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2003 Survey of Juvenile Law

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2003 SURVEY OF JUVENILE LAW

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I. INTRODUCTION

The Supreme Court of Florida has decided a very important issue concerning appellate practice in termination of parental rights cases, ruling that the United States Supreme Court doctrine established in *Anders v. California*,[1] regarding an attorney's withdrawal from an appeal for lack of appealable issues in a criminal case, did not apply to termination of parental rights cases.[2] The Supreme Court of Florida set forth a less onerous standard of withdrawal.[3] The doctrine of prospective neglect has been at issue in a number of cases in Florida's intermediate appellate courts over an extended period of time, including the time period addressed by this article, and no consensus has yet been reached regarding application of the doctrine.[4] The opinions rendered by the district courts of appeal continue to be in conflict over proper application of the doctrine.[5] On the delinquency side, the appellate courts continued the longstanding practice of holding the trial courts strictly

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1. 386 U.S. 738, 744 (1967).
2. N.S.H. v. Fla. Dep't of Children & Family Servs., 843 So. 2d 898, 900 (Fla. 2003).
3. *Id.* at 904.
4. *See, e.g.*, F.L. v. Dep't of Children & Families, 849 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2003).
5. *See id.* at 1124.

responsible for compliance with statutory provisions, including proper notice to children of their right to counsel[6] and proper application of dispositional statutes.[7] Legislative activity was limited during the past year, although a major change occurred in the placement of the guardian *ad litem* program, which moved from the Supreme Court of Florida to the Justice Administrative Commission.[8]

II. DEPENDENCY

Florida case law and prior surveys in this Journal have reported on corporal punishment as one of the bases for a finding of dependency.[9] The question under Florida law is whether corporal punishment is excessive enough to qualify as abuse.[10] In *O.S. v. Department of Children & Families*,[11] the appellate court held that the evidence established substantial bruising over a majority of the child's buttocks, legs, and neck and that some of the bruises were still present six weeks later.[12] The child also testified that this was not the most severe beating she had received.[13] The appellate court upheld the trial court's fact-finding, distinguishing cases in which the court found that bruises were insignificant, did not constitute temporary disfigurement, and did not put the child at risk of imminent abuse or cause the child to suffer significant mental impairment.[14]

An important question of how to prove the grounds for dependency was before the Fourth District Court of Appeal in *D. Children v. Department of Children & Family Services*.[15] *D. Children* involved charges against both parents, the father claimed he was not at home at the time the infant was in-

6. *E.g.*, A.L. v. State, 841 So. 2d 676 (Fla. 4th Dist. Ct. App. 2003).

7. *E.g.*, Fisher v. State, 840 So. 2d 325 (Fla. 5th Dist. Ct. App. 2003).

8. FLA. STAT. § 39.8296 (2003).

9. *See* Michael J. Dale, *Juvenile Law: 2001 Survey of Florida Law*, 26 NOVA L. REV. 903, 915 (2002).

10. *Id.* Parents can also be charged with criminal child abuse for excessive corporal punishment. § 39.01(30)(a)(4). Parental immunity is not a defense to criminal child neglect. Radford v. State, 828 So. 2d 1012, 1019–20 (Fla. 2002) (citing State v. McDonald, 785 So. 2d 640, 642 (Fla. 2d Dist. Ct. App. 2001)).

11. 821 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002).

12. *Id.* at 1148.

13. *Id.*

14. *Id.* at 1147–48 (citing J.C. v. Dep't of Children & Families, 773 So. 2d 1220, 1221 (Fla. 4th Dist. Ct. App. 2000); R.S.M. v. Dep't of Health & Rehab. Servs., 640 So. 2d 1126 (Fla. 2d Dist. Ct. App. 1994)); *see also* W.H. v Dep't of Children & Family Servs., 846 So. 2d 636, 639 (Fla. 2d Dist. Ct. App. 2003); K.R. v. Dep't of Children & Families, 784 So. 2d 594, 597 (Fla. 4th Dist. Ct. App. 2001).

15. 820 So. 2d 980 (Fla. 4th Dist. Ct. App. 2002).

jured, although he was charged and a dependency finding was made as to him.[16] The mother, however, was at home and dependency was also found as to her.[17] In a split opinion, the appellate court held that the dependency as to the father would still be affirmed; even assuming he was not home at the time of the infant's injury.[18] Moreover, the majority held that the trial court did not abuse its very broad discretion.[19] Specifically, the court held that there was ample evidence to support dependency as to the mother, the perpetrator was not identified, and there was an intact family.[20] The court also relied upon an earlier case, *In re B.J.*,[21] where a parent's rights were terminated, even though there was no evidence that the parent had inflicted any abuse.[22] The court stated "'where there is evidence that a child suffered abuse by one or both of the parents present, there is clear and convincing evidence of egregious abuse to support termination of parental rights of both parents.'"[23]

Judge Warner dissented in the *D. Children* case.[24] First, she distinguished *In re B.J.* on the facts.[25] Specifically, she noted that the abuse occurred when the mother was in the residence.[26] In the case at bar, according to the dissent, there was no evidence that the father was at home when the abuse occurred, nor was there any evidence to suggest that the injuries occurred at any time when the father was at home.[27] Although the majority opinion states that it does not "'accept as a given, that the father was not in the home at the time the injury occurred,'" there was no evidence to support that fact unless one rejects the parties' unreported testimony as not credible.[28] Thus, the majority opinion seems to stand for the proposition that it is not an abuse of discretion for the court to find dependency as to one parent based upon acts committed by the other in the absence of the parent and without

16. *Id.* at 981.
17. *Id.*
18. *Id.*
19. *Id.* at 982 (citing D.H. v. Dep't of Children & Families, 769 So. 2d 424, 426 (Fla. 4th Dist. Ct. App. 2000)).
20. *D. Children*, 820 So. 2d at 982.
21. 737 So. 2d 1227 (Fla. 2d Dist. Ct. App. 1999).
22. *Id.* at 1228.
23. *D. Children*, 820 So. 2d at 984 (Warner, J., dissenting).
24. *Id.* at 983.
25. *Id.*
26. D. Children v. Department of Children & Family Services 820 So. 2d 980, 984 (Fla. 4th Dist. Ct. App. 2002).
27. *Id.*
28. *Id.* at 984–85 (Warner, J., dissenting).

any showing of evidence that the other parent had any involvement in the behavior which gave rise to the abuse or neglect.[29]

The second issue in *D. Children* dealt with the ongoing question of whether a child may be found dependent based upon abuse or neglect afflicted upon a sibling, which is also discussed in the section of this article on termination of parental rights.[30] Relying upon *In re M.F.*[31] and *D.H. v. Department of Children & Families*, [32] the majority recognized that the trial court cannot rely solely on the existence of one child's injury in finding two other children dependent.[33] Moreover, the majority decided it would "defer to the trial judge, who heard and observed the witnesses, and resolved the conflicts and doubts in favor of protecting all three of the children, not just the one who was abused."[34] In so doing, it relied upon a social worker who testified at the trial level about the lack of explanation for the injury and the inability to assess the parties' needs to be assessed to ensure the safety of the children.[35] Again, on this ground, Judge Warner dissented.[36] She explained that the social worker never interviewed the children, nor the parents, but found the same risk for the boys as for the infant girl.[37] Relying upon the precedents supporting the proposition that there has to be some kind of independent evidence apart from the single act to allow for a finding of dependency as to two other children, Judge Warner held that "[w]here there is *no* evidence to support the trial court's ruling, or where the *facts* as found by the trial court do not as a matter of law support the relief granted, no deference should be given."[38]

The issue of prospective neglect regularly comes before the Florida appellate courts in both dependency and termination of parental rights cases. As demonstrated by the *D. Children* case, it usually arises in the context of prior abuse or neglect of siblings forming the basis of an allegation of "prospective abuse" against the child who is the subject of the present proceeding.[39] It can also arise in the context where no child has yet been abused or

29. *See id.* at 981, 982.
30. *Id.* at 982.
31. 770 So. 2d 1189 (Fla. 2000).
32. 769 So. 2d 424 (Fla. 4th Dist. Ct. App. 2000).
33. *D. Children*, 820 So. 2d at 982.
34. *Id.*
35. *Id.*
36. *Id.* at 985 (Warner, J., dissenting).
37. *Id.*
38. *D. Children v. Department of Children & Family Services* 820 So. 2d 980, 986 (Fla. 4th Dist. Ct. App. 2002). (Warner, J., dissenting).
39. *See* Dale, *supra* note 9, at 913; Michael J. Dale, *Juvenile Law in Florida in 1998*, 23 NOVA L. REV. 819, 821–22, 825 (1999).

neglected but where the parents' behavior suggests prospective neglect.[40] The standard for such termination cases originated in the Supreme Court of Florida case, *Padgett v. Department of Health & Rehabilitative Services*,[41] decided in 1991. In *In re P.S.*,[42] the question was whether the "court abused its discretion in admitting evidence of the father's prior DUI arrest" in determining whether there was dependency.[43] The arrest had occurred six years before the proceedings and long before the child was born.[44] The appellate court held that such information was not relevant.[45] Applying the prospective neglect standard, and citing *Palmer v. Department of Health & Rehabilitative Services*,[46] the court held that under the standard provided by section 39.01(14)(f) of the *Florida Statutes*, involving substantial risk of imminent abuse, abandonment, or neglect, the "court abused its discretion in finding that the father's single act 'clearly and certainly' predicted future neglect."[47]

As reported in this Journal, a trial court can find a child dependent, who was not being abused, based upon abuse inflicted on a sibling where a "nexus" exists between the "act of abuse and prospective abuse."[48] This was the conclusion of the court in *O.S. v. Department of Children & Families*,[49] where a severe beating by the mother, intended as corporal punishment, was likely to be employed on the younger child even though the child had not been paddled as often as the older sibling.[50] In light of the fact that the older child was no longer in the home, the appellate court upheld the concept that the younger child might "receive the brunt of the mother's rage" and for that reason affirmed the dependency finding as to the younger child.[51] Another dependency case predicated on proof of neglect or abuse of other children is *M.N. v. Department of Children & Families*.[52] The question in *M.N.* was whether an incident of prior neglect or abuse of one child would be sufficient

40. *See* L.B. v. Dep't of Children & Families, 835 So. 2d 1189 (Fla. 1st Dist. Ct. App. 2002); Hroncich v. Dep't of Health & Rehab. Servs., 667 So. 2d 804 (Fla. 5th Dist. Ct. App. 1995); Palmer v. Dep't of Health & Rehab. Servs., 547 So. 2d 981 (Fla. 5th Dist. Ct. App. 1989).

41. 577 So. 2d 565, 571 (Fla. 1991).

42. 825 So. 2d 530 (Fla. 2d Dist. Ct. App. 2002).

43. *Id.*

44. *Id.*

45. *Id.*

46. 547 So. 2d 981, 984 (Fla. 5th Dist. Ct. App. 1989).

47. *P.S.*, 825 So. 2d at 531.

48. *See* D.H. v. Dep't of Children & Families, 769 So. 2d 424, 427 (Fla. 4th Dist. Ct. App. 2000).

49. 821 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002).

50. *Id.* at 1149.

51. *Id.*

52. 826 So. 2d 445 (Fla. 5th Dist. Ct. App. 2002).

by itself to establish "a substantial risk of imminent abuse" of another child, as required by Chapter 39.[53] Relying upon a body of Fifth District Court of Appeal cases, in *M.N.*, the court held that independent evidence must be introduced establishing a nexus between the prior abuse or neglect and the allegation of prospective abuse.[54] An example of a nexus may be a "mental or emotional condition of [a] parent which will continue, such as mental illness [or] drug addiction."[55] In the *M.N.* case, the parent did not suffer from a mental illness but had a below average intellectual ability that resulted in an adjustment disorder that was neither serious nor disturbing.[56] For that reason, the appellate court held that the Department of Children and Families ("DCF") failed to meet its burden of establishing the sufficient nexus between the prior abuse of one child and the prospective abuse or neglect of the other child.[57]

In a series of opinions commencing with *Beagle v. Beagle*,[58] the Supreme Court of Florida has rejected grandparent intervention in family affairs by means of claims of right to visitation.[59] Grandparent visitation rights arose in a different context in *C.S. v. Biddle*,[60] where grandparents initiated the dependency proceeding and sought custody of the children.[61] The court ordered the mother to make the three children available to the grandparents, in order to permit the grandparents to evaluate the children's medical, dental and educational circumstances.[62] Furthermore, the court ordered the parents to deliver the children to the grandparents for overnight visitation and authorized the grandparents to obtain evaluations of the children, all absent a finding that the children were dependent.[63] On a petition for writ of prohibition, the appellate court granted the writ and quashed the service.[64] Citing to the

53. *Id.* at 447 (citing § 39.01(14)(f)).

54. *Id.* at 448 (citing K.C. v. Dep't of Children & Families, 800 So. 2d 676 (Fla. 5th Dist. Ct. App. 2001); Gaines v. Dep't of Children & Families, 711 So. 2d 190, 194 (Fla. 5th Dist. Ct. App. 1998); *O.S.*, 821 So. 2d at 1145; D.H. v. Dep't of Children & Families, 769 So. 2d 424 (Fla. 4th Dist. Ct. App. 2000)).

55. *Id.*

56. *Id.*

57. *Id.* at 449.

58. 678 So. 2d 1271 (Fla. 1996).

59. *See* Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91, 98–99 (2000); *see also* Troxel v. Granville, 530 U.S. 57 (2000); Saul v. Brunetti, 753 So. 2d 26 (Fla. 2000); Von Eiff v. Azicn, 720 So. 2d 510 (Fla. 1998); Lonon v. Ferrell, 739 So. 2d 650 (Fla. 2d Dist. Ct. App. 1999).

60. 829 So. 2d 1004 (Fla. 2d Dist. Ct. App. 2002).

61. *Id.*

62. *Id.* at 1005.

63. *Id.*

64. *Id.*

fundamental rights of parents to raise their children absent a compelling state interest, as articulated in the *Beagle* case,[65] the appellate court held that "[w]hen individuals enlist the judicial system to intervene in a parent/child relationship, the court must scrupulously adhere to the pertinent statutes in determining whether such interference is warranted."[66] The court concluded that the "status as grandparents does not confer on them any special rights to direct the upbringing of these children or to visit with the children without parents' permission."[67]

The failure of parents to appear both at dependency hearings and in termination of parental rights cases can result in a default judgment. Important issues of proper notice and adequate due process protections arise in these cases. Over a dissent, the Third District Court of Appeals, in *L.W. v. Florida Department of Children & Family Services*,[68] upheld a default order of dependency as to a father who failed to appear at an arraignment hearing where the father's attorney was notified of the hearing and left two recorded messages for the father.[69] The dissent argued that less than twenty-four hours notice of the arraignment hearing on the dependency proceeding to the lawyer, while sufficient as a general proposition under Florida law,[70] was insufficient because fundamental rights were at stake and a mere twenty-four hours notice was inadequate particularly given the lack of assurance that the father had actually received the notice.[71]

In another failure to notify case, *S.H. v. Department of Children & Families*,[72] the mother, but not the father, was served at home with a summons in a dependency proceeding.[73] He was at the courthouse on the morning of the arraignment, "signed an attendance sheet outside of the courtroom . . . [but] left the courthouse before the arraignment began."[74] The trial court ruled that he had been properly served by substituted service and entered a default judgment finding the child dependent.[75] Noting that it was sympa-

65. Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996).

66. *C.S.*, 829 So. 2d at 1005.

67. *Id.*; *see also* Miller v. California, 355 F.3d 1172, 1175 (9th Cir. 2004) (discussing grandparents' lack of liberty interest in making decisions about care, custody, and control of their grandchildren).

68. 829 So. 2d 938 (Fla. 3d Dist. Ct. App. 2002).

69. *Id.* at 939.

70. *See* M.E. v. Fla. Dep't of Children & Family Servs., 728 So. 2d 367, 368 (Fla. 3d Dist. Ct. App. 1999).

71. *L.W.*, 829 So. 2d at 940.

72. 837 So. 2d 1117 (Fla. 4th Dist. Ct. App. 2003).

73. *Id.*

74. *Id.*

75. *Id.*

thetic to the "considered ruling of the trial judge,"[76] the court reversed based upon the language of Chapter 39 regarding service of process.[77] The court found that the father's signing of the attendance sheet did not constitute appearance in a hearing before the court as required by Florida law.[78] Furthermore, there was no substituted service on the father "because the mother's residence was not [the father's] 'usual place of abode' at the time of service."[79] Finally, the father's knowledge of the dependency proceeding is not enough to waive the statutory service requirement.[80] In addition, this was not a case of deliberate refusal to accept delivery of service.[81] Thus, "[t]he order of disposition with respect to the father [was] reversed."[82]

In the third case involving default at the dependency hearing stage, *A.J. v. Department of Children & Families Services*,[83] parents, who had attended two days of trial and many hearings in their dependency case suffered a default judgment and consent order against them when they were twenty-five minutes late for the commencement of the third day of trial in Miami.[84] The Fourth District Court of Appeal reversed the lower court's order on grounds that the trial court abused its discretion in denying the parents' motion to set aside the default judgment.[85] The appellate court recognized that the purpose behind the statutory authority enabling the court to enter a default order at this stage is to avoid the parents defeating the object of the dependency proceeding through neglect and further that the court has the authority to bring the case to a conclusion even if the parents do not participate.[86] However, the appeals court noted, nonetheless, that "[t]he purpose of the statute is not to inject 'gotcha' practices into the dependency process."[87] Under the facts of the case, the lower court abused its discretion in deciding the case by way of a default rather than the merits.[88]

There are times when at the end of the dependency proceeding the remaining issue is one of custody. In *L.F. v. Department of Children & Family*

76. *Id.* at 1118.
77. *S.H.*, 837 So. 2d at 1118.
78. *Id.*; *see* § 39.502(2).
79. *S.H.*, 837 So. 2d at 1118.
80. *Id.* (citing Bedford Computer Corp. v. Graphic Press, Inc., 484 So. 2d 1225–27 (Fla. 1984) (finding that actual notice does not render attempted service valid)).
81. S.H. v. Dep't of Children & Families, 837 So. 2d 1117, 1119 (Fla. 4th Dist. Ct. App. 2003).
82. *Id.* at 1120.
83. 845 So. 2d 973 (Fla. 4th Dist. Ct. App. 2003).
84. *Id.* at 974.
85. *Id.* at 976.
86. *Id.*
87. *Id.*
88. *A.J.*, 845 So. 2d at 976.

Services,[89] two half siblings resided with their natural father/step-father in Georgia during the course of a dependency proceeding against the mother.[90] At the end of the proceeding, the court, having previously found dependency, ordered both reunification and strengthening/maintaining the current placement, placing custody of both children with the natural father of one who was also the step-father of the other.[91] The Fourth District Court of Appeal reversed because, while under the dependency statute the court was within its discretion to use the best interest standard to determine which parent should have custody of the dependant child, the step-father was neither a parent nor a relative under the Florida statute to whom custody might go.[92] Thus, the court remanded to consider how the parties might resolve long-term custody and whether a new case plan might be appropriate.[93]

S.C. v. Guardian Ad Litem,[94] involved an important issue of a juvenile's right to privacy in the context of a dependency proceeding. S.C., a child of fourteen, was the subject of a dependency proceeding and had a guardian *ad litem* appointed on her behalf.[95] In the course of the proceeding against the mother, the child sought to maintain the privacy of information contained in her records held by a former therapist and psychologist.[96] In an effort to avoid release of the information to her guardian *ad litem*, the child "moved to enjoin the guardian *ad litem* program, and any individual guardian *ad litem* assigned, from obtaining any confidential or privileged records" in the absence of the formal petition or hearing as provided under Florida law.[97] Consequently, because the doctor was going to be called at the adjudicatory hearing, the child sought to enjoin anyone from calling the doctor.[98]

On a writ of certiorari, the Fourth District Court of Appeal concluded that the order denying the child's motion violated Florida law by failing to allow the child, fourteen years of age, an opportunity to be heard.[99] It did not rule on the issue of maturity or competency of the minor to seek the relief.[100] The court concluded that the child had a right to assert the therapist-patient

89. 837 So. 2d 1098 (Fla. 4th Dist. Ct. App. 2003).
90. *Id.* at 1099.
91. *Id.* at 1101.
92. *Id.* at 1102 (citing FLA. STAT. § 39.01(49), (60) (2002)).
93. *Id.* at 1104.
94. 845 So. 2d 953 (Fla. 4th Dist. Ct. App. 2003).
95. *Id.* at 955.
96. *Id.* at 955–56.
97. *Id.* at 956.
98. *Id.*
99. *S.C.*, 845 So. 2d at 956.
100. *Id.*

privilege, and that nothing contained in Chapter 39[101] provided the guardian *ad litem* with the right to review the privileged records of the dependent child.[102] The power of the guardian *ad litem* found in Section 61.403(2) does not authorize the guardian *ad litem* to obtain confidential psychotherapist-patient records absent the child's right to notice and an opportunity to be heard to challenge such access.[103] The court recognized the child's right of privacy under the Florida Constitution and case law.[104] Moreover, the court concluded that the child had the right to notice and the opportunity to be heard, that the matter should be resolved *in camera* giving the child the opportunity to be heard, and that such was the least restrictive and intrusive means of determining whether the material should be made available.[105] Finally, the court relied upon case law from California,[106] and a body of professional literature to support the proposition that mature minors have privacy interests that ought to be recognized in medical decision-making contexts.[107] It is also significant that the child in this case had a lawyer from a legal aid program representing her. Under Florida law, the child has no right to counsel in a dependency proceeding but is only entitled to representation by the guardian *ad litem* with whom she was at odds in this case.[108]

Jurisdiction of the dependency court over a family that had no ties to the state of Florida and was merely in transit when the children were seized at Miami International Airport was before the Third District Court of Appeal in *K.H. v. Department of Children & Family Services*.[109] The case involved a father from Trinidad who was living with his wife, an employee of the U.S. State Department posted in Brazil, but who was not the mother of his children.[110] The father, according to the appellate court, disciplined his daughter by striking her on the buttocks repeatedly with a wooden stick, leaving bruises and abrasions.[111] The discipline took place on U.S. Embassy property in Brazil.[112] Believing that the family might abscond to Trinidad, the

101. *See* FLA. STAT. § 39.4085(21) (2003).
102. *Id.*
103. § 61.403(2).
104. *S.C.*, 845 So. 2d at 958 (citing FLA. CONST. art. I, § 23; *In re* T.W., 551 So. 2d 1186 (Fla. 1989)).
105. S.C. v. Guardian Ad Litem, 845 So. 2d 953, 959 (Fla. 4th Dist. Ct. App. 2003).
106. *Id.* (citing *In re* Kristine W., 114 Cal. Rptr. 2d 369 (Ct. App. 2001)).
107. *Id.* (citing *Kristine W.*, 114 Cal. Rptr. 2d at 373–74).
108. *See generally* Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769 (2001).
109. 846 So. 2d 544, 545–46 (Fla. 3d Dist. Ct. App. 2003).
110. *Id.* at 546.
111. *Id.*
112. *Id.*

State Department detained them and the children were taken into the DCF custody when their plane arrived at Miami International Airport.[113] Despite its statement that "[w]e agree with the father that their case raises serious concerns over jurisdiction, as the family had no ties to the State of Florida,"[114] the court held that under section 39.40(2) of the *Florida Statutes*, it has original jurisdiction when a child is taken into custody by the DCF.[115] The court also found that under the Uniform Child Custody Jurisdiction Act applicable in Florida pursuant to section 61.503(4) of the *Florida Statutes*, the dependency court had emergency jurisdiction over a child who was present in the State of Florida.[116] In addition, it noted that no proceedings were brought in Virginia.[117] It upheld the jurisdiction despite the fact that it recognized that jurisdiction was created by acts of the U.S. State Department and Florida officials.[118]

And finally, in a statement that is becoming redundant in appellate decisions, the court concluded its opinion by stating that "[t]his case presents yet another unfortunate failure of the Department of Children and Families and the court system to fulfill their statutory duties to the children and the family."[119]

For well over a decade the appellate courts and this author have commented on the failure of the dependency trial court to state the facts upon which findings of dependency are made.[120] In *M.S. v. Department of Children & Families*,[121] the court was faced with the same problem and, once again, it reversed and remanded because the trial court failed to adequately state facts upon which the conclusion of abuse was made, or to state any facts to support the conclusions that the relationship between the mother and her child was unhealthy but simply tracked the factual allegations of the amended petition for dependency.[122]

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113. *Id.*
114. *K.H.*, 846 So. 2d at 546.
115. *Id.* at 547.
116. *Id.*
117. *Id.*
118. *Id.*
119. *K.H.*, 846 So. 2d at 547.
120. *See In re* T.S., 557 So. 2d 676, 677 (Fla. 2d Dist. Ct. App. 1990); Williams v. Dep't of Health & Rehab. Servs., 568 So. 2d 995, 997 (Fla. 5th Dist. Ct. App. 1990); *see also* J.C.G. v. Dep't of Children & Families, 780 So. 2d 965 (Fla. 5th Dist. Ct. App. 2001); Michael J. Dale, *Juvenile Law Color: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139, 140 (1994).
121. 827 So. 2d 1089 (Fla. 1st Dist. Ct. App. 2002).
122. *Id.* at 1090.

III. TERMINATION OF PARENTAL RIGHTS

A. *Adjudicatory Issues*

Florida Rules of Judicial Administration provide that the parties must consent for testimony to take place through the use of communication equipment rather than in court.[123] In *A.B. v. Department of Children & Family Services*,[124] the appeals court reversed in a case where the trial court took testimony of a treating psychiatrist as well as a former foster parent of the child via telephone over objections by the mother's counsel.[125] The court held that given the seriousness of the witnesses' testimony and the nature of the issue in the case the use of telephone testimony without the mother's consent violated the mother's due process rights.[126]

Florida law provides that in a termination of parental rights case one of the grounds for termination is the setting where a case plan has been filed, a child has been previously adjudicated dependent and the child continues to be abused, neglected and abandoned by the parents.[127] That issue is clear on its face. However, in *In re T.B.*,[128] the intermediate appellate court reversed because the child was never declared dependent, the father "had no tasks to complete under the case plan he was given, there was no factual basis to find that he failed to substantially comply with the [case] plan."[129]

The issue of whether the failure of parents to appear at termination proceedings may constitute grounds for default termination of parental rights has been before the appellate courts on a number of occasions.[130] As it has in the dependency context,[131] in *C.R.K. v. Department of Children & Families*,[132] the trial court defaulted a mother at a calendar call for failure to appear after having been given notice.[133] "The mother's attorney was present,

123. FLA. R. JUD. ADMIN. 2.071(d).
124. 820 So. 2d 1085 (Fla. 3d Dist. Ct. App. 2002).
125. *Id.* at 1086.
126. *Id.*
127. § 39.806(1)(e).
128. 819 So. 2d 270 (Fla. 2d Dist. Ct. App. 2002).
129. *Id.* at 272.
130. Michael J. Dale, *Juvenile Law: 1998 Survey of Florida Law*, 24 NOVA L. REV. 179 (1999).
131. *See infra* Part II.
132. 826 So. 2d 1053 (Fla. 4th Dist. Ct. App. 2002).
133. *Id.* at 1054. The notice provision provided "Termination of failure to personally appear at the advisory hearing constitutes consent to termination of parental rights of the child(ren). If you fail to personally appear on the date and time specified, you may lose all legal rights as a parent to the child(ren)." *Id.*

but the mother was not."[134] Nonetheless, the trial court went forward and took testimony on the second part of the Florida test for termination of parental rights—manifest best interest of the children.[135] The appellate court reversed finding that the trial court had entered a default at the calendar call.[136] The appellate court held that the "calendar call is not an adjudicatory hearing" which is the event where failure to appear can produce a default.[137] For that reason, the appellate court held that the notice was inadequate.[138] Section 39.801(3)(v) of the *Florida Statutes* refers specifically to the failure of a parent to appear at the adjudicatory hearing.[139] The court therefore reversed.[140] As a matter of fundamental due process, a parent in a termination of parental rights case is entitled to notice by service of the petition, pleadings, and other papers.[141]

In *M.J.W. v. Department of Children & Families*,[142] the question was whether the trial court could hold an adjudicatory hearing where the mother was never served in compliance with the *Florida Rules of Juvenile Procedure* and the statute.[143] Under the facts of the case, the mother learned of the hearing through telephone conversations but was never served in compliance with the statute by officials from DeKalb County, Georgia, where she lived.[144] The appellate court reversed the adjudication of termination of parental rights finding that the statute and the rule provide for the sole manner to effectuate service in a parental termination proceeding—either personal service or constructive service.[145] Neither happened here, and thus, the court reversed.[146]

A second case involving termination of parental rights and the question of proper service upon a parent who fails to appear is *J.M. v. Department of Children & Families*.[147] In *J.M.*, when the DCF filed its petition to terminate parental rights to appellant's three children, the DCF could not serve the individual personally so it sought service through publication as required by

134. *Id.*
135. *Id.*
136. *C.R.K.*, 826 So. 2d at 1055.
137. *Id.*
138. *Id.*
139. § 39.801(3)(v).
140. *See also In re* C.R., 806 So. 2d 646 (Fla. 3d Dist. Ct. App. 2002).
141. *See generally* § 89.801(1).
142. 825 So. 2d 1038 (Fla. 1st Dist. Ct. App. 2002).
143. *Id.* at 1039.
144. *Id.* at 1039–40.
145. *Id.* at 1040–41.
146. *Id.*
147. 833 So. 2d 279 (Fla. 5th Dist. Ct. App. 2002).

Florida law.[148] The problem the DCF faced was that when it published notice of the termination of parental rights, it did so less than twenty-eight days before the advisory hearing.[149] Florida statute requires that written defenses be filed with the Clerk not later than the date set in the notice, which shall not be less than twenty-eight nor more than sixty days after the first publication of the notice.[150] The fact that the parent had a lawyer is not dispositive of the issue, according to the appellate court, because that makes it clear that the issue was the initial notification, not the presence of counsel.[151] Subsequent notification can be served upon the lawyer and such notification will be appropriate, as the court held in *M.E. v. Florida Department of Children & Family Services*.[152] Because fundamental rights are at issue, strict adherence to notice requirements is required and for that reason the court reversed and remanded.[153] It is also significant that the court cited *Santosky v. Kramer*,[154] which speaks to the significant interests on a constitutional basis of parents in termination cases.[155]

Section 39.806(1)(i) allows for termination of parental rights to one child where parental rights have previously been terminated involuntarily to a sibling.[156] Two appellate courts recently dealt with the related issue of recognizing a termination of parental rights order from another state in an ongoing proceeding within Florida.[157] In *Department of Children & Families v. V.V.*,[158] a mother in a Florida termination case had her rights terminated as to a different child in Mississippi under circumstances where she was not afforded counsel.[159] Nonetheless, the court in *V.V.* held that "[p]rinciples of comity and of full faith and credit demand that the judgment be recognized. No paramount rule of public policy dictates otherwise."[160] In *J.H.K.*, the appellate court reversed the dismissal of a termination case and remanded for new hearing so that the DCF could offer evidence surrounding a New Mexico termination, according to the court, based upon the presumption arising

148. *Id.* at 280 (citing § 49.09).
149. *Id.* at 281.
150. § 49.011(13).
151. *J.M.*, 833 So. 2d at 282.
152. 728 So. 2d 367, 368 (Fla. 3d Dist. Ct. App. 1999).
153. *J.M.*, 833 So. 2d at 282–83.
154. 455 U.S. 745 (1982).
155. *Id.*
156. § 39.806(1)(i).
157. Dep't of Children & Families v. J.H.K, 834 So. 2d 298 (Fla. 5th Dist. Ct. App. 2002); Dep't of Children & Families v. V.V., 822 So. 2d 555 (Fla. 5th Dist. Ct. App. 2002).
158. 822 So. 2d at 555–56.
159. *Id.* at 558.
160. *Id.*

from the prior termination.[161] The court's analysis is troubling, in addition to being so simplistic and lacking in analysis.

Significantly, the United States Supreme Court in *Lassiter v. Department of Social Services*[162] recognized the importance of the protected liberty interest to parents, even though it held there was no absolute right to counsel in a termination of parental rights case.[163] Not looking behind the termination decree in the other jurisdiction raises basic constitutional questions. Indeed, the United States Supreme Court has recognized the concept of a collateral attack upon judgments of other jurisdictions if they lack fairness.[164] The seminal United States Supreme Court case, *Williams v. North Carolina*,[165] demonstrates this proposition in the context of recognition of foreign divorce decrees.

The issue of the appointment of a guardian *ad litem* continues before the appellate courts in Florida. In *G.S. v. Department of Children & Family Services*,[166] the appellate court reversed the trial court in a termination of parental rights case for failure to appoint a guardian *ad litem* to represent the interests of the minor child.[167] With little discussion, the appellate court cited Florida law that requires a trial court to appoint a guardian *ad litem* to represent the best interests of a child in any termination of parental rights proceeding if a guardian *ad litem* had not been previously appointed.[168] Despite the fact that the court in *G.S.* described the failure to appoint a guardian as a clear violation of the statutory mandate, and the fact that the federal funding statute, the Childhood Abuse Prevention and Treatment Act of 1974 ("CAPTA")[169] requires the appointment of a guardian *ad litem* in a dependency proceeding, there is Florida case law that inexplicably accepts the failure to either appoint or continue the appointment of a guardian *ad litem* in dependency and termination cases.[170]

161. *J.H.K.*, 834 So. 2d at 299.
162. 452 U.S. 18 (1981); *see also* Santosky v. Kramer, 455 U.S. 745 (1982).
163. *Lassiter*, 452 U.S. at 32–33.
164. *See id.* at 33–34.
165. 325 U.S. 226 (1945).
166. 838 So. 2d 1221 (Fla. 3d Dist. Ct. App. 2003).
167. *Id.* at 1222.
168. *Id.* (citing § 39.808(2); FLA. R. JUV. P. 8.510(A)(2)(c)).
169. 42 U.S.C. §§ 5101-19 (2000).
170. For a discussion of this issue see Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769, 797 (2001).

B. *Appellate Issues*

The Supreme Court of Florida has decided the issue of whether the procedures set forth in *Anders v. California*,[171] in which the United States Supreme Court enunciated the method by which counsel for an indigent defendant in a criminal case could withdraw from the appeal on grounds that there is no valid basis to appeal, applies to a termination of parental rights case. In *Anders* the United States Supreme Court ruled that when an attorney for an indigent defendant believes the case on appeal to be wholly frivolous, the lawyer may seek permission to withdraw after conscientious examination of the record. However, the attorney must submit a brief referring to anything in the record that the lawyer believes might reasonably support the appeal.[172] Since 1971, Florida has applied the *Anders* procedure to criminal appeals in this state.[173] In *N.S.H. v. Florida Department of Children & Family Services*,[174] the Supreme Court of Florida held that *Anders* did not apply to termination of parental rights cases.[175] It did so, despite the fact that it had earlier expanded the *Anders* procedures to appeals of involuntary civil commitment to mental health facilities, where a person's physical liberty was at issue.[176] The court in *N.S.H.* held that the *Anders* procedures were not necessary in a termination of parental rights case because the risks at stake were not the same.[177] The court held that there was no loss of liberty in the termination of parental rights setting.[178] The court also noted that the interests at stake were not just of the parents but also those of the child.[179] The court believed that because termination cases, apparently unlike criminal cases, involved extensive fact-patterns, the burden placed on the appellate court in reviewing extensive records would be a substantial burden. Finally, the court applied the three-part test of *Matthews v. Eldridge*[180] to conclude that there was no due process violation in the failure to require the *Anders* process to be employed in termination of parental rights proceeding.[181] The court did, however, set up a procedure for withdrawal by appellate counsel. It relied

171. 386 U.S. 738 (1967).
172. *Id.* at 744.
173. State v. Wooden, 246 So. 2d 755, 757–58 (Fla. 1971), *abrogated on other grounds by* State v. First Dist. Ct. of App., 569 So. 2d 439, 442 (Fla. 1990).
174. 843 So. 2d 898 (Fla. 2003).
175. *Id.* at 900.
176. Pullen v. State, 802 So. 2d 1113, 1120 (Fla. 2001).
177. *N.S.H.*, 843 So. 2d at 902.
178. *Id.*
179. *Id.*
180. 424 U.S. 319 (1976).
181. *N.S.H.*, 843 So. 2d at 903.

upon the Fourth District Court of Appeal's opinion in *Ostrum v. Department of Health & Rehabilitative Services*,[182] which held that the attorney should file a motion seeking leave to withdraw, along with a certification.[183]

> [W]here appellate counsel seeks leave to withdraw from representation of an indigent parent in a termination of parental rights case, the motion to withdraw shall be served on the client and contain a certification that after a conscientious review of the record the attorney has determined in good faith that there are no meritorious grounds on which to base an appeal. The parent shall then be provided the opportunity to file a brief on his or her own behalf.[184]

IV. PROSPECTIVE ABUSE AND NEGLECT

Prospective abuse and/or neglect occurs in both dependency proceedings and termination of parental rights ("TPR") cases.[185] This is an important topic that has been the subject of a number of appellate cases in both settings this year, and for this reason it is addressed separately in this survey. "The issue in prospective neglect or abuse cases is whether future behavior, which will adversely affect the child, can be clearly and certainly predicted."[186] The genesis for predicting a parent's future behavior can be the prior abuse or neglect of a sibling.[187] It can also be a finding of "substantial risk of imminent abuse . . . or neglect,"[188] usually stemming from a showing in the record that the parent's behavior "was beyond the parent's control, likely to continue, and placed the child at risk,"[189] but where there was no prior finding of abuse or neglect of another child. The most often cited behavioral conditions in the latter setting include mental illness, drug addiction, or pedophilia.[190]

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182. 663 So. 2d 1359 (Fla. 4th Dist. Ct. App. 1995).

183. *Id.* at 1361.

184. *N.S.H.*, 843 So. 2d at 904.

185. Denson v. Dep't of Health & Rehab. Servs., 661 So. 2d 934, 936 (Fla. 5th Dist. Ct. App. 1995).

186. Palmer v. Dep't of Health & Rehab. Servs., 547 So. 2d 981, 984 (Fla. 5th Dist. Ct. App. 1989).

187. M.N. v. Dep't of Children & Families, 826 So. 2d 445, 447 (Fla. 5th Dist. Ct. App. 2002).

188. *Id.*

189. Gaines v. Dep't of Children & Families, 711 So. 2d 190, 193 (Fla. 5th Dist. Ct. App. 1998).

190. *Id.* Addressing conflict between circuits regarding whether a dependency ruling could be based entirely upon the commission of a single sex act on a different child, the Supreme Court of Florida held in *In re M.F.* that courts should focus on a totality of circumstances in each case and not rely upon only "one particular fact." 770 So. 2d 1189, 1193 (Fla. 2000). In *M.F.*, the father who had committed the sex act on his child had been incarcerated for the

The Supreme Court of Florida initially addressed prospective abuse or neglect in *Padgett v. Department of Health & Rehabilitative Services*[191] in 1991. The court held that permanent termination of rights in one child because of abuse or neglect could be sufficient grounds to terminate parental rights to a different child.[192] However, because fundamental liberty interests are at stake in a TPR case, the Supreme Court of Florida held that "the state must show by clear and convincing evidence that reunification with the parent poses a substantial risk of significant harm to the child."[193] Further, the state must show that termination is the least restrictive means of protecting the child from harm by the parent.[194]

There is continuing appellate conflict over the appropriate application of the prospective abuse and neglect doctrine, particularly in termination cases. In *A.B. v. Department of Children & Families*, the mother appealed an order terminating her parental rights claiming that termination, under section 39.806(1)(i) of the *Florida Statutes*, was unconstitutional because the statute allowed termination "without regard for extraneous circumstances, depriv[ing] parents of the fundamental liberty interests they have in determining the care and upbringing of their children."[195] The court stated that "implicit in the recognition of neglect or abuse of other children as a ground for termination of parental rights to a different child is the absence of any factor that would evince a break in the chain of demonstrated parental failure."[196] In effect, this created a rebuttable presumption of prospective neglect or abuse whenever there had been a prior termination under conditions of abuse or neglect, shifting the burden to the parent to prove that past conduct, condition, or circumstances could not serve as a "predictor" of future behavior.[197] This appears to be at odds with *Padgett's* mandate that the State

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crime. *Id.* at 1194. DCF sought a dependency determination based upon this act rather than upon the totality of the circumstances, which included the fact that the father would be incarcerated for a "substantial portion of the children's years of minority." *Id.* The Supreme Court of Florida approved the lower court's result, but disapproved the remainder of the lower court's opinion for failure to apply the totality of the circumstances test. *Id.* at 1194–95.

191. 577 So. 2d 565 (Fla. 1991).

192. *Id.* at 571.

193. *Id.*; *see also* Santosky v. Kramer, 455 U.S. 745 (1982).

194. *Padgett*, 577 So. 2d at 571. The evidentiary standard required in a dependency proceeding is a preponderance of the evidence. M.N. v. Dep't of Children & Families, 826 So. 2d 445, 447 (Fla. 5th Dist. Ct. App. 2002).

195. 816 So. 2d 684, 685 (Fla. 5th Dist. Ct. App. 2002). In *A.B.*, the mother appealed a termination based upon a prior termination of her rights in a different child at the age of one month because of the child's medical problems. *Id.* at 684.

196. *Id.* at 686.

197. *Id.*

clearly and convincingly show imminent harm to the child,[198] and is in direct conflict with the Fourth District's subsequent decision in *F.L. v. Department of Children & Families*.[199]

Several months later, in his concurrence and dissent to *C.W. v. Department of Children & Families*,[200] a First District case, Judge Ervin expressed doubt over whether the Legislature can "trump" a parent's liberty interest in raising children by allowing a termination proceeding based solely upon that parent's past egregious conduct to another child without requiring some "proof of a causal connection between the prior conduct and the parent's current conduct with the child sought to be committed."[201] Then, in *Department of Children & Families v. B.B.*,[202] a Fifth District case involving termination of parental rights to seven children based upon the sexual abuse of an eighth child, the court addressed the "current uncertainty in the law," acknowledging potential constitutional issues and a need for the least restrictive means of protecting a child.[203] This uncertainty became manifest in *F.L. v. Department of Children & Families*.[204] The Fourth District reversed a termination that had been based solely upon involuntary termination of rights to a prior child.[205] The court held that termination under section 39.806(1)(i) "unconstitutionally shifted the burden to the parent to prove that reunification would not be harmful to the child,"[206] stating that the "DCF carries the

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

199. 849 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2003).

200. 814 So. 2d 488, 493 (Fla. 1st Dist. Ct. App. 2002).

201. *Id.* at 496. In *C.W.*, the mother's rights to her child were terminated because she had lost her rights to three of the child's siblings involuntarily and had surrendered her rights to a fourth child. *Id.* at 491. The court found that she had not remedied the situations leading to these prior terminations and affirmed the termination of her rights to the fifth child. *Id.*

202. 824 So. 2d 1000 (Fla. 5th Dist. Ct. App. 2002). In *B.B.*, the father, a polygamist, "married" his natural daughter, consummating the marriage when she was twelve years old. *Id.* at 1002.

203. *Id.* at 1007–08. The court stated that there may be constitutional implications in a termination proceeding because a parent has a "constitutionally protected liberty interest in the care, custody, and management of his or her child." *Id.* at 1008.

204. 849 So. 2d 1114 (Fla. 4th Dist. Ct. App. 2003). The mother appealed a termination of her rights in her seventh child that had been based upon her voluntary surrender of her first four children, and DCF's attempted termination of her rights in her fifth and sixth children because of medical neglect. *Id.* at 1116. After mediation, the mother surrendered her rights to the fifth child and her rights to the sixth were terminated because she had failed to comply with the DCF case plans. *Id.* at 1116–17. However, the record for termination proceedings for the seventh child showed extensive evidence that the mother was taking appropriate care of this child, voluntarily attending parenting classes, living on her own, and holding down a job. *Id.* at 1118–19.

205. *Id.* at 1124.

206. *F.L.*, 849 So. 2d at 1116.

burden not only to establish a ground for termination but the continuing substantial risk of harm to the current child."[207] There is far more accord among the district courts of appeal in dependency proceedings involving prospective abuse or neglect. In *O.S. v. Department of Children & Families*,[208] the DCF initiated a dependency action for two children based upon a mother's excessive corporal punishment of one of the children.[209] Relying upon *J.C. v. Department of Children & Families*,[210] the mother claimed that corporal punishment in and of itself was not sufficient to order dependency.[211] However, the court held that the evidence supported a charge of abuse, based upon substantial bruising that was present six weeks after the incident and evidence of mental injury to the child.[212] Furthermore, the court held that dependency could be found as to the second child who had not been beaten, when the evidence "support[ed] a nexus between the act of abuse and any prospective abuse to another sibling."[213]

The concept of nexus is a key issue in a line of dependency cases dealing both with step-children and natural children. In *M.N. v. Department of Children & Families*,[214] the Fifth District held that evidence that a father had abused a step-child was not sufficient to find that his natural child was dependent, stating that additional proof in the form of independent evidence was required to prove a nexus between the past abuse and the prospective abuse.[215] The court went on to say that this nexus was most often established through the presence of an ongoing mental or emotional condition of the parent.[216] The father had been shown to have below average intellectual ability. However, this did not constitute a mental condition that would make the allegations of future abuse likely.[217] Likewise, in *In re C.M.*[218] a father's biological children were adjudicated dependent based solely upon evidence that the father had abused his step-children.[219] However, the Second District Court of Appeal found that the evidence relied upon by the DCF was insuffi-

207. *Id.* at 1122.
208. 821 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002).
209. *Id.* at 1146.
210. 773 So. 2d 1220 (Fla. 4th Dist. Ct. App. 2000).
211. *O.S.*, 821 So. 2d at 1146. For further discussion of corporal punishment, see *infra* Part II.A.
212. *Id.* at 1148.
213. *Id.*
214. 826 So. 2d 445 (Fla. 5th Dist. Ct. App. 2002).
215. *Id.* at 447–48.
216. *Id.* at 448.
217. *Id.* at 449.
218. 844 So. 2d 765 (Fla. 2d Dist. Ct. App. 2003).
219. *Id.*

cient to establish a nexus between the abuse of the step-children and prospective abuse of his biological children, and the DCF provided no evidence of an ongoing condition that would make abuse of his natural children highly probable.[220]

The Fourth District continued this line of reasoning in *J.B.P.F. v. Department of Children & Families*.[221] Here, the court held that the evidence was insufficient to establish a nexus between one instance of a mother's abuse of her son and the risk of prospective abuse of her other child.[222] Although both were the mother's natural children, the court looked at evidence showing that the son suffered "severe psychological and behavioral problems," making him extremely difficult to discipline.[223] The other child was well adjusted, and the dynamic between this child and the mother was quite different from the dynamic between the son and the mother.[224] However, the court also noted that there was evidence of domestic violence between the mother and her live-in boyfriend that had perhaps occurred in the presence of this second child.[225] Section 39.01(30)(i) of the *Florida Statutes* allows domestic violence in the presence of children to serve as the basis for harm to the child.[226] Unwilling to reverse the dependency adjudication outright based upon this evidence of domestic violence, the court remanded the case for a factual determination of whether the child ought to be adjudicated dependent based upon the domestic violence.[227]

Another dependency case addressed the question of whether a father's six-year-old DUI conviction could serve as the basis for a charge of prospective neglect to render a child dependent.[228] In *P.S. v. Department of Children & Families*, discussed in the "Dependency" section above, the Second District held that the DUI arrest was too remote in time, having occurred even before the child was born, to predict clearly and convincingly any substantial

220. *Id.* at 766.

221. 837 So. 2d 1108 (Fla. 4th Dist. Ct. App. 2003).

222. *Id.* The son had been adjudicated dependent based upon an incident of "excessive" discipline where the mother and her live-in boyfriend physically restrained the child with handcuffs and poured an entire bottle of hot sauce into his mouth. *Id.* at 1109. The court noted that the mother had sought help with the son, acknowledging her difficulty in raising him by initiating contact with DCF to get assistance in parenting him appropriately. *Id.* at 1110.

223. *Id.* at 1108.

224. *J.B.P.F.*, 837 So. 2d at 1110.

225. *Id.*

226. *Id.*

227. *Id.* at 1111.

228. P.S. v. Dep't of Children & Families, 825 So. 2d 530 (Fla. 2d Dist. Ct. App. 2002).

risk to the child.[229] In fact, the court noted that evidence of the arrest was not relevant to any material fact at issue.[230]

In *D. Children v. Department of Children & Families*,[231] also discussed in the "Dependency" section above, the court upheld the dependency of the three children as to both the mother and the father, based upon the apparent abuse or neglect of one child.[232] The court looked at the totality of the circumstances, as per *M.F.*,[233] noting that the court had broad discretion when dealing with child welfare, that there was sufficient evidence to affirm dependency as to the mother, the perpetrator of the abuse had not been established, and the family was intact with both parents being the only adults who had access to the abused infant prior to injury.[234]

Although the districts have been consistent in the treatment of prospective neglect and abuse in a dependency setting, it is clear that the application of the doctrine in the context of termination of parental rights is an issue rife with uncertainty among Florida's appellate courts. This issue will continue to stir up conflict until the matter is ultimately resolved by the Supreme Court of Florida.

V. JUVENILE DELINQUENCY

A. *Adjudicatory Issues*

It is a basic principle that the prosecutor in criminal and juvenile delinquency cases has the authority relating to the allocation of prosecutorial resources and may use discretion in deciding which cases to file charges.[235] In *State v. D.W.*,[236] the State filed a petition for delinquency against a child for threatening a teacher.[237] After reading the arrest report the trial judge, *sua sponte*, dismissed the petition with prejudice.[238] The State appealed and the appellate court reversed.[239] It held that in a juvenile delinquency proceeding

229. *Id.*
230. *Id.*
231. 820 So. 2d 980 (Fla. 4th Dist. Ct. App. 2002).
232. *Id.*
233. *In re M.F.*, 770 So. 2d 1189 (Fla. 2000).
234. *D. Children,* 820 So. 2d at 982. Police never identified who caused the injury. *Id.* at 981. In a somewhat bizarre twist, the mother told medical personnel that she thought the injury had been caused by the family Dachshund. *Id.* None of the experts who testified found this claim credible. *Id.*
235. *See generally* State v. Earl, 545 So. 2d 415 (Fla. 3d Dist. Ct. App. 1989).
236. 821 So. 2d 1179 (Fla. 3d Dist. Ct. App. 2002).
237. *Id.*
238. *Id.*
239. *Id.*

the court did not have the power to dismiss without giving the State an opportunity to present evidence.[240] While the court did review the arrest report, such review did not constitute proper substitute for the State's presentation of evidence.[241]

Sometimes juveniles claim they are adults when arrested in order to bond out of jail rather than be held in secure detention for twenty-one days, as required by Florida law. In *T.W. v. Jenne*[242] a child who was fifteen, but represented that he was eighteen, brought a writ of habeas corpus for release from the Broward County Jail.[243] The juvenile had been released on bond, but when he missed his court appearance he was held in the adult jail without bond.[244] The writ sought a determination that he was a juvenile and that he should be treated as such.[245] In an earlier case, *Williams v. State*,[246] the juvenile who had lied about his age to obtain a favorable probation sentence was sentenced to 364 days in jail for violation of probation.[247] The child, who it turns out, was sixteen, moved to vacate the adult conviction and sentence.[248] The appellate court in *Williams* held that the child had waived his right to be treated as a juvenile by lying about his age and failing to disclose his age at a plea conference to secure a favorable bond and probation sentence.[249] The court in *T.W.* distinguished *Williams* on the grounds that the correction sought in *T.W.* occurred early in the case rather than after receiving a more beneficial and lenient sentence as in *Williams*.[250] The court concluded in *T.W.* that the child did not "unalterably waive" his right to be treated as a juvenile.[251]

School students often make threats, sometimes of violent activities, and such behavior has been the subject of substantial discussion in the media.[252] Such threats often result in charges of juvenile delinquency. Section 790.163 of the *Florida Statutes* provides that "it is unlawful for any person to make a false report, with intent to deceive, mislead, or otherwise misinform any per-

240. *Id.*
241. *D.W.*, 821 So. 2d at 1180.
242. 826 So. 2d 536 (Fla. 4th Dist. Ct. App. 2002).
243. *Id.*
244. *Id.*
245. *Id.* at 536–37.
246. 754 So. 2d 67 (Fla. 4th Dist. Ct. App. 2000).
247. *Id.* at 68.
248. *Id.*
249. *Id.* (citing Smith v. State, 345 So. 2d 1080 (Fla. 3d Dist. Ct. App. 1997)).
250. *T.W.*, 826 So. 2d at 537.
251. *Id.*
252. *An Epidemic of Violence Incidents in Schools Rise Sharply Since Santee Shooting*, CNN.COM, Mar. 8, 2001, *at* http://www.cnn.com/2001/US/03/08/alarming.incidents/ (last visited Mar. 27, 2004).

son, concerning the placing or planting of any bomb, dynamite, or other deadly explosive." In *D.B. v. State*,[253] a juvenile public school student made "threats to school officials that he would 'blow up' or 'burn down' his school at some time in the future."[254] He was adjudicated delinquent upon those threats.[255] The appellate court held that threats of future activity were not a violation of the statute.[256] The court found that the threats could not fairly be characterized as a "false report" under the statute.[257] The First District Court of Appeal relied upon an earlier decision by Maryland's highest court, in *Moosavi v. State*,[258] in which that court recognized that the crux of its statute was a finding that the telephone, mail, or other transmission was of false information.[259] Thus, the Florida court in *D.B.* reversed the adjudication for the same reason—no showing of a false statement.[260]

In a second case involving the issue of unlawfully making a false report of a bomb,[261] a juvenile appealed from a disposition that committed him to the Department of Juvenile Justice ("DJJ") for high-risk residential placement and then probation in *C.C.B. v. State*.[262] After the adjudication, the DJJ recommended in its report that the court place the child on probation and withhold adjudication of the delinquency.[263] Departing from the DJJ recommendation, the trial court found that in 2001 there had been an epidemic of bomb threats made by young people and that it was necessary to send a message to other young people in the community, despite the fact that the child had no prior record.[264] In *C.C.B.*, the appellate court reversed.[265] Ruling as it had in an earlier case in *In re A.C.N.*,[266] the First District Court of Appeals held that a court's desire to send a message to the community's youth is not a valid reason for disregarding the recommendation of the DJJ.[267] Further, the court was required to explain why the commitment was necessary for a child who had no prior criminal record and why it was important for the safety of

253. 825 So. 2d 1042 (Fla. 1st Dist. Ct. App. 2002).
254. *Id.*
255. *Id.* at 1044.
256. *Id.* at 1043.
257. *Id.* at 1043–44.
258. 736 A.2d 285 (Md. 1999).
259. *Id.* at 291.
260. *D.B.*, 825 So. 2d at 1044.
261. *See* § 790.163.
262. 828 So. 2d 429, 430 (Fla. 1st Dist. Ct. App. 2002).
263. *Id.*
264. *Id.*
265. *Id.* at 433.
266. 727 So. 2d 368, 370 (Fla. 1st Dist. Ct. App. 1999).
267. *Id.*

the community.[268] Because the departure was not supported by competent substantial evidence, the appeals court in *C.C.B.* reversed.[269]

Minors may be adjudicated delinquent on the basis of searches conducted in school. In 1985, the Supreme Court decided *New Jersey v. T.L.O.*,[270] where the Court established that school officials must have a reasonable ground to suspect that the search would result in evidence that the student has violated either the law or school rules.[271] *A.N.H. v. State*,[272] was a case where a school teacher advised a school counselor that the teacher was concerned about a student.[273] The teacher, believing that the child "was not 'acting himself,' had bloodshot eyes, and that 'something wasn't right,'" requested that the student empty his front pockets, where he discovered marijuana.[274] Relying upon *T.L.O.*, the appellate court held that the student's behavior could have resulted from a variety of non-criminal circumstances and, as such, did not rise to reasonable grounds to suspect the child was involved in criminal activity.[275] The appellate court reversed.[276]

The battle over constitutionality of juvenile curfew ordinances continues in Florida. In 2001, the Supreme Court of Florida, in *T.M. v. State*,[277] and *M.R. v. State*,[278] involving juvenile curfew ordinances in the city of Pinellas Park and Tampa, ruled that the Second District Court of Appeal had applied a heightened scrutiny test rather than the strict scrutiny test, and thus remanded.[279] On remand, the court in *J.P. v. State*,[280] and *M.R. v. State*,[281] held that the ordinance in Tampa was unconstitutional under a strict scrutiny standard and the Supreme Court of Florida noted jurisdiction in both cases.[282]

The State often seeks to hold delinquents in pretrial detention past the twenty-one days as provided by Florida law[283] when the state intends to file other charges against the child.[284] For the second time, a Florida appeals

268. *Id.*
269. *C.C.B.*, 828 So. 2d at 433.
270. 469 U.S. 325 (1985).
271. *Id.* at 341.
272. 832 So. 2d 170 (Fla. 3d Dist. Ct. App. 2002).
273. *Id.* at 171.
274. *Id.*
275. *Id.* at 172.
276. *Id.*
277. 784 So. 2d 442 (Fla. 2001).
278. 788 So. 2d 957 (Fla. 2001).
279. *T.M.*, 784 So. 2d at 443–44 ; *M.R.*, 788 So. 2d at 958.
280. 832 So. 2d 110 (Fla. 2d Dist. Ct. App. 2002).
281. 832 So. 2d 121 (Fla. 2d Dist. Ct. App. 2002).
282. *J.P.*, 832 So. 2d at 113–14; *M.R.*, 832 So. 2d at 122.
283. *See* § 985.215(5)(c).
284. *Id.*

court has held that extending detention for an additional period of time based upon the state's articulation of intent to file charges in adult court without a showing of good cause is impermissible.[285] The court thus ruled that the trial court lacked grounds to continue the detention despite the fact that it dismissed the child's petition for writ of certiorari as moot while deciding the issue.[286] Good cause would involve such circumstances as where witnesses were unavailable or an investigation was incomplete.[287]

For over a decade, this author has reported on the failure of Florida trial courts to comply with the United States Supreme Court's ruling in *In re Gault*[288] by not properly advising juveniles of their right to counsel.[289] In *A.L. v. State*,[290] the Fourth District Court of Appeal reversed a dispositional order for failure of the trial court "to renew the offer of counsel to the juvenile after [the juvenile] had waived counsel at an earlier proceeding" because the *Florida Rules of Juvenile Procedure* compelled the court "to offer counsel at each subsequent stage of the proceedings."[291]

B. *Dispositional Issues*

For a number of years now, the Florida state courts, based on separation of powers, have refused to intervene and force the state DCF and the state DJJ to provide appropriate services for children in the care of those two agencies. In *Department of Children & Family Services v. M.H.*,[292] the appellate court was faced with a petition by the DCF to avoid the obligation to place four juveniles facing delinquency charges but found to be incompetent, into appropriate facilities for their treatment.[293] Instead, the children were housed in the local detention center.[294] Once again commenting on "the circuit court's impatience with the state of affairs which allows incompetent children to be warehoused in detention facilities due to insufficient bed space to begin treatment designed to restore their competency;" the court also commented on the dilemma faced by the DCF to provide treatment when sufficient funds have not been allocated.[295] Based on separation of powers

285. T.T. v. Esteves, 828 So. 2d 449, 451 (Fla. 4th Dist. Ct. App. 2002).
286. *Id.*
287. *Id.*; *see* E.W. v. Brown, 559 So. 2d 712 (Fla. 1st Dist. Ct. App. 1990).
288. 387 U.S. 1 (1967).
289. *See* Dale, *supra* note 9, at 904.
290. 841 So. 2d 676 (Fla. 4th Dist. Ct. App. 2003).
291. *Id.*; *see also* M.Q. v. State, 818 So. 2d 615, 618 (Fla. 5th Dist. Ct. App. 2002).
292. 830 So. 2d 849 (Fla. 2d Dist. Ct. App. 2002).
293. *Id.* at 850.
294. *Id.*
295. *Id.*

grounds in case law, the appellate court held that the trial court was without authority to compel the DCF to place the children in programs for which space is simply not available, citing the variety and number of prior court cases.[296] The problem, of course, has been compounded by the failure of the federal courts to recognize the problems in the foster care system and the inability of the state courts to resolve them. In *31 Children v. Bush*,[297] the Eleventh Circuit recently held that such matters should be resolved in dependency court.[298] The catch-22 situation that results is blatant.[299]

In the adult criminal justice system, defendants receive credit for time served, which may even include time spent in the mental institution due to involuntary commitment.[300] However, the juvenile justice system is designed to rehabilitate youngsters; and therefore, juveniles may be placed in commitment status for indeterminate periods of time.[301] But in *C.C. v. State*,[302] the appellate court held that the juvenile was entitled to credit for time spent in secure detention because the adjudication was a misdemeanor for which the maximum period of commitment was statutorily limited to one year.[303] The juvenile was committed within one year of reaching the age of nineteen.[304] In this determinate setting, the court held that the credit for time served was appropriate.[305]

One of the dispositional alternatives available to the court under Florida law is restitution.[306] Under the Florida restitution statute found in Chapter 985, the court may, under certain circumstances, in addition to the sanctions imposed upon the child, order the parent to pay restitution in money or in

296. *Id.*

297. 329 F.3d 1255 (11th Cir. 2003), *cert. denied sub. nom.* Reggie v. Bush, 124 S.Ct. 483 (2003).

298. *Id.* at 1279.

299. *See* 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003); *see also* Dep't of Children & Family Servs. v. I.C., 742 So. 2d 401 (Fla. 4th Dist. Ct. App. 1999); Dep't of Health & Rehab. Servs. v. Bills, 661 So. 2d 69 (Fla. 2d Dist. Ct. App. 1995); Singletary v. Acosta, 659 So. 2d 449 (Fla. 3d Dist. Ct. App. 1995); Quiala v. State, 659 So. 2d 287 (Fla. 3d Dist. Ct. App. 1994); Dep't of Health & Rehab. Servs. v. Pelz, 609 So. 2d 155 (Fla. 5th Dist. Ct. App. 1992); Dep't of Health & Rehab. Servs. v. Stoutamire, 602 So. 2d 564 (Fla. 2d Dist. Ct. App. 1992); Dep't of Health & Rehab. Servs. v. V.L., 583 So. 2d 765 (Fla. 5th Dist. Ct. App. 1991); Dep't of Health & Rehab. Servs. v. Nourse, 437 So. 2d 221 (Fla. 4th Dist. Ct. App. 1983).

300. *See* Tal-Mason v. State, 515 So. 2d 738, 740 (Fla. 1987).

301. C.C. v. State, 841 So. 2d 657, 658 (Fla. 4th Dist. Ct. App. 2003).

302. *Id.* at 657.

303. *Id.* at 658–59.

304. *Id.* at 658.

305. *Id.* 658–59.

306. § 985.231(1)(a)(9).

kind, for damage which has resulted from the child's offense.[307] In *Fisher v. State*,[308] the child pleaded no contest and was adjudicated a delinquent and placed in a Level Four program, resulting from a burglary and arson in which the child and two others broke into a vacant home and set it on fire, burning it to the ground.[309] The court order included restitution payable by the parents.[310] It was the first notice or statement by the judge or the State that the mother was to be held personally liable for restitution.[311] She failed to make payment and she was held in contempt.[312] After entering the order requiring restitution, the court actually held a restitution hearing in which it heard testimony about its value.[313] The court entered an order requiring the mother to pay restitution in the amount of $25,861 and to pay $250 a month.[314] The mother told the judge that her income was $21 per hour and that she could not afford to pay restitution.[315] The statute requires the court to find that the parent failed to make diligent and good faith efforts to prevent the child from engaging in the delinquent acts prior to making an order that the parent perform community service.[316] However, the statute does not explicitly require a similar finding when the question is one of restitution.[317] The court remanded the case for a hearing because it found that there was no finding made that the mother failed to make any diligent and good faith effort, that there was no evidence of her parenting efforts, and because statutes in derogation of the common law ought to be narrowly construed.[318] The court also reversed on due process grounds because the mother had never received notice.[319] She was not a party to the daughter's juvenile delinquency proceeding although she appeared in her role as parent and possible witness.[320] She might be subjected to an order of restitution as the court's ruling was "without prejudice to the right of the state to seek to reimpose restitution sanctions . . . should that be appropriate under the new juvenile rules."[321] The

307. *Id.*
308. 840 So. 2d 325 (Fla. 5th Dist. Ct. App. 2003).
309. *Id.* at 327.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Fisher*, 840 So. 2d at 327.
314. *Id.*
315. *Id.*
316. *See* § 985.231(1)(a)(9); *Fisher*, 840 So. 2d at 329; B.M. v. State, 744 So. 2d 505, 510 (Fla. 5th Dist. Ct. App. 1999).
317. *See* § 985.231(1)(a)(9).
318. Fisher v. State, 840 So. 2d 325, 329–31 (Fla. 5th Dist. Ct. App. 2003).
319. *Id.* at 330.
320. *Id.*
321. *Id.* at 331.

problem of notice has been cured since the events that occurred in *Fisher*, due to changes to the *Florida Rules of Juvenile Procedure* requiring the State to file and serve the petition on the parent or guardian in cases where restitution or other sanctions are sought against them.[322]

C. *Appellate Issues*

In *Brazill v. State*, a case of wide public interest, in the spring of 2003 the Fourth District Court of Appeal ruled on the appeal of Nathaniel Brazill.[323] Brazill was convicted as an adult for second degree murder and aggravated assault with a firearm of shooting and killing a teacher at his middle school during the 1999-2000 school year.[324] In addition to a claim about prosecutorial misconduct in closing argument, Brazill challenged the statute under which he was charged.[325] Specifically, he claimed that the statute, which allowed him to be charged with a violation of state law punishable by death or life imprisonment as an adult, thereby denying the rehabilitative system of the juvenile court, was unconstitutional in violation of due process, equal protection, and separation of powers.[326] The appellate court found that there was no absolute right at common law or in the constitution to be treated in the juvenile system, and that nothing contained in *Kent v. United States*,[327] the Supreme Court opinion on procedural due process in transfer cases, provided a right to be tried in the juvenile system.[328] Further, the court held that no constitutional violation resulted from the prosecutor's use of broad discretion to charge as an adult.[329]

VI. STATUTORY CHANGES

The Florida Legislature in its 2003 Spring regular session made only minor changes to laws relating to children in the child welfare and juvenile justice systems. The Legislature expanded descriptions of persons who having mandatory reporting responsibilities with regard to child abuse, abandonment or neglect by redrafting section 39.201 of the *Florida Statutes*. The

322. *Id.* at 329 (citing FLA. R. JUV. P. 8.040, 8.030, 8.031).

323. 845 So. 2d 282 (Fla. 4th Dist. Ct. App. 2003); *see* Steven A. Drizin & Allison McGowen Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager*, 28 NOVA L. REV. 507 (2004).

324. *Id.* at 286.

325. *Id.*

326. *Id.*

327. 383 U.S. 541 (1996).

328. *Brazill*, 845 So. 2d at 288 (citing *Kent*, 383 U.S. at 552–54).

329. *Id.* at 289.

Legislature noted that certain persons, under certain circumstances, are not obligated to make reports to the hotline.[330] For example, a professional working with the DCF need not render a second report where the treatment is the result of a prior report.[331] Similarly, court officials are not obligated to report when there is an ongoing investigation by the DCF or where there is a dependency case where the matter has previously been reported to the DCF.[332] On the other hand, the Legislature reasserted the notion that community-based care providers have obligations to report suspected or actual child abuse, abandonment or neglect.[333]

The Legislature also slightly expanded the limitations on confidentiality of reports and records in cases of child abuse or neglect to allow access to services for victims of domestic violence to attorneys representing a child in civil and criminal proceedings,[334] and to principals of public, private, and charter schools.[335] Chapter 39 was also amended to allow for release of further information on children in the foster care system who are found to be missing.[336]

Finally, the Legislature passed section 39.8296 of the *Florida Statutes*, which created the Statewide Guardian Ad Litem Office to oversee the Guardian Ad Litem program.[337] Previously, the Guardian Ad Litem program was "supervised by court administration within the circuit courts;" however, the Legislature found that "there [was] a perceived conflict of interest created by the supervision of program staff by the judges before whom they appear."[338] Therefore, the Legislature passed section 39.8296 of the *Florida Statutes* with the intent to "place the Guardian Ad Litem Program in an appropriate place and provide a statewide infrastructure to increase functioning and standardization among the local programs currently operating in the 20 judicial circuits."[339] That location is the Justice Administrative Commission.

VII. CONCLUSION

The Supreme Court of Florida has ruled in an important case involving appellate practice in termination cases, holding that the *Anders* standard does

330. § 39.201(1)(b).
331. § 39.201(1)(c)-(d).
332. *Id.*
333. § 39.201(1)(e).
334. § 39.202(2)(5)(d).
335. *See* § 39.202(2)(p).
336. § 39.202(4).
337. § 39.8296(2).
338. § 39.8296(1)(b).
339. § 39.8296(1)(d).

not apply to lawyers who seek to withdraw where there is no colorable appeal for a client in a termination of parental rights case.[340] The application of the *Padgett* doctrine continues to be an issue discussed by the appellate courts in dependency and termination cases.[341] In delinquency matters, the appellate courts continue its longstanding effort to hold the trial courts accountable for compliance with the variety of procedural obligations under Florida law.[342] The Legislature moved the state office of guardian *ad litem* from the Supreme Court to a freestanding agency.[343]

340. N.S.H. v. Fla. Dep't of Children & Family Servs., 843 So. 2d 898, 904 (Fla. 2003).

341. *See, e.g.*, P.S. v. Dep't of Children & Family Servs., 825 So. 2d 530 (Fla. 2d Dist. Ct. App. 2002); O.S. v. Dep't of Children & Families, 821 So. 2d 1145 (Fla. 4th Dist. Ct. App. 2002); M.N. v. Dep't of Children & Family Servs., 826 So. 2d 445 (Fla. 5th Dist. Ct. App. 2002).

342. *See, e.g.*, A.L. v. State, 841 So. 2d 676 (Fla. 4th Dist. Ct. App. 2003).

343. § 39.8296.