B. v. Dep't of Children & Families, 874 So. 2d 1246 (Fla. 4th Dist. Ct. App. 2004).

9. R.P. v. Dep't of Children & Families, 835 So. 2d 1212 (Fla. 4th Dist. Ct. App. 2003); R.H. v. Dep't of Children & Family Servs., 860 So. 2d 986 (Fla. 3d Dist. Ct. App. 2003); *In re* I.A., 857 So. 2d 310 (Fla. 2d Dist. Ct. App. 2003); *In re* B.B., 858 So. 2d 1184 (Fla. 2d Dist. Ct. App. 2003); *In re* C.D., 867 So. 2d 405 (Fla. 2d Dist. Ct. App. 2003); A.M. v. Dep't of Children & Families, 853 So. 2d 1084 (Fla. 4th Dist. Ct. App. 2003).

10. 864 So. 2d 44 (Fla. 4th Dist. Ct. App. 2003).

11. *Id.* at 47.

12. State v. J.T.D., 851 So. 2d 793 (Fla. 2d Dist. Ct. App. 2003); M.H. v. State, 851 So. 2d 233 (Fla. 4th Dist. Ct. App. 2003).

13. *Tate*, 864 So. 2d at 47.

defendant, Lionel Tate.[14] The appellate opinion established a procedural approach to the evaluation of competency for the young defendant in Florida's juvenile and adult criminal justice systems.[15] The *Tate* case was also the impetus for a special issue of the NOVA LAW REVIEW entitled *The Aftermath of the Lionel Tate Case*.[16]

Competence recently came up again in *Department of Children and Families v. C.R.C.*,[17] involving the issue of proper placement of a child who was previously determined incompetent to stand trial due to mental illness. Florida law provides that when a child is found incompetent based on mental illness or retardation, the child may be committed to the Department of Children and Families (DCF) for restoration of competency, treatment, and training.[18] If a child is adjudicated incompetent to proceed solely because of age or immaturity, the child must not be committed to DCF.[19] In *C.R.C.*, the trial court received two reports from examining psychologists concluding that the child was not competent to stand trial on the basis of the child's age and understanding.[20] Neither expert found incompetency on mental illness or retardation grounds.[21] However, the court made such a finding and ordered the child placed with DCF.[22] The appellate court reversed, holding quite simply that the trial court's order departed from the requirements of Chapter 985,[23] because its findings were not supported by the written reports of the examiners.[24]

Delinquency charges based upon school-related activities often come before the Florida courts. In these cases, a common issue is the legality of a search conducted in the school. The leading case is the 1985 United States Supreme Court opinion in *New Jersey v. T.L.O.*,[25] in which the high Court ruled that school officials must have reasonable grounds to suspect that the search would produce evidence that the student violated either school rules or the law.[26] *T.L.O.* related cases have been the subject of analysis in this

14. *Id.* at 46.
15. *Id.* at 48.
16. *See generally* 28 NOVA L. REV. p. 467–603 (2004).
17. 867 So. 2d 592 (Fla. 5th Dist. Ct. App. 2004).
18. FLA. STAT. § 985.223(2) (2004).
19. *Id.*
20. *C.R.C.*, 867 So. 2d at 593.
21. *Id.* at 593–94.
22. *Id.* at 594.
23. FLA. STAT. ch. 985 (2004).
24. *Id.*
25. 469 U.S. 325 (1985).
26. *Id.* at 341.

review in the past.[27] In *State v. J.T.D.*,[28] the Second District Court of Appeal reversed the trial court's suppression of a child's confession in a delinquency case arising out of a petition charging a middle schooler with lewd and lascivious molestation of another student.[29] The school investigation of the child involved both a St. Petersburg police officer and the school's resource officer.[30] The court held that the school official was not acting as an enforcement agent, and therefore, the necessity for *Miranda* warnings did not exist.[31] The court found that the police officer was merely present during the interview, although in and out of the room, and asked no questions.[32] The opinion also states that the officer heard the admission, and that after the admission, the school official turned the questioning over to the police official.[33] The officer started to read the child *Miranda* warnings but, because another problem arose, he left and never completed them.[34] The appellate court held that under the facts, *Miranda* warnings were not necessary as the police officer's mere presence did not transform the school official's interview of the child into a custodial interrogation.[35] The court did not view the setting as traditional custody as understood under *Miranda*.[36] While the child could not leave the principal's room, the court held that it was not determinative of whether it was a custodial interrogation that had to be preceded by *Miranda* warnings.[37] The court came to this conclusion based upon the principle that children's liberty interests are lessened in the school setting.[38] As the appellate court put it, "[e]stablishing a blanket rule that excludes the presence of a police officer whenever a school administrator questions a student unless *Miranda* warnings are given turns a blind eye to the threatening world surrounding our schools."[39]

A second school suspension delinquency case is *M.H. v. State*.[40] In this case the child moved to suppress statements made to a school official in the presence of a law enforcement officer who was employed as a school re-

27. *See* Michael J. Dale, *2003 Survey of Juvenile Law*, 28 NOVA L. REV. 543, 567 (2004) [hereinafter Dale *2003*].
28. 851 So. 2d 793 (Fla. 2d Dist. Ct. App. 2003).
29. *Id.* at 794, 797.
30. *Id.* at 794.
31. *Id.* at 797.
32. *Id.* at 795–96.
33. *J.T.D.*, 851 So. 2d at 795.
34. *Id.*
35. *Id.* at 797.
36. *Id.* at 796.
37. *Id.*
38. *J.T.D.*, 851 So. 2d at 797.
39. *Id.*
40. 851 So. 2d 233 (Fla. 4th Dist. Ct. App. 2003).

source officer.[41] Charges arose out of an altercation with another student in the middle school.[42] The school official questioned the child in the presence of the resource officer.[43] The court noted that "[a]ll questioning was done by the school official except that the resource officer asked one question at the end."[44] Without any analysis, the court held that "[t]he mere presence of a law enforcement officer, when a student is being questioned by a school official, does not amount to a custodial interrogation requiring *Miranda* warnings."[45]

As in the school setting, the issue of proper *Miranda* warning cases are reported in the appellate court case literature in Florida. *Frances v. State*[46] involved a challenge to the voluntariness of a juvenile confession.[47] The child, who was sixteen at the time of the confession, claimed on appeal that the confession was involuntary because he was not afforded an opportunity to speak with his mother prior to the questioning.[48] Florida courts have held that there is no constitutional requirement that police notify a juvenile's parents prior to questioning.[49] Although section 985.207(2) of the *Florida Statutes*[50] requires police officers to attempt to notify a juvenile's parents when taking the child into custody, failure to do so does not per se make a confession involuntary.[51] Other states do provide by statute for such protection in the form of required notification of parents.[52] In *Frances*, the court did note that had the child said he did not wish to talk to police until he had an opportunity to speak with his parents, the questioning would have ceased.[53] Applying a totality of the circumstances test,[54] the court held there was no basis to conclude that the confession was in any way coerced or involuntary.[55]

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41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *M.H.*, 851 So. 2d at 233–34.
46. 857 So. 2d 1002 (Fla. 5th Dist. Ct. App. 2003).
47. *Id.* at 1003.
48. *Id.*
49. *Id. See* Brancaccio v. State, 773 So. 2d 582, 583–84 (Fla. 4th Dist. Ct. App. 2000).
50. FLA. STAT. § 985.207(2) (2004).
51. *Frances*, 857 So. 2d at 1004 (citing Ramirez v. State, 739 So. 2d 568 (Fla. 1999)).
52. *See* Michael J. Dale, *Representing the Child Client*, 5.03[7] (Matthew Bender & Co. 2004) (summarizing the case law around the country showing different approaches).
53. *Frances*, 857 So. 2d at 1004. *See* B.P. v. State, 815 So. 2d 728 (Fla. 5th Dist. Ct. App. 2002).
54. *See Ramirez*, 739 So. 2d at 568 (describing the totality of the circumstances test).
55. *Frances*, 857 So. 2d at 1004.

In Florida delinquency cases, pretrial practice and discovery issues do not appear often in appellate case law. However, in *F.R. v. State*,[56] a child appealed from an adjudication of delinquency on a charge of trespass on the grounds that the trial court, as a sanction for untimely disclosure of that witness, excluded a defense witness and denied a motion for continuance.[57] Two days prior to the trial the defense filed a witness list, which the state claimed was untimely.[58] The state asked the court to exclude the witness on prejudice grounds, because it could not depose the witness.[59] The defense position was that counsel only became aware of the witness ten days before the trial and did not disclose the witness until after he had the ability to interview the individual.[60] The question on appeal was whether the trial court abused its discretion in excluding the witness as a sanction for the untimely disclosure.[61] The appellate court found that the testimony of the excluded witness was highly relevant, juvenile proceedings operated under an expedited time frame, and the sanction of exclusion is severe and a last resort only to be used in extreme or compelling circumstances.[62] The court concluded that this was an uncomplicated case, the defense gave a reasonable explanation, and other less severe methods existed to overcome the prejudice.[63] The appellate court found an abuse of discretion and remanded for a new trial.[64]

The Florida rules governing speedy trial in juvenile delinquency cases provide that a child shall have an adjudicatory hearing within ninety days, without demand, following the earlier of either the date the child was taken into custody or the date the petition was filed.[65] The Florida appellate courts regularly review cases concerning affirmation of this rule.[66] In *Alvarez v. State*,[67] a juvenile petitioned for issuance of a writ of prohibition directing the trial court to dismiss an information charging him as an adult.[68] The child

56. 860 So. 2d 501 (Fla. 4th Dist. Ct. App. 2003).
57. *Id.*
58. *Id.* at 502.
59. *Id.*
60. *Id.*
61. *F.R.*, 860 So. 2d at 502.
62. *Id.*
63. *Id.* at 503.
64. *Id.*
65. *See* FLA. R. JUV. P. 8.90(a).
66. *See* Michael J. Dale, *2002 Survey of Florida Juvenile Law*, 28 NOVA. L. REV. 1, 5 (2003) [hereinafter Dale *2002*]; Michael J. Dale, *Juvenile Law Issues in Florida in 1998*, 23 NOVA L. REV. 819, 834–35 (1999) [hereinafter Dale *1998*].
67. 849 So. 2d 1089 (Fla. 3d Dist. Ct. App. 2003).
68. *Id.* at 1090.

was initially charged in a delinquency petition with one count of battery.[69] The state entered a nolle prosequi because it was considering direct filing against the child in the adult criminal division.[70] The defendant argued that the ninety-day juvenile speedy trial rule was triggered by the delinquency petition, applied to the adult charges, and had run.[71] The appeals court denied the petition finding that the juvenile rules did not apply to the adult charges filed, because by virtue of the nolle prosequi, nothing was pending against the child in the juvenile court at the time the information was filed in the adult court.[72] The court relied on the Supreme Court of Florida opinion in *State v. Olivo*,[73] which held that while juvenile speedy trial rights are triggered upon filing of delinquency petitions, the rules apply only while something is pending in the juvenile court.[74] As nothing was pending in the case at bar, the juvenile speedy trial rule did not apply.[75]

Under Florida law, parents or guardians of a child who is detained during delinquency proceedings may be required to pay fees to the state for the cost of the child's subsistence.[76] In *B.S. v. State*,[77] the child was taken into police custody, subsequently ordered to home detention, and released to her parents.[78] While the matter was pending, the court ordered the parents to pay twenty dollars a day for the cost of the child's care.[79] The State subsequently filed a nolle prosequi petition in the case, and the child then filed a pro se motion to rescind the cost order.[80] The child argued that the parents should not be required to pay, because the State decided not to prosecute, and the defendant was at home.[81] Based upon the mandatory language of the statute,[82] the juvenile court denied the motion.[83] The child then brought a constitutional challenge on both equal protection and substantive due process

69. *Id.*
70. *Id.*
71. *Id.*
72. *Alvarez*, 849 So. 2d at 1091.
73. 759 So. 2d 647 (Fla. 2000).
74. *Id.* at 649.
75. *Alvarez*, 849 So. 2d at 1091.
76. FLA. STAT. § 985.215(b) (2004).
77. 862 So. 2d 15 (Fla. 2d Dist. Ct. App. 2003).
78. *Id.* at 17.
79. *Id.*
80. *Id.*
81. *Id.*
82. FLA. STAT. § 985.215(6) (2004). This statute provides "[w]hen any child is placed into secure or home detention care . . . the court shall order the parents . . . to pay to the Department of Juvenile Justice fees as provided under s. 985.2311." *Id.*
83. *B. S.*, 862 So. 2d at 17.

grounds.[84] The child argued that the statute violated equal protection by treating exonerated juveniles differently than exonerated adults.[85] In addition, the child argued that the statute violated substantive due process by requiring "payment of subsistence costs for a child's detention at home."[86] The appellate court accepted both of the child's arguments.[87] Applying an ordinary scrutiny equal protection standard under Florida law,[88] the court could find no legitimate state objective to justify discriminating between adults and juveniles in this context.[89] The court also applied ordinary scrutiny to the due process question, concluding that requiring payment for home detention bore no rational relationship to the permissible legislative objective of alleviating the state's financial burden.[90] The court further held that requiring a parent to pay both to support her child at home and to reimburse the state for unexpended costs was arbitrary and oppressive.[91]

B. *Dispositional Issues*

Florida statutes provide the juvenile court with a variety of dispositional powers, including probation, restitution, community service, curfew, revocation or suspension of driver's license, placement in a consequence unit, placement in home detention, commitment to a licensed child care agency, and commitment to the Department of Juvenile Justice (DJJ) at a residential commitment level (a level of security provided by programs that supervise and care for the child).[92] The issue in *B.A.B. v. State*[93] was whether a juvenile disposition order "should be reversed because the trial court failed to order and consider a predisposition report, ('PDR'), before making its final disposition."[94] Under Florida law, "a predisposition report shall be ordered for any child for whom a residential commitment disposition is anticipated or recommended by an officer of the court or by the [D]epartment [of Juvenile Justice]."[95] In denying the child's motion to correct the order, the trial court

84. *Id.* at 16.
85. *Id.*
86. *Id.* at 16–17.
87. *Id.* at 20.
88. *B.S.*, 862 So. 2d at 18 (citing D.P. v. State, 705 So. 2d 593, 597 (Fla. 3d Dist. Ct. App. 1997)).
89. *Id.* at 19.
90. *Id.*
91. *Id.* at 19–20.
92. *See* §§ FLA. STAT. 985.231, .03 (2004).
93. 853 So. 2d 554 (Fla. 1st Dist. Ct. App. 2003).
94. *Id.* at 554–55.
95. § 985.229(1).

stated it did not order a PDR because the court had previously seen the child on multiple occasions for prior offenses and commitment.[96] The trial court held that redundant investigations were unnecessary where the court already had knowledge of the relevant information.[97] The appellate court held that the statute's requirements are mandatory.[98] A predisposition report is required, the court shall consider it, and it shall be made available to the child and counsel among others.[99] It then concluded that there was no authority to support the proposition that the court could, if it had knowledge of the child's prior record, forego the statutory requirements.[100] It added that the trial court effectively "created an exception to the applicable statutes and rules that does not exist."[101] More importantly and significantly, the trial court deprived the child of an opportunity to review a PDR prior to his dispositional hearing as required by state law by relying upon its knowledge of the child.[102] Therefore, the court reversed and remanded.[103]

Issues concerning proper application of the restitution provisions of the dispositional law in delinquency cases come regularly before the appellate courts.[104] *J.D. v. State*[105] involved a restitution jurisdictional issue where the trial court terminated probation without reserving jurisdiction for purposes of restitution.[106] In failing to reserve jurisdiction, the trial court relied upon a DJJ recommendation that probation be terminated, but DJJ overlooked the fact that restitution had not been completed.[107] When it became known that restitution had not been completed, the court accepted the State's reliance on the ground of a "scrivener's error," and vacated its order to reinstitute jurisdiction.[108] The Fourth District Court of Appeal reversed the decision.[109] It found that the mistake was not a "scrivener's error," but concluded that the court had authority to vacate its order on grounds of mistake under the *Florida Rules of Juvenile Procedure*.[110] However, despite the ability to vacate an

96. *B.A.B.*, 853 So. 2d at 555.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 556.
101. *B.A.B.*, 853 So. 2d at 556.
102. *Id.*
103. *Id.*
104. Dale *2003*, *supra* note 27, at 569; Dale *2002*, *supra* note 66, at 8; Dale *1998*, *supra* note 66, at 839.
105. 849 So. 2d 458 (Fla. 4th Dist. Ct. App. 2003).
106. *Id.* at 459.
107. *Id.*
108. *Id.*
109. *Id.* at 461.
110. *J.D.*, 849 So. 2d at 459 (citing FLA. R. JUV. P. 8.140).

order on the grounds of mistake, the court had to "have jurisdiction over a juvenile to enter an order."[111] In the case at bar, the court lacked jurisdiction because it failed to enter a restitution order before the child's nineteenth birthday, the time jurisdiction would otherwise end.[112] Instead, the new order "merely reserved jurisdiction for restitution purposes."[113] There being no proper restitution order in effect prior to the respondent's nineteenth birthday, the court lacked jurisdiction to subsequently enter the order setting the restitution amount.[114]

C. *Appellate Issues*

The First District Court of Appeal dealt with a very important issue regarding application of what is commonly known as an *Anders* appeal in *A.F.E. v. State*.[115] In *Anders v. California*,[116] the United States Supreme Court held that a defendant's Sixth Amendment right to assistance of counsel in criminal cases is not satisfied when an appointed appellate lawyer merely reports by letter that there is no meritorious issue presented on appeal.[117] Pursuant to its ruling implementing *Anders*, the Supreme Court of Florida held that the appellate court must then undertake "a full and independent review of the record to discover any arguable issues apparent on the face of the record."[118] The problem that arose in *A.F.E.* involved a legitimate catch-22 situation.[119] The defendant and several other juveniles were charged after a note containing a bomb threat was found in their high school, and the appellant didn't contest the charge.[120] At the dispositional stage, DJJ recommended probation with the alternative of commitment at a moderate risk facility.[121] The trial court rejected these alternatives and committed the child to a high risk residential commitment facility.[122] However, in its independent review of the record, the appellate court found that the trial court's departure did "not appear to be supported by competent substantial evidence in the

111. *Id.* at 460.
112. *Id. See* FLA. STAT. § 985.201(4)(a) (2004).
113. *J.D.*, 849 So. 2d at 460.
114. *Id.*
115. 853 So. 2d 1091 (Fla. 1st Dist. Ct. App. 2003).
116. 386 U.S. 738 (1967).
117. *Id.* at 744.
118. *In re* Anders Briefs, 581 So. 2d 149, 151 (Fla. 1991).
119. *See A.F.E.*, 853 So. 2d at 1091.
120. *Id.* at 1092.
121. *Id.*
122. *Id.*

record" as required by state law,[123] but the child's counsel failed to preserve the issue for appeal.[124] Because the child's lawyer neither objected at the time the trial court entered its disposition nor filed a motion to correct the disposition order pursuant rule 8.135(b)(2) of the *Florida Rules of Juvenile Procedure*, the appellate court could not act.[125] All that remained was a claim of ineffective assistance of counsel.[126] However, as the appellate court pointed out, a claim of ineffective assistance of counsel "is of little practical assistance in juvenile cases, where the sentence imposed may be completed before any relief is granted."[127] Describing the problem as a dilemma, the appellate court affirmed, but certified as a question of public importance whether an appellate court can correct a sentencing error in an *Anders* case that was not preserved pursuant to the applicable rules of procedure, and if not, what steps should the appellate court follow to carry out the mandate of *Anders*?[128]

III. DEPENDENCY

Dependency court jurisdictional issues do not come up regularly in Florida. An exception is *J.M. v. Department of Children and Family Services*.[129] The case involved adjudication of an infant as dependent where the child was absent from the State of Florida and where DCF had claimed that there was a risk of harm to the child being "with his mother, who herself was a minor and had been adjudicated dependent, but was on runaway status."[130] The facts are significant. The trial court issued an ex parte order to take the mother and the child into custody.[131] At no time had the infant been declared dependent prior to the filing of the petition.[132] The court held an arraignment hearing, and ultimately entered a consent on behalf of the parent by default after the court determined that there had been a diligent search to find her.[133] An attorney ad litem was present for the mother and objected to the adjudica-

123. *Id.* at 1093.
124. *A.F.E.*, 853 So. 2d at 1093.
125. *Id.* at 1093, 1095.
126. *Id.* at 1094.
127. *Id.* at 1093.
128. *Id.* at 1095. *See also* The Honorable Martha C. Warner, Anders *in the Fifty States: Some Appellants' Equal Protection Is More Equal than Others'*, 23 FLA. ST. U. L. REV. 625 (1996).
129. 851 So. 2d 303 (Fla. 4th Dist. Ct. App. 2003).
130. *Id.* at 304.
131. *Id.*
132. *Id.*
133. *Id.* at 305.

tion.[134] The court took hearsay evidence presented by DCF regarding the mother's circumstances and adjudicated the infant child dependent.[135] Thereafter, the court held a dispositional hearing and established a reunification case plan, which the mother ultimately signed when her whereabouts became known.[136] The appellate court reversed the trial court order, finding that the court lacked jurisdiction over the infant because DCF never had custody of the infant child, and the mother was never given notice or the opportunity to be heard.[137] Furthermore, the court order adjudicating the infant dependent, where both mother and child were outside the jurisdiction, constituted a deprivation of the mother's due process rights.[138]

A more troubling jurisdictional case involving dependency is *In re D.N.*[139] The case concerned two children as to whom a Hawaii court entered an order of protection giving the father both legal and physical custody with supervised visitations for the mother.[140] While proceedings were pending in Hawaii, the mother took the children out of the state and was subsequently arrested in Florida.[141] As a result, DCF filed a petition for dependency of the two children against the mother only, never filing against the father.[142] Relying upon the Uniform Child Custody Jurisdiction Act (UCCJA), which was in effect in Florida,[143] the father quickly filed a motion to have the children returned to him in Hawaii based upon the Hawaii custody order.[144] Despite the existence of the Hawaii order and the relevant statutory mandate, the trial court denied the motion to have the two children returned.[145] DCF filed a case plan defining tasks to the father for reunification, but never sought to have the children adjudicated dependent as to the father.[146] Despite no finding of dependency as to the father, the court approved the case plan.[147] For a year and a half the father continued to seek to have the Hawaii custody order enforced.[148] The trial court held an evidentiary hearing concerning return of the children to the father, and DCF never raised issues of compliance with

134. *J.M.*, 851 So. 2d at 305.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. 858 So. 2d 1087 (Fla. 2d Dist. Ct. App. 2003).
140. *Id.* at 1088.
141. *Id.*
142. *Id.*
143. FLA. STAT. §§ 61.501-.542 (2004).
144. *D.N.*, 858 So. 2d at 1088.
145. *Id.* at 1089.
146. *Id.*
147. *Id.*
148. *Id.*

the Interstate Compact on the Placement of Children (ICPC).[149] At the end of the hearing, the trial court ordered the children returned to the father, and despite that order, DCF refused to transfer the children to Hawaii.[150] The father sought to enforce the court order, and at this late stage, DCF argued that the Hawaii ICPC administrator had not approved the placement.[151] The court ordered the children placed with their father, and then DCF appealed, even seeking a stay.[152] In the absence of a stay, the children were reunited with their father while the case was pending on appeal.[153] In a detailed opinion, the appellate court laid out what would have been obvious to any lawyer in the field—the application of the UCCJA and the Parental Kidnapping Prevention Act (PKPA).[154] In what could only be described as a significant understatement, the court concluded as follows:

> Finally, we note that the Department has come under increased public scrutiny during the past year concerning the way it has handled, or mishandled, certain cases. Given that scrutiny, we fail to understand why the Department chose to focus its efforts in this case on keeping the two children from a father who clearly wants them and who has a valid court order awarding him custody. Further, we fail to understand why the Department chose not to bring the controlling provisions of the UCCJA and the PKPA to either the trial court's or this court's attention. In making these choices, the Department strayed from its legislatively mandated objectives, and its attorneys strayed from their duty to bring controlling authority to the court's attention.[155]

The initial court proceeding in a dependency case is often the hearing on a shelter petition.[156] This hearing takes place when "a child has been or is to be removed from the home and maintained in an out-of-home placement for a period longer than 24 hours."[157] The issue *In re J.P.*,[158] was whether the father was "denied the statutorily afforded opportunity to be heard and to present evidence at the shelter hearing."[159] The Pasco County Sheriff's Office filed a petition for placement in shelter of three children based upon fac-

149. *D.N.*, 858 So. 2d at 1089; FLA. STAT. § 409.401 (2004).
150. *D.N.*, 858 So. 2d at 1089.
151. *Id.*
152. *Id.* at 1094.
153. *Id.*
154. 20 U.S.C. § 1738(A) (2003).
155. *D.N.*, 858 So. 2d at 1094.
156. *See* FLA. STAT. § 39.402 (2004).
157. FLA. R. JUV. P. 8.305(a).
158. 875 So. 2d 715 (Fla. 2d Dist. Ct. App. 2004).
159. *Id.* at 716.

tual allegations of domestic violence, the father's prior drug conviction, and his current drug use.[160] At the shelter hearing, where both parents were represented by counsel, the mother's lawyer sought an opportunity to present evidence.[161] The trial court decided that the hearing sought was discretionary, and since the court never did "three-hour shelter hearings,"[162] it refused to start conducting them.[163] It ruled that probable cause could be found on the four corners of the affidavit.[164] The Second District Court of Appeal reversed, holding that Florida law provides parents with due process rights in judicial proceedings involving temporary removal from the home.[165] Specifically, section 39.402 of the *Florida Statutes* provides that parents shall be given "an opportunity to be heard and to present evidence at shelter hearings."[166] Further, the *Florida Rules of Juvenile Procedure* provide that persons shall be given an opportunity to be heard and present evidence on the criteria for placement under the law.[167] The appellate court concluded that the judge below incorrectly held that the written submissions alone constituted probable cause despite the fact that the clear statutory and rule authority afforded the parents the right to be heard and to present evidence at the shelter hearing.[168]

The interplay of child custody issues in dependency proceedings and domestic relations proceedings comes up often in Florida appellate case law.[169] In *King v. Jordan*,[170] the trial court initially entered an order granting custody of the parties' daughter to the father during the course of a dependency proceeding under Chapter 39.[171] In exercising its continuing jurisdiction as provided by statute,[172] the court subsequently reopened the dependency proceeding, restored all of the mother's rights and obligations, and granted her liberal visitation, while continuing the father's primary residential responsibility for the child.[173] At the close of the proceeding, the court ruled that custodial and visitation rights were granted without prejudice to

160. *Id.* at 716–17.
161. *Id.* at 717.
162. *Id.*
163. *J.P.*, 875 So. 2d at 717.
164. *Id.*
165. *Id.* at 718–19.
166. *Id.*
167. FLA. R. JUV. P. 8.305(b)(4).
168. *J.P.*, 875 So. 2d at 718.
169. *See* Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91, 100 (2000) [hereinafter Dale *2000*].
170. 850 So. 2d 645 (Fla. 2d Dist. Ct. App. 2003).
171. *Id.*; FLA. STAT. ch. 39 (2004).
172. § 39.013(2).
173. *King*, 850 So. 2d at 646.

the right of either parent to seek further relief under Chapter 61,[174] Florida's domestic relations child custody statute.[175] Thereafter, the mother petitioned for primary residential custody pursuant to the dependency court's prior order preserving her right to seek relief under Chapter 61. The court rejected her claim,[176] citing *Gibbs v. Gibbs*, [177] a case from the Second District Court of Appeal, holding "that a party seeking to modify a custody decree must establish a substantial change in circumstances since the final judgment and that such a change justifies imposing a change in custody."[178] The appellate court reversed, holding that the domestic relations standard applied in *Gibbs*, relating to a modification of a custody decree after an initial Chapter 61 determination, does not apply here, where the custody determination was made in a Chapter 39 dependency proceeding.[179] The appellate court held that when a custody arrangement is ordered in a dependency case, all the court is doing is making a decision to place the child with a responsible adult, preferably a parent.[180] Such a decision does not consider all of the elements of the dissolution statute "concerning a determination of the primary residential parent based on the best interests of the child."[181] The court concluded that the extraordinary circumstances test applied to modification under Chapter 61 is not applicable when the initial custody determination was made in a dependency case as opposed to a dissolution proceeding.[182] Unlike a dissolution or paternity custody order arising under Chapter 61, a custody order arising from a Chapter 39 dependency proceeding is not a determination of the best interest of the child for purposes of determining primary residential custody.[183]

A second case involving custodial placement in the dependency context is *S.L. v. Department of Children and Families*.[184] During the course of a dependency proceeding against both parents arising out of severe violence between the mother and the father in the presence of the children, the court initially placed the children with their maternal uncle.[185] Thereafter, the court placed the children jointly with the mother and the maternal grandpar-

174. *Id.*
175. FLA. STAT. ch. 61 (2004).
176. *King*, 850 So. 2d at 645.
177. 686 So. 2d 639 (Fla. 2d Dist. Ct. App. 1996).
178. *King*, 850 So. 2d at 646 (citing *Gibbs*, 686 So. 2d at 639).
179. *Id.* at 647.
180. *Id.*
181. *Id.* (citing § 61.13).
182. *Id.*
183. *King*, 850 So. 2d at 647.
184. 852 So. 2d 372 (Fla. 5th Dist. Ct. App. 2003).
185. *Id.* at 373.

ent with unsupervised visitations for the father.[186] The father appealed, claiming he was entitled to custody of the children because a parent is preferred over more distant relatives.[187] He relied upon *Hammond v. Howard*,[188] a case arising out of the Fifth District. The appellate court rejected the application of *Hammond* to a dependency proceeding because *Hammond* was a domestic relations custody case arising under Chapter 61, which is unrelated to dependency.[189] In a dependency case, the issue is whether the child should be reunited with the parent.[190] Furthermore, the court must determine whether the parents substantially complied with the terms of the case plan as well as considering the well-being and safety of the child.[191] Finally, the *S.L.* court opined that the court below had substantial flexibility in the dependency proceeding because of the statutory obligation to include protective supervision by DCF at the home of either or both parents.[192] The appellate court thus affirmed.[193]

The question of application of speedy trial rules in a dependency case was before the Fourth District in *D.D. v. Department of Children and Families*.[194] The father appealed the denial of a motion to dismiss because the state failed to hold a dependency trial within thirty days as provided by Florida law.[195] The father argued that the Supreme Court of Florida case, which held the thirty-day time frame applicable to involuntary commitment procedures, should apply to dependency cases.[196] The appellate court rejected this argument.[197] It found that the juvenile rule governing speedy trials applies only in delinquency cases.[198] According to the Fourth District, while the Florida dependency statute does speak of a thirty-day period, it is not mandatory.[199] Rather, it concluded that the thirty-day rule is discretionary, given the nature of the proceedings and the state's interest in protecting a child's welfare, which is paramount to the parents' interests.[200]

186. *Id.*
187. *Id.* at 373–74.
188. 828 So. 2d 476 (Fla. 5th Dist. Ct. App. 2002).
189. *S.L.*, 852 So. 2d at 374.
190. *Id.*
191. *Id.*
192. *Id.* (citing FLA. STAT. § 39.521(1)(b)(3) (2004)).
193. *Id.*
194. 849 So. 2d 473 (Fla. 4th Dist. Ct. App. 2003).
195. § 39.507(1)(a).
196. *D.D.*, 849 So. 2d at 475, (citing § 39.507(1)(a)); State v. Goode, 830 So. 2d 817, 825–26 (Fla. 2002)).
197. *D.D.*, 849 So. 2d at 476.
198. *Id.* at 475.
199. *Id.* at 476; *see* § 39.507(1)(a).
200. *D.D.*, 849 So. 2d at 476.

A case involving "default" or, more appropriately, "consent" to adjudication in the dependency in context[201] is *R.P. v. Department of Children and Families*.[202] The consent occurred when a father, through counsel, advised the court that due to the fault of the lawyer's office, the father was not told until 5:45 p.m. the previous day that it was necessary for him to be at the hearing.[203] The father lived two hundred miles away and did not have a vehicle.[204] The father's counsel then asked for a brief continuance.[205] When the father did not appear in the afternoon, the attorney requested another continuance until the father's arrival, which the court denied and entered a default.[206] On appeal, the Fourth District reversed, stressing the importance of the parent-child relationship and warning the lower courts not to disrupt this relationship on procedural grounds unless harm will befall the child.[207]

IV. PROSPECTIVE ABUSE AND NEGLECT

On July 8, 2004, just beyond the usual annual survey period for this article, the Supreme Court of Florida decided *Department of Children and Families v. F.L.*[208] This important opinion clarifies the application of prospective abuse and neglect in both dependency and termination of parental rights (TPR) cases, which was first addressed by the Supreme Court of Florida in 1991 in *Padgett v. Department of Health and Rehabilitative Services*.[209] Prospective abuse or neglect was the subject of a lengthy discussion of the intermediate appellate cases in last year's survey article.[210] In that case, the court ruled that permanent termination of parental rights to one child on the basis of abuse and neglect may be sufficient grounds for termination of the parental rights to another child.[211] However, the court held that constitutional liberty interests required that the state "show by clear and convincing evidence that the reunification with the parent poses a substantial risk of significant harm to the child."[212] In addition, the court held that the

201. *See infra* pp. 413–19 for a discussion of consent in the termination of parental rights context.
202. 835 So. 2d 1212 (Fla. 4th Dist. Ct. App. 2003).
203. *Id.* at 1213.
204. *Id.*
205. *Id.*
206. *Id.*
207. *R.P.*, 835 So. 2d at 1213–14.
208. 880 So. 2d 602 (Fla. 2004).
209. 577 So. 2d 565 (Fla. 1991).
210. Dale *2003*, *supra* note 27, at 559–64.
211. *Padgett*, 577 So. 2d at 571.
212. *Id.*

State must prove that termination is the least restrictive means of protecting the child from harm by the parent.[213]

F.L. specifically dealt with the issue of which party has the burden of proof to show substantial risk of harm, or lack thereof, to a current child based upon harm perpetrated upon another child.[214] Since *Padgett*, a substantial number of appellate cases have interpreted it, both in the dependency and termination of parental rights contexts.[215] The courts were in disagreement as to the proper interpretation of section 39.806(1)(i) of the *Florida Statutes*, dealing with the test for terminating parental rights when the parental rights to a sibling have been involuntarily terminated.[216] A quartet of appellate cases in the intermediate appellate courts were at odds as to the appropriate burden of proof.[217] In *A.B. v. Department of Children and Families*,[218] *T.P. v. Dep't of Children and Families*,[219] and *In re T.S.*[220] the courts held that the statute validly created a rebuttable presumption of termination of parental rights, which the parent could rebut.[221] On the other hand, in *C.W. v. Department of Children and Families*,[222] Judge Erwin wrote a concurring opinion taking the view that the statute could not be used to terminate parental rights solely on the basis of the parents' conduct.[223] Likewise in *F.L.*, at the appellate court level, the court held that the section "unconstitutionally shifts the burden to the parent to prove reunification would not be harmful to the child."[224] The Supreme Court of Florida affirmed this opinion.[225] Applying *Padgett*, the court held that the statute may not constitutionally be viewed to permit a termination of parental rights without proof of substantial risk to the child.[226] A rebuttable presumption would relieve DCF

213. *Id.*
214. *F.L.*, 880 So. 2d at 606–07.
215. Dale *2003*, *supra* note 27, at 546–48, 559–64; Dale *2002*, *supra* note 66, at 13–14, 18–19.
216. Dale *2003*, *supra* note 27, at 546–48, 559–64; Dale *2002*, *supra* note 66, at 13–14, 18–19.
217. Dale *2003*, *supra* note 27, at 546–48, 559–64; Dale *2002*, *supra* note 66, at 13–14, 18–19.
218. 816 So. 2d 684 (Fla. 5th Dist. Ct. App. 2002); *see contra* Dale *2003*, *supra* note 27, at 560.
219. 860 So. 2d 1084 (Fla. 5th Dist. Ct. App. 2003).
220. 855 So. 2d 679 (Fla. 2d Dist. Ct. App. 2003).
221. *A.B.*, 816 So. 2d at 684; *T.P.*, 819 So. 2d at 271; *T.S.*, 855 So. 2d at 680.
222. 814 So. 2d 488 (Fla. 1st Dist. Ct. App. 2002).
223. *Id.* at 493–98 (Erwin, J., concurring).
224. F.L. v. Dep't of Children & Families, 849 So. 2d 1114, 1116 (Fla. 4th Dist. Ct. App. 2003).
225. Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 609 (Fla. 2004).
226. *Id.*

of its burden of proof and would, according to the high court, violate the constitutional requirements articulated in *Padgett*.[227] The court held explicitly that the state must prove both the prior involuntary termination of parental rights to a sibling and a substantial risk of significant harm to the child who is before the court.[228] In addition, DCF must prove that termination of parental rights is the least restrictive alternative for protecting the child from harm.[229] The court gave the trial courts guidance on how to apply the section, explaining that the circumstances leading to the prior termination are highly relevant to the issue before the court concerning risk to the other child.[230] The parents' conduct which led to the involuntary termination may tend to indicate a greater risk of harm to the current child.[231] The courts should take into account the amount of time that passes between the two events, and evidence of a change of circumstances since the prior involuntary termination will be significant to the determination of risk.[232] Finally, the court explained that past conduct has some predictive value as to likely future conduct, which can be changed by positive life changes.[233] The court emphasized that the parent is not obligated to show evidence of changed circumstances to avoid the termination of parental rights.[234] The court held that DCF must prove by clear and convincing evidence[235] that the rights of the prior child were terminated involuntarily, that the child now before the court is at a substantial risk of significant harm, and that termination of parental rights is the least restrictive alternative for the protection of the child.[236] The court then concluded that, so interpreted, the statute would be constitutional.[237]

In two concurring opinions, Justices Pariente and Cantero were at odds over an additional question—whether a manifest best interest determination is the equivalent of an obligation of the State to prove substantial risk of

227. *Id.*
228. *Id.*
229. *Id.* at 610.
230. *F.L.*, 880 So. 2d at 610.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *See generally*, Santosky v. Kramer, 455 U.S. 745 (1982) (holding the standard of proof in termination of parental rights cases must be at least clear and convincing evidence to comport with due process rights).
236. *F.L.*, 880 So. 2d at 611.
237. *Id.*

harm to the child under one of the statutory grounds for termination.[238] Justice Pariente said no,[239] and Justice Cantero said yes.[240]

A separate ground for termination of parental rights involving prospective abuse or neglect is the situation where the parent has committed murder or voluntary manslaughter of another child or a felony assault that results in serious bodily injury to another child.[241] A number of courts have held that a nexus must be shown between the acts described in the subsection and the potential for future abuse.[242] The issue of nexus arose in *J.F. v. Department of Children and Families*[243] where the mother's stepchild was physically abused and died while in her care as a result of blunt trauma to the stomach.[244] She was ultimately convicted of manslaughter and child abuse.[245] On appeal, the Fourth District reversed the trial court's termination of parental rights, *inter alia*, rejecting DCF's position that no nexus need be shown.[246] In so doing, the court noted that "[f]ailure to give the statutory scheme a narrow construction requiring the State to prove a nexus between the past conduct and the continuing substantial risk of harm to the current child could render the statute constitutionally infirm."[247] DCF argued that the mother's failure to take responsibility for the first child's death constituted the nexus of danger necessary to the second child.[248] The court held this argument insufficient to support a finding that the mother posed a threat to her other children.[249]

A second nexus case, this one occurring at the dependency stage, is *N.S. v. Department of Children and Families*.[250] In *N.S.*, DCF commenced a dependency proceeding alleging that the neglect of an older child was grounds to find abuse and neglect of the younger children. The dependency proceeding was commenced despite the fact that there were no allegations in the petition that the parents had in fact abused and neglected any of the younger children or that the children might be abused in the future.[251] There was nei-

238. *See id.* at 611–13 (Pariente, J., concurring); *id.* at 613–615 (Cantero, J., concurring).
239. *F.L.*, 880 So. 2d at 611.
240. *Id.* at 615.
241. FLA. STAT. § 39.806(1)(h) (2004).
242. *See* Dale *2003*, *supra* note 27, at 562–63.
243. 866 So. 2d 81 (Fla. 4th Dist. Ct. App. 2004).
244. *Id.* at 82.
245. *Id.* at 83.
246. *Id.* at 88–89.
247. *Id.* at 88.
248. *J.F.*, 866 So. 2d at 88.
249. *Id.*
250. 857 So. 2d 1000 (Fla. 5th Dist. Ct. App. 2003).
251. *Id.* at 1000–01.

ther testimony that the younger children were abused nor any evidence presented to support a conclusion that the younger children were at risk.[252] Citing earlier case law, the appellate court reversed,[253] concluding that the trial court made no findings to draw a connection between the treatment of the older child and the probable treatment of the younger children in the future.[254]

V. TERMINATION OF PARENTAL RIGHTS

A. *Adjudicatory Issues*

Appellate opinions continue to appear relating to "defaults", or as noted earlier, "consents" to terminations of parental rights or dependency based upon non-appearance of the parent as often occurs in the dependency setting.[255] In *R.H. v. Department of Children and Family Services*,[256] the father failed to appear on the trial date, and the court entered a default against him.[257] The father was advised of the trial date at the advisory hearing and also through a letter from counsel.[258] However, the trial date was changed.[259] The court sent written notice to the father's counsel who then sent a second letter to the father "mimick[ing]" the first, but with the new trial date.[260] The father argued that he did not appear on the continued date, which in fact was earlier in time, because he thought the second letter was simply a duplicate of the first.[261] The father filed a timely motion to vacate the default, attaching the letters from counsel as well as a letter demonstrating completion of an outpatient substance abuse program.[262] The father claimed excusable neglect and a meritorious defense.[263] The trial court held a hearing and denied the motion based upon the best interests of the child, finding no excusable neglect.[264] The appellate court held that the failure of the trial court to accept

252. *Id.* at 1001–02.
253. *Id. See also* M.S. v. Dep't of Children & Families, 765 So. 2d 152 (Fla. 1st Dist. Ct. App. 2000); M.N. v. Dep't of Children & Families, 826 So. 2d 445 (Fla. 5th Dist. Ct. App. 2002).
254. *N.S.*, 857 So. 2d at 1001.
255. *See* FLA. STAT. § 39.506(3) (2004).
256. 860 So. 2d 986 (Fla. 3d Dist. Ct. App. 2003).
257. *Id.* at 987.
258. *Id.*
259. *Id.*
260. *Id.*
261. *R.H.*, 860 So. 2d at 987.
262. *Id.*
263. *Id. See also* FLA. R. CIV. P. 1.540(b)(1).
264. *R.H.*, 860 So. 2d at 987–88.

the father's uncontroverted confusion was an abuse of discretion.[265] The appellate court also found that the second element of the grounds for release from judgment is not the best interest of the child, but rather whether there is a meritorious defense.[266] Finally, the court reversed because the trial court terminated the father's parental rights without taking any evidence in support of the termination, even assuming there was a default.[267] Referring to the United States Supreme Court case, *Santosky v. Kramer*,[268] as well as other Florida intermediate appellate court cases,[269] the court held that even in a default situation, evidence must be taken to determine the need for termination of parental rights.[270]

The issue of default also arose in a group of Second District cases, involving both termination of parental rights and dependency. In *In re I.A.*,[271] a dependency case, the parent was in the restroom when the case was called.[272] When the parent entered the courtroom, the trial court stated the following: "Well, that's too late. You can just appeal if you need to. The record reflects it's 20 minutes to 10:00. This thing was set for 9:00."[273] The appellate court held that the trial court abused its discretion in finding that the parent consented to the adjudication of dependency.[274] The court held there was no showing that a short continuance would have had adverse consequences to the child.[275] Relying on an earlier opinion from the Fourth District,[276] the appellate court found that there was no single valid reason to refuse the continuance, but rather good ones to grant it.[277]

In *In re B.B.*,[278] at a dependency arraignment hearing, the parent was unrepresented by counsel and not present when the case was called, but had used his cell phone to contact the DCF employee in the courtroom directly.[279]

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265. *Id.* at 988.
266. *Id.*
267. *Id.* at 988–89.
268. 455 U.S. 745 (1982) (recognizing the need for due process protections and the significance of the parental interest at stake).
269. *See* M.A. v. Fla. Dep't of Children & Family Servs., 760 So. 2d 249 (Fla. 3d Dist. Ct. App. 2000); M.E. v. Fla. Dep't of Children & Family Servs., 728 So. 2d 367 (Fla. 3d Dist. Ct. App. 1999).
270. *R.H.*, 860 So. 2d at 988–90.
271. 857 So. 2d 310 (Fla. 2d Dist. Ct. App. 2003).
272. *Id.* at 311.
273. *Id.*
274. *Id.* at 312.
275. *Id.*
276. R.P. v. Dep't of Children & Families, 835 So. 2d 1212 (Fla. 4th Dist. Ct. App. 2003).
277. *I.A.*, 857 So. 2d at 312–13.
278. 858 So. 2d 1184 (Fla. 2d Dist. Ct. App. 2003).
279. *Id.* at 1185.

The court apparently learned this information, confirmed that the parent had been served, and requested that DCF move for a default, which they did.[280] The court did not appoint a lawyer for another five months, whereupon the lawyer filed a motion to set aside the default.[281] When the lawyer attempted to argue the default should be set aside, the court cut off counsel's argument and summarily denied the motion even though the parent was anxious to testify and explain why he had arrived five minutes late for the hearing.[282] The appellate court recognized that the trial court has lengthy dockets and needs to manage them.[283] However, as the appellate court said, "dependency arraignment hearings where many parties are unrepresented and all parties have already demonstrated that they have difficulty coping with life's normal burdens are an especially questionable place to rigidly impose 'defaults' as a method of case management."[284] Furthermore, the appellate court held that the *Florida Rules of Juvenile Procedure* provide that when a consent is entered to dependency, there must be a disposition hearing within fifteen days.[285] The trial court did none of these things in *B.B.*[286] In addition, under the rules, a party has a right to seek to withdraw a consent for good cause prior to the beginning of the disposition hearing.[287]

In re C.D.[288] was a termination of parental rights case in which the father was "three minutes late for the initial advisory hearing."[289] According to appellate court, he waited outside the courtroom in the waiting area for forty-five minutes until he was told where the proper courtroom was located.[290] Because he wasn't in the courtroom when the case was called, the father was "defaulted."[291] In addition, he was unrepresented by counsel at the termination hearing.[292] Within ten days of the entry of the default, the father sent a letter to the trial court explaining why he was late.[293] The appellate court concluded that although the trial court should have regarded the letter as a motion for rehearing, it made no ruling and instead terminated the father's

280. *Id.*
281. *Id.*
282. *Id.*
283. *B.B.*, 858 So. 2d at 1185–86.
284. *Id.* at 1186.
285. *Id. See* FLA. STAT. § 39.506(5) (2004); FLA. R. JUV. P. 8.315(a).
286. *B.B.*, 858 So. 2d at 1186.
287. *Id. See* FLA. R. JUV. P. 8.315(b).
288. 867 So. 2d 405 (Fla. 2d Dist. Ct. App. 2003).
289. *Id.*
290. *Id.* at 405–06.
291. *Id.* at 406.
292. *Id.*
293. *C.D.*, 867 So. 2d at 406.

parental rights.[294] One month after the termination, counsel was appointed to represent the father.[295] After reversing and remanding, the appellate court, in a dramatic understatement, said that the trial court "must review these issues and make a lawful decision as soon as possible following issuance of our mandate."[296]

The same problem occurred in the Fourth District. In *A.M. v. Department of Children and Families*,[297] a termination of parental rights case, the trial court entered a default against parents who were late for a hearing.[298] According to the appellate court, the parents were mistaken about the public transportation schedule, arriving one hour after the hearing was to begin.[299] A consent to the termination of parental rights was thus entered.[300] The trial court subsequently held a hearing on the parents' motion to set aside default and denied it.[301] Citing its prior holdings interpreting section 39.801(3)(d) of the *Florida Statutes*,[302] the Fourth District vacated the default as an abuse of discretion, holding that the trial court should ordinarily refrain from deciding termination of parental rights cases by default where there was a reasonable effort to be present by the parents.[303]

The trial court also has an obligation to carefully weigh a parent's motion for continuance in a termination of parental rights case. *In re D.S.*[304] arose out of a dispute between a mother and DCF about an alleged agreement that DCF would not seek to terminate the parental rights as to her oldest child so long as she relinquished parental rights as to her three other children.[305] The oldest child was in the custody of the father in Puerto Rico.[306] The existence of the agreement came into dispute when a lawyer merely associated with the parent's counsel appeared on the day of trial to deliver consents regarding the other children.[307] The associated lawyer was under the impression that there had been an agreement as to the consents, although

294. *Id.*
295. *Id.*
296. *Id.*
297. 853 So. 2d 1084 (Fla. 4th Dist. Ct. App. 2003).
298. *Id.* at 1084–85.
299. *Id.* at 1084.
300. *Id.* at 1085.
301. *Id.*
302. FLA. STAT. § 39.801(3)(d) (2004).
303. *A.M.*, 853 So. 2d at 1085 (citing A.J. v. Dep't of Children & Families, 845 So. 2d 973 (Fla. 4th Dist. Ct. App. 2003) and R.P. v. Dep't of Children & Families, 835 So. 2d 1212 (Fla. 4th Dist. Ct. App. 2003)).
304. 849 So. 2d 411 (Fla. 2d Dist. Ct. App. 2003).
305. *Id.* at 412.
306. *Id.*
307. *Id.*

DCF strenuously denied that there was one.[308] When the lawyer requested a continuance of the trial on the ground that he had understood there was an agreement and was not prepared to try the case, the trial court denied the request and proceeded with the trial.[309] Despite the fact that trial courts have broad discretion in granting or denying continuances, the appellate court held that the trial court abused its discretion, and that the denial of a continuance created an injustice to the mother based upon the fundamental liberty interests recognized by the United States Supreme Court in *Santosky*.[310]

Discovery issues occasionally are the subject of reported opinions in termination of parental rights cases. In *A.A. v. Department of Children and Families*,[311] the court held that the parent's lawyer did not have a right to the release of the names and addresses of the two younger children's foster parents.[312] In a pretrial motion, the father's counsel argued that DCF's witnesses would testify that the children were in good homes with good foster parents and the only way to challenge that testimony was by means of discovery as to the foster parents.[313] The appellate court affirmed the trial court ruling that DCF did not have to reveal the names and addresses of the foster parents for several reasons.[314] First, it found that the termination statute did not allow the court, in considering the manifest best interests of the child, to compare the attributes of the parents to those providing present or future placement for the child.[315] Thus, an evaluation of a foster parent's quality was not material to the termination proceedings.[316] Furthermore, as a matter of public policy, the court held that there is a need to protect caretakers against intimidation and harassment.[317]

Under Florida law, there are nine separate grounds for termination of parental rights,[318] one of which is incarceration of the parent.[319] Two cases dealt with this standard during the past survey period. In *In re A.D.C.*,[320] a parent appealed from an order terminating his parental rights to a child who was one and a half years old at the time of the termination, *inter alia*, on the

308. *Id.* at 412–13.
309. *D.S.*, 849 So. 2d at 413.
310. *Id.*; 455 U.S. 745 (1982).
311. 852 So. 2d 318 (Fla. 4th Dist. Ct. App. 2003).
312. *Id.* at 320.
313. *Id.* at 319.
314. *Id.* at 320.
315. *Id.* at 320–21 (citing FLA. STAT. § 39.810 (2004)).
316. *A.A.*, 852 So. 2d at 321.
317. *Id.*
318. § 39.806(1)(A)-(I).
319. § 39.806(1)(D).
320. 854 So. 2d 720 (Fla. 2d Dist. Ct. App. 2003).

ground that the parent's incarceration in a correctional institution would be for a substantial portion of the time before the child obtained the age of eighteen as required by statute.[321] Under the facts of the case, the child would be five years old at the time of the parent's release.[322] The appellate court held, simply, that the time period in the case could not be described as substantial, citing to other cases of limited incarceration time.[323]

In *C.B. v. Department of Children and Families*,[324] the issue was whether incarceration alone was enough to constitute grounds for termination of parental rights when the specific ground for termination was abandonment.[325] The appellate court held that incarceration is a factor in considering termination based upon abandonment, but incarceration alone is not sufficient.[326] In the case at bar, the court found that the mother kept in touch with family members and constantly asked her sister, the child's aunt, about the child.[327] In turn, the aunt kept in communication with DCF.[328] The child's aunt also sent the mother pictures and kept the mother informed about the child.[329] The court reversed on the ground that the incarceration alone was insufficient to justify termination.[330] The court relied upon other cases reversing trial court decisions to terminate parental rights when an incarcerated parent had not demonstrated a failure to make efforts to provide for the child or carry out a case plan.[331] Furthermore, the court made special mention that DCF failed to provide the mother with the services necessary to complete a case plan while incarcerated.[332]

In *C.B.*, the court also dealt with egregious conduct as grounds for termination of parental rights.[333] As defined by Florida statute, egregious conduct involves behavior that is "'outrageous by normal standards of con-

321. *Id.* at 721.

322. *Id.*

323. *Id.* (citing W.W. v. Dep't of Children & Families, 811 So. 2d 791 (Fla. 4th Dist. Ct. App. 2002) (holding that fifty-four months is not a substantial period)); *see also In re* A.W., 816 So. 2d 1261 (Fla. 2d Dist. Ct. App. 2002)).

324. 874 So. 2d 1246 (Fla. 4th Dist. Ct. App. 2004).

325. *Id.* at 1248 (citing § 39.01 (defining abandonment)).

326. *Id.* at 1249 (citing *In re* T.B., 819 So. 2d 270 (Fla. 2d Dist. Ct. App. 2002)).

327. *Id.*

328. *Id.*

329. *C.B.*, 874 So. 2d at 1249–50.

330. *Id.* at 1250.

331. *Id.* at 1249 (citing *T.B.*, 819 So. 2d at 270; C.A.H. v. Dep't. of Children & Families, 830 So. 2d 939 (Fla. 4th Dist. Ct. App. 2002); *In re* T.C.S., 647 So. 2d 1025 (Fla. 4th Dist. Ct. App. 1994)).

332. *Id.* at 1252.

333. *Id.* at 1253–55. *See* FLA. STAT. § 39.806(1)(f)(2004).

duct'".[334] In *C.B.*, the trial court found that while the mother was incarcerated her first child was adjudicated dependent.[335] Thereafter, she was medically furloughed from prison and got pregnant with another child who was the subject of the instant proceeding.[336] The trial court found it was outrageous for the mother to get pregnant while furloughed with a child she could not care for.[337] The appeals court held that there must be a nexus between the behavior and the abuse, neglect, or other specific harm to the child in order to serve as grounds for termination based upon egregious conduct.[338] In addition, the court pointed out that in the context of prospective abuse, DCF must also prove a nexus between the prior act of abuse or neglect and any prospective abuse or neglect, a topic discussed elsewhere in this survey.[339]

B. *Appellate Issues*

In one of its two major decisions involving children and families, the Supreme Court of Florida, in *S.B. v. Department of Children and Families,*[340] held that there is no right to pursue a collateral proceeding challenging the competency of court-appointed counsel[341]—the commonly-understood ineffective assistance of counsel argument—in civil dependency proceedings not involving the possibility of criminal charges against the parent or permanent termination of parental rights.[342] The court agreed to hear *S.B.* because of a conflict in lower court opinions.[343] The Supreme Court of Florida first found that in dependency proceedings, which are civil in nature, parents must be informed of the right to counsel at all stages and, if indigent, to have counsel

334. *C.B.*, 874 So. 2d at 1254 (quoting § 39.806(f)(2)).
335. *Id.* at 1248.
336. *Id.*
337. *Id.* at 1254.
338. *Id.*; *see also* P.S. v. Dep't of Children & Family Servs., 863 So. 2d 392, 394 (Fla. 3d Dist. Ct. App. 2003) (holding that there must be a connection between the activity or conduct involved and abuse or neglect or specific harm to the child).
339. *Id.* at 1254 (citing J.F. v. Dep't of Children & Families, 866 So. 2d 81 (Fla. 4th Dist. Ct. App. 2004)).
340. 851 So. 2d 689 (Fla. 2003). For a detailed critical discussion of the case, see Michele Forte, Note, *Making the Case for Effective Assistance of Counsel in Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 196 (2003).
341. *S.B.*, 851 So. 2d at 690.
342. *Id.*
343. *Id.* at 691 (citing S.B. v. Dep't of Children & Families, 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002); L.W. v. Dep't of Children & Families, 812 So. 2d 551 (Fla. 1st Dist. Ct. App. 2002)).

appointed because state law so requires.[344] The court then referred to *In re D.B.*,[345] a case in which the court previously held that a constitutional right to counsel existed in dependency proceedings only in two cases: first, if the proceedings would result in permanent termination of parental rights, and second, when a parent might be charged with criminal child abuse.[346] Because the parents in *S.B.* were not criminally charged, and there was nothing to indicate that DCF was intending to bring a termination of parental rights proceeding, there was no constitutional right to counsel in the case.[347] There being no constitutional right to counsel, but only a statutory right, the court held that there is no right to collaterally challenge the effectiveness of counsel.[348]

VI. CHILD WELFARE CASES AND ADOPTION

The role of foster parents and grandparents in child welfare cases that move to the adoption stage, as well as the extent of the trial court's authority at the adoption stage, have been the subject of a number of reported cases in Florida including two that are illustrative of problems in this area. In *I.B. v. Department of Children and Families*,[349] foster parents appealed from an order dismissing a petition to adopt a child, removing the child from their home, and placing the child with a relative in Tennessee.[350] The foster parents, among other things, "moved to reappoint a guardian ad litem, intervene in the dependency action, consolidate the dependency action with their adoption case and place the case on the trial docket."[351] As to the guardian ad litem program which had been very active in the case earlier on, the appellate court stated, "[u]nfortunately, the Program responded they had no available guardians and so were discharged from the appointment."[352] Ultimately, the

344. *Id.* at 691.
345. 385 So. 2d 83 (Fla. 1980).
346. *S.B.*, 851 So. 2d at 692 (citing *D.B.*, 385 So. 2d at 87, 90).
347. *Id.* at 693.
348. *Id.* at 693–94.
349. 876 So. 2d 581 (Fla. 5th Dist. Ct. App. 2004).
350. *Id.* at 582.
351. *Id.* at 583.
352. *Id.* For a detailed discussion on the subject of adequate representation of children in child welfare proceedings, including issues related to the voluntary nature of the program and the state court's attitudes toward it, see Michael J. Dale, *Providing Counsel for Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769 (2000). *See also Guardian Ad Litem: The Voice For Florida's Abused and Neglected Children*, 2004 Progress Report (stating that approximately half of the 42,565 children in the system had a guardian ad litem on June 30, 2004).

court held a hearing, but took no evidence.[353] Instead, it ruled that as a matter of law the decision to select the appropriate adoptive parents was one for DCF and not for the judiciary, and that the foster parents lacked standing to challenge DCF's decision.[354] The appellate court reversed and remanded.[355] First, it found, as had other courts, that foster parents have standing to intervene[356] and are proper participants under the *Florida Rules of Juvenile Procedure*, even if not proper intervenors.[357] The appellate court then concluded that the trial court erred "by refusing to consider the child's best interests before changing placement from the foster parents to the relatives."[358] Under the relevant provisions of both the dependency and adoption statutes,[359] the appeals court held that the authority and discretion of DCF regarding adoptive placement is not absolute.[360] The appellate court also held that the trial court had "inherent and continuing jurisdiction to entertain matters pertaining to child custody and to enter any order appropriate to a child's welfare."[361]

The foster parents attempted to challenge the Chapter 39 proceedings as facially violative of equal protection because, while Chapter 63 refers to a best interest test governing adoption of a child, according to the foster parents, DCF had unfettered discretion in adoption under Chapter 39.[362] The appellate court held that the best interest standard applies in both instances.[363]

In *B.B. v. Department of Children and Families*,[364] a grandmother appealed from a final order denying her motion to intervene in a dependency proceeding related to twin grandchildren as well as the denial of her petition for adoption.[365] The trial court refused to address the adoption petition on the merits.[366] During the course of the dependency proceedings, the two children were transferred to the appellant as the children's relative custodian where they resided for a period of time.[367] After the appellant's son, whom DCF

353. *I.B.*, 876 So. 2d at 583.
354. *Id.* at 584.
355. *Id.* at 588.
356. *Id.* at 584 (citing Sullivan v. Sapp, 866 So. 2d 28, 33 (Fla. 2004); FLA. R. CIV. P. 1.230).
357. *I.B.*, 876 So. 2d at 584 (citing FLA. R. JUV. P. 8.210(b)).
358. *Id.* at 586.
359. FLA. STAT. §§ 39.812(4), (5), 63.022(2).
360. *Id.*
361. *Id.*; *see also* Dep't of Children & Family Servs. v. J.C., 847 So. 2d 487 (Fla. 3d Dist. Ct. App. 2002).
362. *I.B.*, 876 So. 2d at 586.
363. *Id.*
364. 854 So. 2d 822 (Fla. 1st Dist. Ct. App. 2003).
365. *Id.* at 823.
366. *Id.*
367. *Id.* at 824.

advised could no longer reside in the appellant's home if the children were to remain, failed to move out within twenty-four hours, DCF removed the children from her home.[368] However, DCF did leave five of appellant's minor nieces and nephews in her home.[369] At the termination of parental rights trial, DCF was considering a cousin as a suitable adoptive home.[370] The cousin ultimately was unable or unwilling to adopt, and DCF took no steps to assist the appellant to obtain custody, and in fact reduced her visitation rights.[371] The grandmother then filed a motion to intervene in the ongoing dependency proceeding and to enforce an earlier court order that she be considered for adoption in the event the cousin could not adopt.[372] The trial court ruled that it lacked jurisdiction until an adoption petition was filed under Chapter 63.[373] The grandmother filed a petition, and the trial court denied it.[374] The trial court held that it: "lacked jurisdiction, because the dependency court [under Chapter 39] has ongoing reviews and jurisdiction until the children are adopted; that DCF had identified another adoptive home for the twins; that DCF did not consent to Appellant's adoption of the twins and, absent DCF's consent, an adoption petition must be denied."[375] The appellant was also denied intervener status.[376]

The appellate court held, first, that the trial court was in error in stating that it lacked jurisdiction.[377] It held that the dependency court has jurisdiction after a TPR trial despite the fact that there may be a subsequent adoption proceeding under Chapter 63.[378] In fact, according to the appellate court, the statutes prescribe jurisdiction.[379] As in *I.B.*,[380] DCF argued that the court must give "unqualified deference to [their] placement decision."[381] The appellate court disagreed, finding that the agency's "authority and discretion are not absolute."[382] The court gave examples such as the court's ability to place conditions on the exercise of DCF discretion concerning the children and the court's ability to refuse to grant the adoption petition of a non-

368. *Id.*
369. *B.B.*, 854 So. 2d at 824.
370. *Id.*
371. *Id.* at 825.
372. *Id.*
373. *Id.*
374. *B.B.*, 854 So. 2d at 825.
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *B.B.*, 854 So. 2d at 825 (citing FLA. STAT. §§ 39.812(4), -.813 (2003)).
380. 876 So. 2d 581 (Fla. 5th Dist. Ct. App. 2004).
381. *B.B.*, 854 So. 2d at 826.
382. *Id.*

relative.[383] Relying on an earlier opinion from the Fourth District Court of Appeal in *Florida Department of Children and Families v. Adoption of B.G.J.*,[384] the court held that non-interference by the court would exist so long as the selection was appropriate and in compliance with policies made in an expeditious manner.[385] Thus, the appellate court concluded that the trial court has an obligation to "ensure that DCF's selection is *appropriate* and *consonant* with DCF's policy."[386] Given the statutory and case law preference for grandparents in the adoption process, the grandparent had priority, and failure to consider the individual with such priority was neither appropriate under the facts of the case nor consistent with DCF policies and Florida law governing relative placement.[387]

VII. STATUTORY CHANGES

The Florida Legislature made a number of statutory changes in the past year in the delinquency area, including a change regarding the obligation of families to pay for the cost of supervision of children in delinquency care.[388] The new law requires the court to order a parent of a child who is in home detention, on probation, or other supervised status or placement, secure detention or committed to DJJ to pay a daily fee for costs of supervision and care.[389] Under certain circumstances, the court can reduce the fees.[390]

On the dependency side, the legislature passed a statute governing education of abused, neglected, and abandoned children.[391] As is typical in Florida, the legislation fails to provide any rights or a cause of action.[392] Furthermore, the legislation does not require an expenditure of funds.[393] However, it does obligate DCF to enter into an agreement with the Department of Education concerning the education and related services of children known to them.[394] It also requires DCF to enter into agreements with school boards and other entities regarding children known to them,[395] including enrollment

383. *Id.*
384. 819 So. 2d 984 (Fla. 4th Dist. Ct. App. 2002).
385. *B.B.*, 854 So. 2d at 826 (citing *Adoption of B.G.J.*, 819 So. 2d at 986).
386. *Id.* at 827.
387. *Id.*
388. FLA. STAT. § 985.2311 (2004).
389. § 985.2311(1)(a)-(b).
390. § 985.2311(3)-(4).
391. § 39.0016.
392. *See* § 39.0016.
393. *Id.*
394. § 39.0016(3).
395. § 39.0016(4).

in school, notification of the name and phone number of the child, establishing a protocol to share information, and notification of DCF's case planning.[396] In return, the school district will provide DCF with a listing of its services, identify services which are needed for children known to DCF, determine whether transportation is available, continue enrollment in the same school throughout the time the child is known to DCF, provide individualized student intervention when necessary, cooperate in assessment of services and support needed for the children, and appoint a surrogate parent under the Individuals with Disabilities Education Act.[397]

The legislature also passed a statute setting up a procedure for release of confidential information contained in the records of DCF pertaining to "investigations of alleged abuse, abandonment, or neglect of the child."[398] The statute provides a test for release based upon good cause for public access found to be in the best interest of the child who is the focus of the proceeding.[399]

The legislature passed a judicial review procedure for children aging out of the dependency system.[400] It provides for a mandatory judicial review hearing within ninety days after a child's seventeenth birthday and hearings thereafter to review the status of the child concerning a series of matters related to the child's movement toward independent living.[401] Included is the power of the court, when it concludes that DCF has not complied with its obligation as articulated in the written case plan for the child or the provision for independent living services as otherwise provided by Florida law, to issue an order to show cause, give DCF thirty days to comply, and ultimately to hold DCF in contempt.[402] The same statute also requires DCF to continue to include independent living and life skills information in its report to courts on the status of thirteen to eighteen year olds.[403]

The legislature also made a very specific change to the post disposition provisions of Chapter 39 regarding petitions for adoption and the involvement of licensed foster parents or court-ordered custodians.[404] It changed Chapter 39 to provide that when a foster parent or custodian is not granted an application to adopt, DCF cannot move the child from the foster home absent

396. § 39.0016(4)(a)(1)-(4).
397. § 39.0016(4)(b)(1)-(4), (c)(5); 20 U.S.C. § 1401 (2000).
398. FLA. STAT. § 39.2021(1) (2004).
399. *Id.*
400. § 39.701.
401. § 39.701(6).
402. § 39.701(6)(a)-(c).
403. § 39.701(7)(a)(10).
404. *See* § 39.812.

a prior court order.[405] The exceptions to this section are if there is danger of abuse and neglect, the foster parent agrees, or most significantly, thirty days have expired following a written notice to the foster parent, and there has been no formal challenge to the agency decision.[406]

Finally, the legislature allowed DCF to enter into agreements "with a private provider to finance, design, and construct a [mental health] treatment facility . . . of at least 200 beds and to operate all aspects" of that facility.[407] The agreements cannot exceed twenty years.[408]

VIII. CONCLUSION

The Supreme Court of Florida decided two significant cases in this past reporting year. They deal with the question of ineffective assistance of counsel in dependency cases[409] and the burden of proof in a termination case where the parental rights to another child in the family have already been terminated.[410] At the appellate level, the intermediate appellate courts have been very active in both the dependency and the termination of parental rights areas, ruling on a number of issues including how the courts should handle proceedings where the parents miss their appearance[411] and in delinquency cases involving school settings.[412]

405. § 39.812(4).
406. § 39.812(4)(a)-(c).
407. § 287.057(14)(b).
408. *Id.*
409. *See* S.B. v. Dep't of Children & Families, 851 So. 2d 689 (Fla. 2003).
410. *See* Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602 (Fla. 2004).
411. *See* R.H. v. Dep't of Children & Family Servs., 860 So. 2d 986 (Fla. 3d Dist. Ct. App. 2003); *In re* I.A., 857 So. 2d 310 (Fla. 2d Dist. Ct. App. 2003); *In re* B.B., 858 So. 2d 1184 (Fla. 2d Dist. Ct. App. 2003); *In re* C.D., 867 So. 2d 405 (Fla. 2d Dist. Ct. App. 2003); A.M. v. Dep't of Children & Families, 853 So. 2d 1084 (Fla. 4th Dist. Ct. App. 2003).
412. *See* State v. J.T.D., 851 So. 2d 793 (Fla. 2d Dist. Ct. App. 2003); M.H. v. State, 851 So. 2d 233 (Fla. 4th Dist. Ct. App. 2003).