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## 2002 Survey of Florida Juvenile Law

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## 2002 SURVEY OF FLORIDA JUVENILE LAW

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### I. INTRODUCTION

Children are entitled to counsel, including a lawyer free of charge in a delinquency case, because the Supreme Court so held thirty-five years ago in *In re Gault*.<sup>1</sup> The Florida trial courts seem to have trouble properly explaining to a child about the right to counsel and determining whether the waiver is knowing, intelligent, and voluntary. This year, the intermediate appellate courts ruled in a number of cases on relatively blatant violations of the juvenile's right to counsel. The Supreme Court of Florida weighed-in in the area, albeit on a procedural matter. The court held that, while a motion to withdraw a plea is generally required prior to appellate review, since the child had no lawyer, a direct appeal would lie.<sup>2</sup> Issues of the right to counsel also arose in dependency and termination of parental rights cases where, by statute, Florida requires counsel for parents. The intermediate appellate courts ruled that a parent is entitled to proper notice of a proceeding, as well as notice to the attorney for the parent, that failure to appear may result in termination of parental rights.<sup>3</sup> However, the court is bound by the context of the statute, which addresses when there must be parental appearance and when counsel may withdraw at the appellate level.<sup>4</sup> The proper standard for withdrawal differs, and is dependent upon which district court of appeal is speak-

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1. 387 U.S. 1 (1967).

2. *State v. B.P.*, 810 So. 2d 918, 919 (Fla. 2002).

3. FLA. STAT. § 39.801(3)(d) (2002).

4. *Id.*

ing.<sup>5</sup> Finally, in both the dependency and termination area, a number of appellate court opinions deal with the question of prospective neglect, including how to evaluate whether the neglect of one child can constitute grounds for neglect of the other, under the 1991 United States Supreme Court opinion in *Padgett v. Department of Health & Rehabilitative Services*.<sup>6</sup>

## II. JUVENILE DELINQUENCY

### A. Adjudicatory Issues

The 1967 United States Supreme Court ruling in *In re Gault* requires the provision of counsel to children in delinquency cases, and if the child is indigent an attorney paid for by the state.<sup>7</sup> As reported in virtually every juvenile survey article written by the author since 1989, the Florida trial courts continue to fail to comply with *Gault*'s provision of counsel requirement.<sup>8</sup> In *V.S.J. v. State*,<sup>9</sup> the failure of the court to properly advise a child of the right to counsel and waiver was again before the appellate court.<sup>10</sup> As has happened so often in Florida, the trial judge addressed the juveniles appearing before it en masse and advised the youngsters as a group of their rights.<sup>11</sup> Reversing and remanding for the failure to comply with proper advice of the right to counsel and failure to obtain a knowing and intelligent waiver of counsel at every stage of the proceedings, the appellate court in *V.S.J.* said, "[w]e recognize that this method [referring to the en masse explanation] offers some convenience, but it also reduces the probability that every accused will be adequately and effectively advised of his or her constitutional rights."<sup>12</sup> The trial courts ought to dispose of this regular violation of children's constitutional rights and provide the proper admonition and evaluation of voluntary relinquishment on an individual basis.

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5. *Id.*

6. 577 So. 2d 565 (Fla. 1991).

7. 387 U.S. at 41.

8. Michael J. Dale, *Juvenile Law: 2001 Survey of Florida Law*, 26 NOVA L. REV. 903, 903-04 (2002) [hereinafter Dale I]. Under Florida law, children do not have the right to counsel in dependency or termination of parental rights cases. See also Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769, 783 (2001).

9. 793 So. 2d 104 (Fla. 2d Dist. Ct. App. 2001).

10. *Id.* at 105.

11. *Id.* (citing *G.E.F. v. State*, 782 So. 2d 951 (Fla. 2d Dist. Ct. App. 2001)); see also Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91, 94 (2000) (discussing this precise issue) [hereinafter Dale II].

12. *Id.* at 105-06.

In *M.Q. v. State*,<sup>13</sup> the Fifth District Court of Appeal also reversed for failure to properly offer counsel and failure to adequately inquire as to the waiver of counsel.<sup>14</sup> The appellate court decision could not be any more direct. “One proceeding even involved an en masse group advisement of rights by the trial [court]. For this reason we write again on the duties and responsibilities of trial judges with regard to offering legal representation in juvenile proceedings.”<sup>15</sup> The court, thereafter, cited to the entire rule of juvenile procedure governing the duties and responsibilities of the trial court to notify children about their right to counsel.<sup>16</sup> The court went on to cite other examples of failure to comply with the rules, including the following colloquy in the opinion:

JUDGE: Would it be your desire that you need to have an attorney, or would you like to represent yourself on that one?

M.Q.: I’ll represent myself.

JUDGE: Would you like to enter a plea of guilty or not guilty?

M.Q.: Guilty.<sup>17</sup>

The court ruled that this inquiry was insufficient and then, using italics, said the following: “The requirement is one of *detailed inquiry*, because it is ‘extremely doubtful that any child of limited experience can possibly comprehend the importance of counsel.’”<sup>18</sup>

The admonition about right to counsel under the *Florida Rules of Juvenile Procedure* is also multifaceted, requiring the court to tell the child a number of things and then inquire as to whether the child knowingly and intelligently enters the plea and waiver of counsel based upon the understanding of a variety of admonitions. In *J.M.B. v. State*,<sup>19</sup> the court failed to inform the child of the possible dispositions available to the court and failed

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13. 818 So. 2d 615 (Fla. 5th Dist. Ct. App. 2002).

14. *Id.*

15. *Id.* at 616–17; see *V.S.J.*, 793 So. 2d at 104 (rejecting this process).

16. *M.Q.*, 818 So. 2d at 617 (citing FLA. R. JUV. P. 8.165).

17. *Id.* at 618.

18. *Id.* (citing *State v. T.G.*, 800 So. 2d 204 (Fla. 2001); *P.L.S. v. State*, 745 So. 2d 555, 557 (Fla. 4th Dist. Ct. App. 1999) (quoting *G.L.D. v. State*, 442 So. 2d 401, 404 (Fla. 2d Dist. Ct. App. 1983))).

19. 800 So. 2d 317 (Fla. 2d Dist. Ct. App. 2001).

to advise the child that he was entitled to be represented by counsel at every stage of the proceedings.<sup>20</sup> The appellate court found that the inquiry was incomplete, and thus, there was no effective waiver of counsel in accordance with section 8.165 of the *Florida Rules of Juvenile Procedure*, which is fundamental error requiring reversal.<sup>21</sup>

Not only is the court's inquiry multifaceted, it must also be thorough. In *T.M v. State*,<sup>22</sup> the court compared and contrasted the inquiry at the adjudicatory stage before one judge and the inquiry at the dispositional stage before a second judge, and then recited the full section of the relevant Florida Rule of Juvenile Procedure in the text before concluding that the judge did not conduct a thorough inquiry.<sup>23</sup> The inquiry made by the trial judge, essentially, was whether the child understood that he had a right to counsel, that a public defender would be appointed to represent the child if he so desired, and the child's age.<sup>24</sup> The appeals court found this was reversible error.<sup>25</sup>

While the trial courts repeatedly fail to properly advise children of their right to counsel, the question of how procedurally to challenge such failure ultimately came before the Supreme Court of Florida recently in *State v. T.G.*<sup>26</sup> The question in *T.G.* was whether a juvenile was required to preserve the error, in the context of failure to advise of the right to counsel, with a motion to withdraw a plea prior to seeking appellate review of the plea.<sup>27</sup> On the adult side, in *Robinson v. State*<sup>28</sup> the court held that the adult statute limited a defendant's right of appeal from a guilty plea to matters occurring contemporaneously with the plea.<sup>29</sup> Thus, defendants were required to attack the validity of the guilty plea in the trial court before challenging the plea on direct appeal.<sup>30</sup> The court in *T.G.* held that *Robinson* applies to juvenile delinquency proceedings, reading the amended juvenile statute so that juveniles pleading guilty or *nolo contendere* may directly appeal an involuntary plea only if it is preserved through a motion to withdraw the plea in the trial court.<sup>31</sup>

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20. *Id.* at 318 (citing FLA. R. JUV. P. 8.080(b)(1), (2)).

21. *Id.* (citing M.A.F. v. State, 742 So. 2d 534 (Fla. 2d Dist. Ct. App. 1999)).

22. 811 So. 2d 837 (Fla. 4th Dist. Ct. App. 2002).

23. *Id.* at 839.

24. *Id.* at 838–39 (citing FLA. R. JUV. P. 8.165).

25. *Id.* at 839.

26. 800 So. 2d 204 (Fla. 2001).

27. *Id.* at 206.

28. 373 So. 2d 898 (Fla. 1979).

29. *Id.* at 900.

30. *Id.*

31. 800 So. 2d at 206.

However, the Supreme Court of Florida noted that there is an exception in the situation where the juvenile enters into a guilty plea without the benefit of counsel, and the juvenile has not knowingly and intelligently waived the right to counsel.<sup>32</sup> While *Robinson* applies to a juvenile who is represented by counsel and claims that his or her plea is involuntary due to an inadequate plea colloquy requiring the juvenile to file a motion to withdraw the plea, the same is not true where the juvenile entered the plea without the benefit of counsel and did not knowingly or intelligently waive the right to counsel.<sup>33</sup> This is fundamental error, according to the court in *T.G.*, because of the “unique concern for juveniles who enter pleas without the benefit of counsel.”<sup>34</sup> Thus, the court established what it described as a “narrowly drawn and extremely limited exception to *Robinson*” for juveniles who enter uncounseled pleas where the trial court fails to comply with the requirements of the Rules of Juvenile Procedure.<sup>35</sup> Because there was a failure to make a thorough inquiry into the child’s comprehension of the offer and the capacity to make a knowing and intelligent choice, and because there was not even any offer made at the dispositional stage, the Supreme Court of Florida reversed and remanded.<sup>36</sup>

Florida’s speedy trial rule in juvenile delinquency matters requires that the State commence trial within ninety days.<sup>37</sup> Application of the speedy trial rule, in a variety of contexts, has been repeatedly before the state appellate courts.<sup>38</sup> In *R.F. v. State*,<sup>39</sup> the question was whether the speedy trial time had run, measured from the time the child was taken into custody, one of the two tests for the running of the time period.<sup>40</sup> The State took the position that the child was not taken into custody when he was issued an “arrest/notice to appear” document at the police station.<sup>41</sup> However, the appellate court disagreed.<sup>42</sup> Relying upon section 985.03(55) of the *Florida Stat-*

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32. *Id.* at 212; see also *State v. B.P.*, 810 So. 2d 918 (Fla. 2002) (following *T.G. v. State* in context of waiver of counsel at plea hearing where child was shown a video that explained the right to counsel and a public defender was consulted but never appointed).

33. *T.G.*, 800 So. 2d at 212.

34. *Id.* at 213.

35. *Id.* (citing FLA. R. JUV. P. 8.165).

36. *Id.* at 213.

37. FLA. R. JUV. P. 8.090(a).

38. Michael J. Dale, *Juvenile Law in Florida in 1998*, 23 NOVA L. REV. 819, 834–35 (1999) [hereinafter Dale III]; Dale II, *supra* note 11, at 96.

39. 798 So. 2d 17 (Fla. 4th Dist. Ct. App. 2001).

40. *Id.*; see FLA. R. JUV. P. 8.090(a)(1).

41. *R.F.*, 798 So. 2d at 17–18.

42. *Id.* at 20.

utes,<sup>43</sup> the court determined that the documents in evidence showed that the child was arrested when he received the notice.<sup>44</sup> The child went to the police station in response to the police officer's request that he appear there to be arrested or processed, was issued a notice to appear, and was in fact formally processed and charged.<sup>45</sup> Thereafter, he was released to his mother.<sup>46</sup> The court concluded that the speedy trial rule applied because the evidence showed that the official took the child into custody and elected to release the child to the mother.<sup>47</sup>

In 1985 the United States Supreme Court decided *New Jersey v. T.L.O.*,<sup>48</sup> in which the Court established the test for the legality of school searches. A large body of both state and federal opinions have followed from the *T.L.O.* opinion.<sup>49</sup> In *T.L.O.*, the Court held that the Fourth Amendment protection against unreasonable searches and seizures applies in the school setting, but the balance between a child's right of privacy and the government's need for effective control of the school setting required a lesser standard, which the Court articulated as "reasonable" suspicion.<sup>50</sup> One example of the limitation on a child's privacy involves the school locker.<sup>51</sup> In Florida, by statute, the principal of a public school, or other school official designated by the principal, has authority to search the student's locker if that individual has reasonable suspicion of prohibited or illegal substance in that locker.<sup>52</sup> In *M.E.J. v. State*,<sup>53</sup> the court held that when a student was found in a school parking lot smelling of marijuana twenty minutes after school had begun and the student acknowledged smoking marijuana, it was reasonable for school officials to check the locker where a knife, rather than marijuana, was found.<sup>54</sup> The child's adjudication as delinquent for possession of a weapon on school property was thus affirmed.<sup>55</sup>

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43. *Id.* at 19. "'Taking into custody' means the status of a child immediately when temporary physical control over the child is attained by a person authorized by law, pending the child's release, detention, placement, or other disposition as authorized by law." FLA. STAT. § 985.03(55) (1999).

44. *R.F.*, 798 So. 2d at 20.

45. *Id.* at 19.

46. *Id.* at 19.

47. *Id.* at 20.

48. 469 U.S. 325 (1985).

49. See 2 MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT ¶ 10.07[1], at 10-46 (2003).

50. *T.L.O.*, 469 U.S. at 341.

51. FLA. STAT. § 232.256 (2001).

52. § 232.256(2).

53. 805 So. 2d 1093 (Fla. 2d Dist. Ct. App. 2002).

54. *Id.* at 1094.

55. *Id.*

Illegal secure detention, in violation of the risk assessment instrument under Florida law, also occurs where the child is detained based upon non-attendance at school, as previously ordered by the court.<sup>56</sup> In *R.G. v. State*, no risk assessment was made out.<sup>57</sup> The statute is clear that such a requirement is obligatory.<sup>58</sup> Had the trial court sought to detain the child based upon indirect criminal contempt, an order to show cause, a hearing within twenty-four hours, and notice would have been necessary.<sup>59</sup> None occurred, and the appellate court reversed.<sup>60</sup>

Finally, and perhaps most significantly, is the following statement from the appellate court in *R.G.*:

this is the sixth emergency habeas corpus petition filed against this same judge since March 26, 2002. In each case, the Attorney General's Office has conceded error. We would think that the message to this trial court judge should be clear that he, too, must follow the law. We trust that after this opinion, the trial court judge will modify his conduct accordingly.<sup>61</sup>

### B. *Dispositional Issues*

Florida provides that a child also may be confined in secure detention following commitment and pending placement.<sup>62</sup> The question before the Second District Court of Appeal in *J.W. v. Leitner*<sup>63</sup> was whether a child must "meet [the] statutory 'detention criteria' to qualify for placement in secure detention" when the commitment is to a high-risk residential program.<sup>64</sup> The court held that the risk assessment evaluation scheme in the Florida statute, applying to detention criteria, is no different for children awaiting placement in a high-risk residential facility than it is for children awaiting placement in other facilities.<sup>65</sup> Furthermore, the court rejected the State's argument that it could rely upon representations of the Department of

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56. *R.G. v. State*, 817 So. 2d 1019, 1020 (Fla. 3d Dist. Ct. App. 2002). *See generally* FLA. STAT. § 985.213 (2002).

57. *R.G.*, 817 So. 2d at 1020.

58. § 985.213(2)(a).

59. *R.G.*, 817 So. 2d at 1020.

60. *Id.*

61. *Id.*

62. *See generally* § 985.215(10).

63. 801 So. 2d 295 (Fla. 2d Dist. Ct. App. 2001).

64. *Id.* at 296.

65. *Id.* at 297.



Juvenile Justice that the child's lifestyle supported detention, in order to meet detention requirements.<sup>66</sup>

In a case of first impression, the First District Court of Appeal, in *L.S. v. State*,<sup>67</sup> agreed with other jurisdictions that have "upheld the constitutionality of similar DNA data base statutes."<sup>68</sup> In *L.S.*, a juvenile pled nolo contendere to a burglary charge, in exchange for an agreement by the State to drop a different charge.<sup>69</sup> Thereafter, the State requested that the child be compelled to give a blood sample or DNA testing as provided for by Florida law.<sup>70</sup> The district court of appeal rejected all of the child's constitutional arguments, finding the statute constitutional as against the Fourth, Fifth, and Eighth Amendment claims as well as a Florida Constitutional right of privacy challenge.<sup>71</sup>

Among the dispositional alternatives, restitution is available in Florida in delinquency cases.<sup>72</sup> Under Florida law, jurisdiction ends when the child turns nineteen.<sup>73</sup> In *Cesaire v. State*, the question was whether the court could consider an order to show cause for contempt after the child turned nineteen and when the child failed to make restitution.<sup>74</sup> The court held that the juvenile court did not retain jurisdiction to enforce the restitution order beyond the child's nineteenth birthday, although the state statute provides for such authority.<sup>75</sup> Thus, the court had no jurisdiction to enter a new order requiring the payment of restitution.<sup>76</sup> Moreover, a subsequent order to show cause for failure to appear and subsequent contempt was likewise void because the underlining restitutional order was void for lack of jurisdiction.<sup>77</sup>

Until recently, Florida used the term "community control" to mean probation.<sup>78</sup> That term has now been changed, as of 1998, to probation.<sup>79</sup> Under certain circumstances, a child who is on probation status and who is alleged to have violated that status by committing another delinquent act may be

66. *Id.*

67. 805 So. 2d 1004 (Fla. 1st Dist. Ct. App. 2001).

68. *Id.* at 1007.

69. *Id.* at 1005.

70. *Id.* at 1006; see FLA. STAT. § 943.325(1) (2002).

71. *L.S.*, 805 So. 2d at 1008.

72. See generally *G.J.V. v. State*, 637 So. 2d 78, 79 (Fla. 2d Dist. Ct. App. 1994); *Cesaire v. State*, 811 So. 2d 816 (Fla. 4th Dist. Ct. App. 2002).

73. FLA. STAT. § 985.201(4)(a) (2002).

74. *Cesaire*, 811 So. 2d at 817.

75. *Id.* at 818; see also § 985.201(4)(c).

76. *Cesaire*, 811 So. 2d at 818.

77. *Id.*

78. Dale II, *supra* note 11, at 96.

79. See § 985.215(2)(a); Dale II, *supra* note 11, at 96.

held in secure detention.<sup>80</sup> The question before the court in *D.H. v. Esteves*, was how to define probation when the statute refers specifically to “probation program.”<sup>81</sup> The court held that the term probation was more extensive and did not just involve “program[s],” thus, ruling that secure detention was appropriate.<sup>82</sup>

Florida’s juvenile delinquency dispositional statute allows a court to order placement at a restrictiveness level that differs from the Department of Juvenile Justice’s recommendation.<sup>83</sup> However, when the court disagrees with the recommendation it must state so on the record and its rationale must be supported by a preponderance of the evidence.<sup>84</sup> In *K.N.M. v. State*,<sup>85</sup> a significant factor in the trial court’s decision not to accept the recommendation of the Department of Juvenile Justice was the court’s belief in the juvenile’s lack of remorse and unwillingness to admit guilt.<sup>86</sup> On appeal, the court reconfirmed the proposition that it is improper for a trial court to aggravate a sentence when a defendant fails to exhibit remorse.<sup>87</sup> The appellate court held that in a dispositional hearing, the juvenile has a constitutional right to avoid aggravation of a sentence on those grounds.<sup>88</sup>

Three decades ago, in two cases, *Morrissey v. Brewer*<sup>89</sup> and *Gagnon v. Scarpelli*,<sup>90</sup> the United States Supreme Court applied due process protections to parole revocation in the adult context, finding that a parolee had a liberty interest in his parole. In those cases the court set up due process procedures including: 1) written notice; 2) disclosure of evidence; 3) an opportunity to be heard in person and present witnesses; 4) the ability to confront and cross-examine witnesses; 5) a hearing before a neutral and detached hearing officer; and 6) a written statement of the decision.<sup>91</sup> While the Court in the second case, *Gagnon*, did not provide that there was an absolute right to counsel, it said that the issue should be decided on a case-by-case basis.<sup>92</sup> In *M.T.*

80. *D.H. v. Esteves*, 790 So. 2d 1275, 1276 (Fla. 4th Dist. Ct. App. 2001). *See generally* § 985.215(2)(a).

81. *Id.*

82. *D.H.*, 790 So. 2d at 1276.

83. § 985.23(3)(e).

84. *See A.C.N. v. State*, 727 So. 2d 368, 370 (Fla. 1st Dist. Ct. App. 1999).

85. 793 So. 2d 1195, 1197 (Fla. 5th Dist. Ct. App. 2001).

86. *Id.* at 1196.

87. *Id.* at 1198.

88. *Id.* (citing *A.S. v. State*, 667 So. 2d 994, 996 (Fla. 3d Dist. Ct. App. 1996); *R.A.B. v. State*, 399 So. 2d 16 (Fla. 3d Dist. Ct. App. 1981)).

89. 408 U.S. 471 (1972).

90. 411 U.S. 778 (1973).

91. *Id.* at 782; *Morrissey*, 408 U.S. at 489.

92. *Gagnon*, 411 U.S. at 790.

*v. State*,<sup>93</sup> the trial court had revoked a child's parole after a hearing, finding that an affidavit of violation was unnecessary since the child was on a suspended commitment and that the effect of the revocation would be to remove him from community control to commitment, which had been previously imposed on the child, but suspended.<sup>94</sup> The appellate court held, relying upon *Gagnon*, that due process protections apply to a proceeding alleging a violation of community control for juveniles.<sup>95</sup> The court held further that the child did not receive proper notice of the violation that served as the basis of the revocation, and thus, it reversed.<sup>96</sup>

Florida, like other states, provides for parole revocation hearings, until recently, referred to as community control violation hearings.<sup>97</sup> In *J.S. v. State*,<sup>98</sup> the appellate court found that the trial court violated the child's due process rights by failing to give the juvenile adequate time to prepare for a violation hearing.<sup>99</sup> The facts are worth reciting. When the case was called, the community control officer advised the court that she was ready to proceed, and at that point the court appointed an assistant public defender to represent the child.<sup>100</sup> The lawyer received a notice of violation of court order ten minutes before, said she was not prepared to proceed, objected to the proceeding that day, and asked for a hearing.<sup>101</sup> The lawyer explained that she had not had an opportunity to speak with her client, nor to investigate.<sup>102</sup> The court offered her five minutes more and the attorney objected.<sup>103</sup> The proceeding went forward and community control was revoked.<sup>104</sup> The appellate court reversed, describing the court's violation of the constitutional rights in polite terms as "palpable abuse of [judicial] discretion."<sup>105</sup>

The question of whether Florida's Sexual Predators Act<sup>106</sup> applies to juveniles has been before the court on several occasions, most recently in *T.R.B. v. State*.<sup>107</sup> In that case, a child pleaded *nolo contendere* to the charge of sexual battery on a child under twelve, was adjudicated as delinquent and

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93. 805 So. 2d 898 (Fla. 2d Dist. Ct. App. 2001).

94. *Id.* at 899.

95. *Id.*

96. *Id.*

97. See Dale II, *supra* note 11, at 96.

98. 796 So. 2d 1256 (Fla. 4th Dist. Ct. App. 2001).

99. *Id.*

100. *Id.*

101. *Id.* at 1256–57.

102. *Id.* at 1257.

103. *J.S.*, 796 So. 2d at 1257.

104. *Id.*

105. *Id.*

106. FLA. STAT. § 775.21 (2002).

107. 796 So. 2d 640 (Fla. 1st Dist. Ct. App. 2001).

was then declared a sexual predator, pursuant to the adult statute.<sup>108</sup> The appellate court reversed, holding that adjudication of delinquency is not a conviction for purposes of the sexual predator statute, and that there was no legislative intent to give the juvenile court authority to declare the child a sexual predator.<sup>109</sup> The ruling conflicts with a Second District Court of Appeal decision in *Payne v. State*.<sup>110</sup>

### C. Appellate Issues

Two courts have recently been faced with the question of how to procedurally handle appeals challenging sentences beyond the statutory maximum, where the proper appellate procedure was not followed. Section 985.234(1) of the *Florida Statutes* requires all juvenile appeals to proceed pursuant to the *Florida Rules of Appellate Procedure*. The appellate rules provide that an appeal may not be taken unless prejudicial evidence is preserved.<sup>111</sup> In *J.C.R. v. State*<sup>112</sup> and *A.M. ex rel D.M. v. State*,<sup>113</sup> the Fourth and Fifth District Courts of Appeal, respectively, held that when a juvenile is sentenced beyond the statutory maximum for a particular crime, a fundamental error occurs that may be corrected without regard to preservation of issues.<sup>114</sup>

## III. DEPENDENCY PROCEEDINGS

In 1997 the Florida Legislature amended chapter 39 to provide that indigent parents must be appointed counsel in dependency proceedings.<sup>115</sup> In *In re M.C.*,<sup>116</sup> a mother appealed from an order denying a motion to reopen a dependency case concerning her child.<sup>117</sup> The Department of Children and Family Services (appellee) failed to afford due process to the mother by properly notifying her and her attorney of a motion to terminate the dependency proceeding because the child had been in the custody of a maternal aunt for an extended period of time.<sup>118</sup> The court order relieved the Department of

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108. *Id.* at 641.

109. *Id.* (citing *J.M. v. State*, 783 So. 2d 1204 (Fla. 1st Dist. Ct. App. 2001)).

110. 753 So. 2d 129 (Fla. 2d Dist. Ct. App. 2000), *rev. denied*, 773 So. 2d 56 (Fla. 2000); Dale I, *supra* note 8, at 909–10.

111. *See* FLA. STAT. § 90.104 (2002).

112. 785 So. 2d 550 (Fla. 4th Dist. Ct. App. 2001).

113. 790 So. 2d 1233 (Fla. 5th Dist. Ct. App. 2001).

114. *See id.* at 1235; *J.C.R.*, 785 So. 2d at 551.

115. *See* Dale III, *supra* note 38, at 828.

116. 796 So. 2d 566 (Fla. 2d Dist. Ct. App. 2001).

117. *Id.* at 567.

118. *Id.*

any further supervision of the child and placed the child in the care and custody of the maternal aunt.<sup>119</sup> The mother wrote the court, seeking to have the child and siblings returned to her.<sup>120</sup> Apparently, without her knowledge, the Department ordered to terminate the mother's supervision.<sup>121</sup> Subsequently, the court appointed a new lawyer to represent the mother, and counsel filed a motion to reopen the dependency case.<sup>122</sup> The Department filed a new motion to terminate supervision, despite the longstanding existence of a case plan aimed at reunification.<sup>123</sup> The court, inexplicably, terminated supervision based upon the length of time that the child had been in the care of the maternal aunt.<sup>124</sup> The appellate court reversed, finding a violation of due process in that the earlier case plan goal was reunification and that there had been no finding that reunification would be detrimental to the child's well-being.<sup>125</sup>

Mental abuse, as defined in chapter 39 governing dependency proceedings, has not been the topic of significant appellate review. That changed, however, with the recent opinion in *G.C. v. Department of Children & Families*.<sup>126</sup> Abuse is defined as "any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired."<sup>127</sup> The question in *G.C.* was how to evaluate the test for willful mental abuse.<sup>128</sup> The case arose from a sexual abuse claim against a father toward two daughters.<sup>129</sup> The trial court found that after the alleged sexual abuse occurred, the mother, in an attempt to gain the return of the father to the family unit, allowed a private investigator to interview the children, and thus, the children were subjected to willful mental abuse.<sup>130</sup> The appellate court reversed, holding that the mother may have used poor judgment in telling the children the truth about the consequences of their actions and that she was following the advice of the lawyer when she allowed the investigator

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119. *Id.*

120. *Id.*

121. *M.C.*, 796 So. 2d at 568.

122. *Id.* at 567.

123. *Id.*

124. *Id.* at 568.

125. *Id.*

126. 791 So. 2d 17 (Fla. 5th Dist. Ct. App. 2001).

127. FLA. STAT. § 39.01(2) (2002).

128. *G.C.*, 791 So. 2d at 20.

129. *Id.* at 18.

130. *Id.* at 19.

into the home to talk to them, but that neither was sufficient to establish mental abuse as defined by the law.<sup>131</sup>

The Florida courts are often asked to determine whether a child is subject to prospective neglect or abuse. Under the *Florida Statutes*, such prospective abuse or neglect is tested by evaluating whether the child is subjected to “substantial risk of imminent abuse, abandonment, or neglect by the parent or parents or legal custodian.”<sup>132</sup> In a dependency proceeding, the state must prove the allegation by a preponderance of the evidence.<sup>133</sup> Florida appellate courts have held that the trial court is not obligated to wait until the child is abused and neglected before adjudicating the child dependent.<sup>134</sup> In *C.W. v. Department of Children & Families*,<sup>135</sup> the father had a twenty-two year alcohol problem and there had been domestic violence between the parents, thus, placing the children at risk.<sup>136</sup> The appellate court explained that the father had stopped drinking and began attending Alcoholics Anonymous two months before the petition was filed and nearly a year before the hearing.<sup>137</sup> Moreover, the mother had obtained an injunction against the father for domestic violence four months before the dependency petition was filed, and there had been no subsequent acts of domestic violence.<sup>138</sup> There was no evidence that the father would repeat the cycle of alcohol abuse and domestic violence, and the children appeared to be well adjusted.<sup>139</sup> And finally, because there was no competent substantial evidence of prospective abuse or neglect in the record, the court reversed.<sup>140</sup>

The *Florida Statutes* do not define how imminent the prospective neglect must be. It is clear, however, that there need not be actual prior abuse, abandonment, or neglect before the court finds dependency, just so long as the imminent risk requirement is met.<sup>141</sup> In *E.M.A. v. Department of Children & Families*,<sup>142</sup> the court relied on an earlier ruling that where a nexus is shown between a parent’s mental disorder and a significant risk of danger to

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131. *Id.* at 21.

132. § 39.01(14)(f).

133. *Richmond v. Dep’t of Health & Rehabilitative Servs.*, 658 So. 2d 176, 177 (Fla. 5th Dist. Ct. App. 1995).

134. *See Palmer v. Dep’t of Health & Rehabilitative Servs.*, 547 So. 2d 981, 983–84 (Fla. 5th Dist. Ct. App. 1989).

135. 789 So. 2d 497 (Fla. 5th Dist. Ct. App. 2001).

136. *Id.*

137. *Id.*

138. *Id.* at 497–98.

139. *Id.* at 498.

140. *C.W.*, 789 So. 2d at 499.

141. *See Denson v. Dep’t of Health & Rehabilitative Servs.*, 661 So. 2d 934, 935 (Fla. 5th Dist. Ct. App. 1995); *Richmond*, 658 So. 2d at 177.

142. 795 So. 2d 183 (Fla. 1st Dist. Ct. App. 2001).

the child, the court need not wait for the abuse or neglect to occur.<sup>143</sup> In the case at bar, there was a clear nexus between the father's mental disorder and the inevitable prospect of another manic episode that would place the children in danger.<sup>144</sup> The court added that the legislature, in writing the relevant provision of chapter 39, did not require the injury to occur before a finding of neglect or abuse, where the exact timing of the next manic episode could not be predicted, but that it would happen very soon.<sup>145</sup> The same issue arose in *B.D. v. Department of Children & Families*,<sup>146</sup> where the court gave inconsistent verbal and written findings on the issue of whether the parent's mental illness was clearly connected to child-rearing capacity.<sup>147</sup> Relying on its ruling in *E.M.A.*, the First District reversed and remanded for further findings, clearly stating whether the Department met its burden to satisfy one of the dependency grounds.<sup>148</sup>

The issue of whether alleged abuse of one child constituted grounds for dependency of another child was before the court in *K.C. v. Department of Children & Families*.<sup>149</sup> A father appealed from a dependency adjudication as to one child, based upon alleged physical abuse by the father of the girlfriend's other child.<sup>150</sup> The trial court relied upon its memory of the testimony in the prior proceeding, where the father was not a party, and where testimony was not admitted into evidence in the instant proceeding to find dependency.<sup>151</sup> The appellate court held, first, that there was no establishment of a nexus between the father's alleged abuse of the first child and the potential abuse of the second child;<sup>152</sup> citing the Supreme Court of Florida 2000 opinion of *In re M.F.*,<sup>153</sup> where the court reversed based upon the fact that the trial court solely based its determination of dependency of one child upon the dependency adjudication of the other. More significantly, the court held that there was no competent evidence before the court in *K.C.*,<sup>154</sup> because the trial court relied upon its memory of prior testimony, where the

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143. *Id.* at 187.

144. *Id.* at 186.

145. *Id.* at 188.

146. 797 So. 2d 1261 (Fla. 1st Dist. Ct. App. 2001).

147. *Id.* at 1265 (citing *E.M.A. v. Dep't of Children & Families*, 795 So. 2d 183, 186 (Fla. 1st Dist. Ct. App. 2001); *Richmond v. Dep't of Health & Rehabilitative Servs.*, 658 So. 2d 176, 177-78 (Fla. 5th Dist. Ct. App. 1995)).

148. *Id.* at 1265.

149. 800 So. 2d 676 (Fla. 5th Dist. Ct. App. 2001).

150. *Id.* at 677.

151. *Id.*

152. *Id.*

153. 770 So. 2d 1189 (Fla. 2000); Dale I, *supra* note 8, at 913-14.

154. *K.C.*, 800 So. 2d at 677.

father had no opportunity to challenge the testimony or cross-examine witnesses.<sup>155</sup>

After a dependency adjudication under Florida law the Department of Children and Family Services shall develop a case plan for each child who is to receive services.<sup>156</sup> The case plan is to include a permanency goal for the child including the type of placement.<sup>157</sup> In *F.M. v. Department of Children & Families*,<sup>158</sup> a mother appealed from an order of dependency and disposition approving a case plan that had a permanency goal of maintaining and strengthening the placement with the child's father who had taken custody of the child.<sup>159</sup> The appellate court affirmed the trial court's ruling finding that reunification under the Florida statute is not the only possible role of a case plan.<sup>160</sup>

Once a child is declared dependent and in foster care, the child is in the legal care of the Department of Children and Family Services. The question in *Department of Children & Family Services v. G.M.*<sup>161</sup> was whether a court order was necessary to allow a child to have surgery, specifically removal of a cyst under the chin.<sup>162</sup> Chapter 39 provides that DCF may give the child ordinary medical care and may consent to medical treatment.<sup>163</sup> But neither term makes reference to surgery and the terms are not defined. However, section 743 of the *Florida Statutes* does deal with persons who may consent to medical care of a minor that does not include surgery.<sup>164</sup> Thus, the appellate court held that routine medical examination may be authorized but a surgery, inherently invasive by nature, is not ordinary and thus a court order is necessary.<sup>165</sup>

The issue of how informal dependency matters may be was before the Fifth District Court of Appeal in *Department of Children & Families v. H.W.W.*<sup>166</sup> In that case the judge called an informal meeting in chambers to explore options for obtaining financial assistance for the children in a de-

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155. *Id.* at 678 (citing *Petersen v. Dep't of Children & Families*, 732 So. 2d 374 (Fla. 5th Dist. Ct. App. 1999), *rev. denied*, 740 So. 2d 527 (Fla. 1999)).

156. § 39.601.

157. § 39.601(3)(a).

158. 807 So. 2d 200 (Fla. 4th Dist. Ct. App. 2002).

159. *Id.*

160. *Id.* at 201-02 (citing § 39.601(5)).

161. 816 So. 2d 830 (Fla. 5th Dist. Ct. App. 2002).

162. *Id.* at 831.

163. *See* § 39.407(1), (13).

164. *See* FLA. STAT. § 743.0645(1)(b) (2002).

165. *G.M.*, 816 So. 2d at 832.

166. 816 So. 2d 1249 (Fla. 5th Dist. Ct. App. 2002).



pendency proceeding.<sup>167</sup> The parents of the children, although parties, were not informed of the meeting, which resulted in an order finding that the children's grandparent would be a "relative caregiver" under Florida law entitled to receive financial assistance.<sup>168</sup> The appellate court reversed, stating:

We are unaware of how prevalent is this practice of a judge convening "meetings" rather than conducting hearings in juvenile cases. Such a practice does appear to be fraught with potential for problems, however. Certainly, if one of these "meetings" appears to be moving in the direction of court action, it is incumbent on the court to either adjourn the meeting and convene a hearing in accordance with the rules, or to create a record establishing that those procedures have been waived.<sup>169</sup>

Two cases decided this year affirmed the principle that speedy trial rules do not apply to dependency cases as they do in delinquency cases. In *M.T. v. Department of Children & Family Services*<sup>170</sup> and *J.W. v. Department of Children & Families*,<sup>171</sup> the courts held that there is no equivalent to Rule 8.090 of the *Florida Rules of Juvenile Procedure*, which governs speedy trials in delinquency cases. There are time frames referenced in chapter 39, but they are viewed by the courts as only directory and not mandatory or jurisdictional.<sup>172</sup>

#### IV. TERMINATION OF PARENTAL RIGHTS

As described previously in this review, Florida law provides nine distinct grounds for termination of parental rights.<sup>173</sup> Included among them is the situation where a parent fails to comply with a case plan for a period of twelve months, which constitutes evidence of continuing abuse, neglect, or abandonment.<sup>174</sup> This section of the statute applies only when a parent is provided with a case plan with the goal of reunification but not when the goal is termination. It was this problem that arose in *In re Z.J.S.*<sup>175</sup> The Department did not offer the parent a case plan with the goal of reunification.<sup>176</sup>

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167. *Id.* at 1250.

168. *Id.* (citing FLA. STAT. § 39.5085 (2000)).

169. *Id.* at 1251.

170. 816 So. 2d 227 (Fla. 5th Dist. Ct. App. 2002).

171. 812 So. 2d 599 (Fla. 5th Dist. Ct. App. 2002).

172. *M.T.*, 816 So. 2d at 229.

173. FLA. STAT. § 39.806(1) (2002).

174. § 39.806(1)(e).

175. 787 So. 2d 875 (Fla. 2d Dist. Ct. App. 2001).

176. *Id.* at 878.

In that situation the Department must establish another ground for termination of parental rights. Thus, the court reversed.<sup>177</sup>

An interesting second issue in *In re Z.J.S.* dealt with the father's effort to have his child placed with relatives as an alternative remedy.<sup>178</sup> The appeals court recognized that on remand the trial court should revisit the issue of whether the child could be placed within relatives' care.<sup>179</sup> Significant is the concurrence of Judge Northcutt recognizing that parents have fundamental rights to care, custody, and management of their child, which he argued requires the court to grant deference to the father's plan.<sup>180</sup> In Judge Northcutt's view, the constitution requires respect for a parent's private placement decision "just as it does for the myriad other choices a parent must make in the raising of a child."<sup>181</sup>

Failure to comply with a case plan was also before the appellate court in *In re G.R.*<sup>182</sup> The Department of Children and Families alleged in its petition to terminate that the mother was in material breach and did not remain drug free.<sup>183</sup> The appeals court relied upon the Supreme Court of Florida decision in *Padgett v. Department of Health & Rehabilitative Services*<sup>184</sup> to rule that while the state has a paramount interest in protecting children from harm, the parents have a fundamental right to the care of their children which may only be compromised using the least restrictive means to protect the children from serious harm.<sup>185</sup> Here the court found that the state acted prematurely because the mother was making rehabilitative efforts and there was no evidence of severe neglect of the children.<sup>186</sup> Thus, as the court stated "there is no compelling need to rush to judgment under these facts."<sup>187</sup>

A separate ground for termination of parental rights in Florida involves one incident where the parent engaging in egregious conduct or failing to

177. *Id.* at 879.

178. *Id.* at 877.

179. *Id.* at 879.

180. *Z.J.S.*, 787 So. 2d at 879 (Northcutt, J., concurring) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

Many parents who are unable to tend their children elect to place them with relatives or friends to ensure that the children receive proper care. Surely, such decisions are within the ambit of fundamental parenting rights, and the state has no authority to interfere with them in the absence of the exceptional circumstances specified in Chapter 39, Florida Statutes.

*Id.*

181. *Id.* at 880.

182. 793 So. 2d 988 (Fla. 2d Dist. Ct. App. 2001).

183. *Id.* at 989.

184. 577 So. 2d 565 (Fla. 1991).

185. *G.R.*, 793 So. 2d at 989.

186. *Id.*

187. *Id.*

prevent egregious conduct which threatens the life or safety of the child.<sup>188</sup> A single act may be enough to terminate parental rights. However, that single act must be of significant intensity, magnitude, or severity as to endanger the life of the child.<sup>189</sup> The Second District Court of Appeal in *In re D.W.*<sup>190</sup> evaluated whether in a particular factual situation one act was enough. The court recognized that termination of parental rights must be the least restrictive methodology for protecting the child from serious harm.<sup>191</sup> However, under the facts of the case the Department did not demonstrate that termination was the only option to protect the child.<sup>192</sup> Under the facts of the case, the mother had never been given a chance to demonstrate that she could safely maintain a relationship with the child.<sup>193</sup> Thus, the court reversed.<sup>194</sup>

As noted earlier in the section of this survey discussing dependency proceedings, prospective neglect based upon parental abuse of one child then can be used as evidence of a basis for termination of the parental rights to another child.<sup>195</sup> That issue arose in *A.C. v. Department of Children & Families*,<sup>196</sup> where the question was, *inter alia*, whether the mother's act of inflicting burns on a daughter should constitute grounds to terminate the parental rights over a son.<sup>197</sup> The court found that there was no evidence submitted by the Department that the single act of abuse of the prior child created a substantial risk of injury to this child and that the termination of parental rights was in the child's best interest as the case law in Florida provides.<sup>198</sup> Under Florida law a single act of abuse does not itself constitute proof of imminent risk of abuse and neglect of that child or of another unless the behavior is beyond the parent's control and is likely to continue and place the child at risk. Furthermore, the termination must be the least restrictive means to protect the child.<sup>199</sup>

To some degree in both prospective neglect adjudications and in termination of parental rights cases, the court does have to make some prediction about future behavior of the parent. When a prediction becomes speculation,

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188. § 39.806(1)(f).

189. § 39.806(1)(f)(2).

190. 793 So. 2d 39 (Fla. 2d Dist. Ct. App. 2001).

191. *Id.* at 40 (citing *Padgett*, 577 So. 2d at 571).

192. *Id.*

193. *Id.*

194. *Id.* at 41.

195. *Padgett v. Dep't of Health & Rehabilitative Servs.*, 577 So. 2d 565, 571 (Fla. 1991).

196. 798 So. 2d. 32 (Fla. 4th Dist. Ct. App. 2001).

197. *Id.* at 33.

198. *Id.* at 36.

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

the adjudication cannot stand. *In re C.W.W.*<sup>200</sup> was a termination of parental rights case involving a two-month old child of a mother with significant substance abuse problems.<sup>201</sup> The Department never offered the mother a case plan with the goal of reunification but rather commenced the termination proceeding *inter alia* on the grounds of future harm to the child irrespective of the provision of services.<sup>202</sup> The appellate court held that the Department did not establish that the continuing involvement of the mother with the child would threaten the child's life, safety, or health irrespective of services being provided.<sup>203</sup> The court explained that the Department could cite no case in which parental rights were terminated solely on the basis of the birth of a drug-dependent child.<sup>204</sup> The court's conclusion that the mother would fail in any attempt to comply with a case plan with a goal of reunification was speculation, and not a valid basis for terminating parental rights.<sup>205</sup> And finally, the court added that the Department had failed to establish that termination was the least restrictive means of preventing harm to the child, an additional standard required under Florida law.<sup>206</sup> The court therefore remanded.<sup>207</sup>

Abuse and neglect resulting in termination of parental rights can also be proven based upon past conduct with regard to other children. In *C.W. v. Department of Children & Families*,<sup>208</sup> the appellate court reviewed the facts and concluded that termination of parental rights to siblings because of abuse and neglect may serve as grounds for terminating parental rights, citing *Padgett v. Department of Health & Rehabilitative Services*.<sup>209</sup> Significantly, there was a dissent demonstrating the difficulty with application of *Padgett*.<sup>210</sup> Judge Ervin, dissenting, argued that there must be a causal connection between the past conduct and the present.<sup>211</sup>

A problematic interpretation of prospective neglect based upon parental abuse of one child used as the basis for termination of parental rights to a

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200. 788 So. 2d 1020 (Fla. 2d Dist. Ct. App. 2001).

201. *Id.* at 1022.

202. *Id.*

203. *Id.* at 1023.

204. *Id.* at 1024.

205. *C.W.W.*, 788 So. 2d at 1023.

206. *Id.* at 1025.

207. *Id.*

208. 814 So. 2d 488 (Fla. 1st Dist. Ct. App. 2002).

209. *Id.* at 492; *Padgett v. Dep't of Health & Rehabilitative Servs.*, 577 So. 2d 565, 571 (Fla. 1991).

210. *C.W.*, 814 So. 2d at 495 (Ervin, J., dissenting).

211. *Id.* at 496.

second child is *A.B. v. Department of Children & Families*.<sup>212</sup> In that case, the court seemed to opine that, based upon *Padgett*,<sup>213</sup> a parent whose parental rights have been terminated as to one child may avoid termination as to another child “if he or she comes forward with evidence that the circumstances or pattern of conduct that led to termination of parental rights to the other child cannot serve as a predictor of his or her conduct with the child at issue.”<sup>214</sup> This rationale seems to suggest that the parent must demonstrate that his or her conduct changed after the State proved the termination as to the other child. It does not appear that this is what *Padgett* held.

Another and equally important issue was before the court in *A.C. v. Department of Children & Families*,<sup>215</sup> involving the question of the effect of a parent’s invocation of the Fifth Amendment privilege against self-incrimination in the termination of parental rights case because of an ongoing criminal proceeding.<sup>216</sup> In both *A.C.* and in an earlier opinion in *C.J. v. Department of Children & Families*<sup>217</sup> the courts held that the trial court is obligated to exercise discretion when balancing the interests of the child in permanent placement at the earliest possible time with affording fairness to the parents. The criminal case can take a substantial period of time and thus, while a termination of parental rights proceeding may be continued, that continuance must be balanced against the circumstances of the child.<sup>218</sup>

Problems a child encounters after being removed from the home relating to separation from the parents do not constitute grounds for termination of parental rights. Two courts have so held. In *In re F.M.H.B.*,<sup>219</sup> the fact that a child was having great difficulty adjusting to foster care and school after separation from the parents was not a basis for termination of parental rights.<sup>220</sup> Similarly, in 1999 the court held in *In re K.C.C.*<sup>221</sup> that a youngster’s need for counseling because of anxiety as a result of separation from the parents did not support termination of parental rights.<sup>222</sup>

Included among the grounds for termination of parental rights in Florida is voluntary relinquishment of parental rights.<sup>223</sup> However, even in the con-

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212. 816 So. 2d 684, 686 (Fla. 5th Dist. Ct. App. 2002).

213. 577 So. 2d at 565.

214. *A.B.*, 816 So. 2d at 686.

215. 798 So. 2d 32 (Fla. 4th Dist. Ct. App. 2001).

216. *Id.* at 35.

217. 756 So. 2d 1108 (Fla. 3d Dist. Ct App. 2000).

218. *A.C.*, 798 So. 2d at 35.

219. 803 So. 2d 837 (Fla. 2d Dist. Ct. App. 2001).

220. *Id.* at 839.

221. 750 So. 2d 38 (Fla. 2d Dist. Ct. App. 1999).

222. *Id.* at 41.

223. See § 39.806(1)(a); § 39.808(4).

text of voluntary relinquishment certain procedural due process rights apply. In *L.O. v. Florida Department of Children & Family Services*,<sup>224</sup> a mother appealed from an order terminating her parental rights based upon a prior plea agreement in a criminal case in which she entered a guilty plea to neglect and violation of probation and also consented to termination of parental rights.<sup>225</sup> When the Department of Children and Family Services subsequently filed a termination of parental rights petition and the mother moved to withdraw her consent, the court entered an order terminating parental rights *nunc pro tunc*.<sup>226</sup> The appellate court reversed, holding that chapter 39 provides no short cuts in termination proceedings based on voluntary surrender of parental rights.<sup>227</sup> An adjudicatory hearing on a petition for voluntary termination must be held within twenty-one days after filing the petition.<sup>228</sup> The parent was not given an opportunity to deny any of the allegations of the petition nor to introduce testimony.<sup>229</sup> The court thus reversed.<sup>230</sup>

A second case interpreting voluntary relinquishment of parental rights is *T.C.B. v. Florida Department of Children & Families*.<sup>231</sup> In that case, when the Department sought to terminate parental rights, the mother, through counsel, made an offer of settlement or compromise providing that in return for the cancellation of the termination proceeding the mother would carry out her obligations under a case plan and if she defaulted, the Department would be entitled to receive executed surrenders for the children.<sup>232</sup> After that happened, the mother appealed a final order terminating her parental rights, challenging the settlement agreement.<sup>233</sup> The First District Court of Appeal reversed, finding that the contract was in fact void as against public policy and that it violated legislative intent.<sup>234</sup> Further, the appellate court held that in any circumstances an adjudicatory hearing must be held where the Department would establish the elements required for terminating parental rights by clear and convincing evidence.<sup>235</sup>

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224. 807 So. 2d 810 (Fla. 4th Dist. Ct. App. 2002).

225. *Id.* at 811.

226. *Id.* at 812.

227. *Id.*

228. *Id.* at 813.

229. *L.O.*, 807 So. 2d at 813.

230. *Id.*

231. 816 So. 2d 194 (Fla. 1st Dist. Ct. App. 2002).

232. *Id.* at 196.

233. *Id.* at 195.

234. *Id.* at 196–97 (citing *Padgett v. Dep't of Health & Rehabilitative Servs.*, 577 So. 2d 565, 570 (Fla. 1991); *Santosky v. Kramer*, 455 U.S. 745, 754 (1982); § 39.806(1)(a)).

235. *Id.* at 197.

In addition to defining separate grounds for termination of parental rights, Florida law provides that the court must also determine that termination of parental rights is in the manifest best interest of the child.<sup>236</sup> Florida law contains eleven factors the court shall consider in making this determination.<sup>237</sup> In *K.M. v. Department of Children & Families*<sup>238</sup> there was no evidence that the court considered the factors regarding the best interests of the child.<sup>239</sup> The appeals court reiterated what is clear under Florida law—that termination shall be based upon clear and convincing evidence after review of all statutory factors.<sup>240</sup>

In what one would have thought was an issue that never would have reached the appellate court, the Fifth District Court of Appeal in *E.J. v. Department of Children & Families*<sup>241</sup> held that a successor judge may not make a judgment based upon a reading of the court file and the transcript of a hearing held before his predecessor in the absence of a stipulation by the parties.<sup>242</sup>

As a practical matter which ought not require elucidation, a judgment terminating parental rights must be based upon evidence in the record. In *In re J.M.M.*<sup>243</sup> the court made findings reciting the court-appointed guardian ad litem's beliefs about the best interest of the child being served by termination of parental rights, that the child had formed a significant relationship with a parental substitute, and "that no bond or love existed between the parent and the child."<sup>244</sup> Unfortunately, there was no evidence as to the first two; as to the third, the evidence was to the contrary.<sup>245</sup> Thus, where the judgment was not based on record evidence, the court reversed.<sup>246</sup>

Under Florida law, failure to appear at an advisory hearing in a termination of parental rights case can result in a default and termination of parental rights.<sup>247</sup> In *In re W.C.*,<sup>248</sup> a parent had his attorney appear at the advisory hearing in a termination of parental rights case regarding two children of a father who resided in New Jersey. The court terminated parental rights based

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236. § 39.810.

237. *Id.*

238. 795 So. 2d 1129 (Fla. 5th Dist. Ct. App. 2001).

239. *Id.* at 1130.

240. *Id.*

241. 795 So. 2d 1131 (Fla. 5th Dist. Ct. App. 2001).

242. *Id.*

243. 795 So. 2d 1034 (Fla. 2d Dist. Ct. App. 2001).

244. *Id.* at 1036.

245. *Id.*

246. *Id.* (citing *In re C.W.W.*, 788 So. 2d 1020 (Fla. 2d Dist. Ct. App. 2001)).

247. See § 39.801(3)(d).

248. 797 So. 2d 1273 (Fla. 1st Dist. Ct. App. 2001).

upon the failure of the father to appear.<sup>249</sup> The Florida Legislature had changed the statute regarding personal appearances in amendments to the law in 1998 which precluded appearances through counsel at the advisory hearing as the method of appearance.<sup>250</sup> The appellate court in *W.C.* found that the clear intent of the legislature was that the parent personally appear because it provides the court with an opportunity to demonstrate that it performs a statutory duty of informing the parent of rights and responsibilities in the termination case.<sup>251</sup> The appellate court thus affirmed.<sup>252</sup>

On the other hand, termination of parental rights based on default can only occur in situations set forth in the Florida statute,<sup>253</sup> which provides for failure to appear in either an advisory or adjudicatory hearing. In *In re C.R.*,<sup>254</sup> the court held that neither a docket sounding nor scheduling conference at which the parent failed to appear allowed for default because the statute did not speak to either of these two settings.<sup>255</sup> The court relied upon other earlier opinions to the effect that termination of parental rights may not be entered on default unless specifically authorized by statute.<sup>256</sup>

Appointed counsel on occasion will seek to withdraw from representation on appeal in termination of parental rights cases where the lawyer concludes that the appeal is frivolous.<sup>257</sup> The Supreme Court of Florida has never established a procedure for withdrawal of counsel in termination cases. However, in *Pullen v. State*, the court did establish a procedure for withdrawal of counsel in involuntary civil commitment cases under the Baker Act.<sup>258</sup> In so doing, the court relied upon *Anders v. California*,<sup>259</sup> in which the United States Supreme Court established the grounds for withdrawal of counsel in criminal proceedings. The lower appellate courts in Florida have used the *Anders* test for some time in termination cases. In *N.S.H. v. Department of Children & Family Services*,<sup>260</sup> the Fifth District Court of Appeal affirmed an earlier Fifth District opinion in *Ostrum v. Department of Health*

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249. *Id.* at 1276.

250. *Id.* at 1275.

251. *Id.* at 1276.

252. *Id.*

253. *See* § 39.801(3)(d).

254. 806 So. 2d 646 (Fla. 2d Dist. Ct. App. 2002).

255. *Id.*

256. *Id.* (citing *In re B.A.*, 745 So. 2d 962 (Fla. 2d Dist. Ct. App. 1999); *In re A.L.*, 711 So. 2d 600 (Fla. 2d Dist. Ct. App. 1998)).

257. *Pullen v. State*, 802 So. 2d 1113, 1115 (Fla. 2001).

258. *Id.* at 1117.

259. 386 U.S. 738 (1967).

260. 803 So. 2d 877 (Fla. 5th Dist. Ct. App. 2002).



& *Rehabilitative Services*<sup>261</sup> in which the Fourth District established an *Anders*-like procedure for withdrawal that differs from the approach employed in *Pullen*. Under *Ostrum* the lawyer serves a motion to withdraw on the client with certification in the motion to the court that counsel in good faith has discovered no valid error below, and there is an opportunity for the client to file a brief individually or through counsel.<sup>262</sup> *Anders* as employed in *Pullen* actually requires the filing of a brief indicating that there is no merit to the appeal.<sup>263</sup> The Florida courts are thus split on the particular procedure, and the issue will be decided by the Supreme Court of Florida.<sup>264</sup>

The issue of the application of stays on appeal in termination of parental rights cases was before the Second District Court of Appeal in *In re M.A.D.*<sup>265</sup> In that case the Department filed a petition to terminate parental rights and after an adjudicatory hearing the court denied the petition, ordering that the children be sent to New York for a visit with their mother pending approval of the placement using the Interstate Compact on the Placement of Children.<sup>266</sup> The Department appealed the denial of the petition to terminate.<sup>267</sup> Then after the notice of appeal was filed, the mother filed a motion seeking immediate placement of the children with her.<sup>268</sup> The Department objected on the grounds that the notice of appeal constituted an automatic stay precluding changing placement during the appeal.<sup>269</sup> The trial court agreed and the mother filed an emergency motion for relief of the stay in the appellate court.<sup>270</sup> The appeals court engaged in a process of statutory construction looking at the *Florida Rules of Appellate Procedure*, the *Florida Statutes*, and the *Florida Rules of Juvenile Procedure*.<sup>271</sup> The court concluded that the provisions read together provide for an automatic stay in the termination case when the court terminates parental rights and directs that the child be placed for subsequent adoption.<sup>272</sup> The rationale for the stay avoids the significantly disadvantageous consequences of allowing the child to be

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261. 663 So. 2d 1359 (Fla. 4th Dist. Ct. App. 1995).

262. *N.S.H.*, 803 So. 2d at 879.

263. *Id.*

264. *Martinez v. Fla. Power & Light Co.*, 785 So. 2d 1251, 1253 (Fla. 3d Dist. Ct. App. 2001), *rev. granted*, 819 So. 2d 137 (Fla. 2002).

265. 812 So. 2d 509 (Fla. 2d Dist. Ct. App. 2002).

266. *Id.* at 511; FLA. STAT. § 409.401 (2002).

267. *M.A.D.*, 812 So. 2d at 511.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*; see FLA. R. APP. P. 9.146(c); FLA. STAT. § 39.815(3) (2002); FLA. R. JUV. P. 8.275(a).

272. *In re M.A.D.*, 812 So. 2d 509, 512 (Fla. 2d Dist. Ct. App. 2002).

adopted only to have the termination reversed on appeal.<sup>273</sup> The court explained that the stay did not apply to the situation where the Department had not proven a legal basis to terminate to parental rights, and that obligating children to remain in foster care pending resolution of the appeal would not serve the purposes of chapter 39.<sup>274</sup> Holding children in foster care after the court ordered return of the children would only “prolong the state-imposed absence of stability in the lives of these children.”<sup>275</sup> The court did say that while an automatic stay did not exist under the law, the Department was free to seek a stay in the individual case based upon the circumstances of that case.<sup>276</sup>

In a case that may be of first impression, the First District Court of Appeal recently was faced with questions of whether parents are constitutionally entitled to competent court-appointed counsel in a dependency proceeding, and if so, what means should be used to ensure that the right is not denied. The issues were raised in *L.W. v. Department of Children & Family Services*.<sup>277</sup> The closest the court had previously come to these questions was in the context of a dependency proceeding implicating possible permanent termination of parental rights. In *In re M.R.*<sup>278</sup> the court had held that there was the implication that counsel provide competent assistance. The court also noted that the position in *M.R.* was consistent with a large number of other jurisdictions.<sup>279</sup> The court looked at several cases which had indeed dealt with effective assistance in dependency proceedings and concluded that the right to counsel was something more than a meaningless formality.<sup>280</sup> While immediate termination of parental rights might not be in the offing, the court recognized that it is a possibility that the parent could lose custody of the child or be separated from the child for a significant period of time.

The court also determined that the standard to be applied for competence of counsel is that used in a criminal case.<sup>281</sup> The court noted that the vast majority of courts have applied that standard, which had been enunciated by the United States Supreme Court in *Strickland v. Washington*.<sup>282</sup> In that case, the Court held that the performance must be deficient by falling outside the broad range of professionally-acceptable activity and that the

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273. *Id.* (citing *In re J.R.G.*, 624 So. 2d 273, 275 (Fla. 2d Dist. Ct. App. 1993)).

274. *Id.*

275. *Id.*

276. *Id.*

277. 812 So. 2d 551 (Fla. 1st Dist. Ct. App. 2002).

278. 565 So. 2d 371 (Fla. 1st Dist. Ct. App. 1990).

279. *L.W.*, 812 So. 2d at 554.

280. *Id.* at 555.

281. *Id.* at 556.

282. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

deficient performance must prejudice the defense, meaning that there must be a reasonable probability that without the unprofessional errors there might be a different result.<sup>283</sup> The court in *L.W.* concluded that the *Strickland* standard is well-established and straightforward and therefore it concluded that it ought to be applied.<sup>284</sup> The procedure to be used to raise the effective assistance of counsel is habeas corpus because that is the only available remedy.<sup>285</sup> Laches, finally, is available where there has been an unreasonable delay in raising a claim of ineffective assistance of counsel.<sup>286</sup>

Whether a fifteen-year-old minor who is the respondent in a termination of parental rights case with respect to her own minor child has the right to the appointment of a guardian ad litem and an attorney was before the Fourth District in *M.C. v. Department of Children & Family Services*.<sup>287</sup> The court answered the question in the negative, finding that there is no statutory entitlement to both.<sup>288</sup> The court reviewed the relevant rules of juvenile procedure and could find nothing in the rules nor in the statutes making special provision for respondent parents who also happen to be minors.<sup>289</sup> The court discussed the distinction between the role of the guardian ad litem and the lawyer finding that they were not coextensive.<sup>290</sup> Finally, the court found that the term “child” referred to in both statute and court rule was not meant to include parents who were also minors.<sup>291</sup>

The failure of a mother’s attorney, who was appointed for her because she is indigent, to appear at a termination of parental rights hearing does not allow the court to conduct a hearing in the absence of counsel without first inquiring as to whether the mother wished to proceed without counsel and whether the mother knowingly and intelligently waived her right to counsel. In *In re L.N.*,<sup>292</sup> the appellate court reversed for this reason stating what ought to be obvious—“that the procedure followed by the trial court failed to satisfy due process requirements that meaningful assistance of counsel be provided to the Mother.”<sup>293</sup>

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283. *Strickland*, 466 U.S. at 694.

284. *L.W.*, 812 So. 2d at 556.

285. *Id.* at 557.

286. *Id.*

287. 814 So. 2d 449 (Fla. 4th Dist. Ct. App. 2001).

288. *Id.* at 451.

289. *Id.*

290. *Id.*

291. *Id.*

292. 814 So. 2d 1142 (Fla. 2d Dist. Ct. App. 2002).

293. *Id.* at 1144.

## V. CONCLUSION

The Florida appellate courts have spoken vigorously and bluntly about the failure of the trial courts to properly advise children of their right to counsel in delinquency cases as has been reported for over a decade in survey articles in this Journal. The appellate courts also spoke to specific issues about the right to counsel and notification in dependency and termination of parental rights cases. Finally, the courts worked this past year to flesh out the rules for prospective neglect, first established by the Supreme Court of Florida in 1991 in *Padgett v. Department of Health & Rehabilitative Services*.<sup>294</sup>

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294. 577 So. 2d 565 (Fla. 1991).