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Juvenile Law: 2001 Survey of Florida Law

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I. INTRODUCTION

Rulings in the Florida state courts, with one exception, raised no major issues this past year. A number of technical matters were resolved, and the appeals courts continued the ongoing process of holding trial courts accountable for the protection of constitutional rights and enforcement of Florida statutory provisions. The Supreme Court of Florida rendered one major opinion, however. It held that it was constitutional to close termination of parental rights proceedings against a challenge by the media that such hearings should be public. The Florida Legislature was less active than it had been in recent years, tightening several provisions and making just a few substantive changes to services in the dependency field and to provisions of the delinquency law governing delinquent acts.

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II. JUVENILE DELINQUENCY

A. *Adjudicatory Issues*

In re Gault,[1] decided thirty-four years ago, requires that juveniles be provided counsel in delinquency cases and, if indigent, are entitled to an attorney paid for by the state.[2] In juvenile law survey articles going back almost one third of that time, this author has recounted the ongoing failure of Florida trial courts to comply with *Gault*.[3] In *T.S. v. State*,[4] a young teenager pleaded guilty to violation of the City of Orlando's youth protection ordinance, a curfew, which barred juveniles from certain areas of downtown Orlando after midnight, and was placed in a Level Eight Facility.[5] At the plea hearing, the child was not represented by counsel and was not informed of her right to counsel in violation of rule 8.165(a) of the *Florida Rules of Juvenile Procedure*.[6] The trial court made a brief comment that it had explained to the child her rights under the constitution, to which she had agreed, although the statement did not appear in the transcript.[7] There were written waivers of the right to counsel but they had not been witnessed.[8] Recognizing that there is a right to counsel at all critical stages of a juvenile proceeding in Florida,[9] the court held that a plea is a critical stage and warrants the same guarantee of effective assistance of counsel as do trial proceedings.[10] The court reversed.[11]

In another right-to-counsel case, *D.C.W. v. State*,[12] the child appeared for arraignment in a delinquency proceeding at which the court gave a speech to the group of juvenile defendants before him and informed them of

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1. 387 U.S. 1 (1967).
2. *Id.*
3. *See* Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91, 92 and n.2 (2000).
4. 773 So. 2d 635 (Fla. 5th Dist. Ct. App. 2000).
5. *Id.* at 636.
6. *Id.*
7. *Id.*
8. *Id.*
9. *T.S.*, 773 So. 2d at 635 (citing A.D. v. State, 740 So. 2d 565 (Fla. 5th Dist. Ct. App. 1999)).
10. *Id.*
11. *Id.*
12. 775 So. 2d 363 (Fla. 2d Dist. Ct. App. 2000).

their rights.[13] The appeals court held that the specific colloquy with the child, to the effect that the child had heard and understood the speech to the group, was inadequate to meet the requirements of the *Florida Rules of Juvenile Procedure*.[14] The court held that the colloquy about the right to counsel must include an inquiry into the juvenile's comprehension of the right to counsel and his capacity to waive the right in an intelligent and understanding fashion.[15] The issue came up a third time in *G.E.F. v. State*.[16] In that case, at the detention hearing, when asked whether the child wanted an attorney, the father replied in the negative and the court made no further inquiry.[17] Then at the plea hearing, the only colloquy among the child, the parent, and the court concerned the court stating that it had offered the child an attorney, asking whether the parent could afford an attorney, and then when the mother replied that she could not, the court explaining the right to a public defender, and the parent decided to waive that right.[18] The court failed to make any further inquiry as required by rule 8.165 of the *Florida Rules of Juvenile Procedure*, which explicitly states what is necessary. The appeals court reversed.[19]

Under Florida law, prior juvenile delinquency adjudications may be treated as convictions to enhance the classification of a subsequent delinquency offense charge.[20] In *State v. T.T.*,[21] a juvenile was charged with a felony petit theft on the basis of prior convictions.[22] In the *T.T.* case, the prior delinquency proceedings resulted in withheld delinquency adjudications and not in convictions, and as a result the juvenile moved to dismiss the delinquency charge.[23] The trial court granted the motion and the First District Court of Appeal affirmed, finding that because there was no express statutory language that a withheld adjudication may be considered a conviction for purposes of charging a juvenile in a subsequent delinquency proceeding as occurs with adults.[24]

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13. *Id.*
14. *Id.* at 364 (citing FLA. R. JUV. P. 8.165(b)(2)).
15. *Id.*
16. 782 So. 2d 951 (Fla. 2d Dist. App. 2001).
17. *Id.* at 952.
18. *Id.*
19. *Id.*
20. FLA. STAT. § 985.228(6) (2001).
21. 773 So. 2d 586 (Fla. 1st Dist. Ct. App. 2000).
22. *Id.* at 587.
23. *Id.*
24. *Id.* (citing FLA. STAT. § 784.03(2) (1999)).

Proper application of Florida's risk assessment instrument and other standards for secure detention have been the subject of discussion in this survey on a number of occasions.[25] The risk assessment instrument is a tool used by the court to determine whether a child may be held in secure detention.[26] The issue before the court in *J.J. v. Frier*[27] arose in the context of the writ of habeas corpus to overturn a trial court order that a child be held in secure detention.[28] *Florida Statutes* provide that the court may order a placement more restrictive than that demonstrated by the statistical results of the risk assessment instrument.[29] Under those circumstances, the court shall state its clear and convincing reasons for the placement in writing.[30] In *J.J.*, the appellate court described the pertinent statute as a "departure provision."[31] The trial court did not state in writing the reasons for exceeding the risk assessment instrument, and all the appellate court had before it was a transcript of the detention hearing.[32] The appeals court understood the statutory obligations of the court to be specific and aimed at controlling juvenile detention.[33] Therefore, it could not "casually dispense with the writing requirement[s]."[34] The court added that the statutory provision required the judge's reasons rather than a statement of evidence.[35] Thus, the appellate assessment of the reasons given by the judge to validate a variation from the risk assessment requirement of the statute is not a deferential review, but rather de novo review.[36]

Florida cities, like those in many jurisdictions, have passed juvenile curfew ordinances.[37] The constitutionality of the City of Pinellas Park's

25. Michael J. Dale, *Juvenile Law Issues in Florida in 1998*, 23 NOVA L. REV. 819, 831-34 (1999); Michael J. Dale, *Juvenile Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 179, 180-84 (1997); Michael J. Dale, *Juvenile Law: 1996 Survey of Florida Law*, 21 NOVA L. REV. 189, 190-93 (1996); Michael J. Dale, *Juvenile Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 191, 192-94 (1995).

26. *See* FLA. STAT. § 985.213(2)(b)1. (2001).

27. 765 So. 2d 260 (Fla. 4th Dist. Ct. App. 2000).

28. *Id.* at 261.

29. FLA. STAT. § 985.215(2)(j) (2001).

30. *Id.*

31. *J.J.*, 765 So. 2d at 264.

32. *Id.*

33. *Id.* at 265.

34. *Id.*

35. *Id.*

36. *J.J.*, 765 So. 2d at 266.

37. *See* Michael J. Dale, *Representing the Child Client*, 3-38-3-41(2000).

Juvenile Curfew Ordinance was before the Supreme Court of Florida in *T.M. v. State*.[38] The ordinance made it unlawful for a juvenile to be or remain in a public place or establishment between 11:00 p.m. and 6:00 a.m. of the following day on Sundays through Thursdays and 12:01 a.m. through 6:00 a.m. on Saturdays, Sundays, and legal holidays.[39] The child could be the subject of a juvenile delinquency petition for violation of the ordinance.[40] The supreme court reversed the Second District Court of Appeal without ruling that the statute was or was not constitutional because the intermediate appellate court had applied a heightened scrutiny test rather than the strict scrutiny test.[41] The Office of the Attorney General essentially conceded that the wrong standard was applied and the case was remanded for application of the strict scrutiny test.[42]

B. *Dispositional Issues*

At the close of the adjudicatory stage of a juvenile delinquency proceeding, if the court finds that the allegations of the petition have been proven, it may either enter an order of adjudication or withhold adjudication.[43] When the court withholds adjudication, it shall place the child on probation and set additional conditions such as restitution, community service, curfew, urine monitoring, and driver's license revocation or suspension, among others.[44] When the court elects to adjudicate a child delinquent, it may enter a disposition that the child be placed on probation.[45]

The issue before the appellate court in *S.R.A. v. State*[46] was what length of probation may be imposed upon a juvenile when the court withholds adjudication of delinquency.[47] The general rule in Florida is once the court obtains jurisdiction over the juvenile under chapter 985, the court retains

38. 784 So. 2d 442 (Fla. 2001).
39. *Id.* at 442-43.
40. *Id.* at 443.
41. *Id.* at 443-44.
42. *Id.* at 444.
43. FLA. STAT. § 985.231(1)(a)1. (2001).
44. § 985.228(4); FLA. R. JUV. P. 8.110(g) (2001).
45. §§ 985.03(43), 985.231. Until recently probation in Florida was known as community control. Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA. L. REV 91, 96 (2000).
46. 766 So. 2d 277, 278 (Fla. 4th Dist. Ct. App. 2000).
47. *Id.*

jurisdiction until the child reaches the age of nineteen.[48] When the court adjudicates the child to be delinquent and places the child on probation, Florida law explicitly limits the term of probation.[49] But for a second-degree misdemeanor, the statute limits probation to the maximum sentence that could be imposed if the juvenile were committed to the Department of Juvenile Justice, which may not exceed the maximum term of imprisonment that an adult could serve for the same offense.[50] However, where adjudication is withheld, chapter 985 allows an indeterminate probation sentence until the juvenile turns nineteen.[51] Several courts have previously upheld the statutory provision for indeterminate probation in the withheld adjudication setting.[52] On the other hand, the Fifth District Court of Appeal rejected the distinction in *G.R.A.*[53] Deciding that the juvenile justice system area is remedial in nature, the Fourth District Court of Appeal in *S.R.A.* upheld the legislative prerogative, although certifying the conflict with the Fifth District Court of Appeal.[54] The Supreme Court of Florida subsequently approved the *S.R.A.* decision without opinion.[55]

The general rule in Florida is that the trial court has exclusive original jurisdiction over a child who is alleged to have committed a delinquent act until the child reaches the age of nineteen.[56] An exception occurs when the court enters a disposition in which it commits the child to the Department of Juvenile Justice when under certain circumstances the term of the commitment shall be until the child is charged by the Department or until he or she reaches the age of twenty-one.[57]

In *S.L.K. v. State*,[58] the trial court committed the child to a Level Eight Department of Juvenile Justice program, suspending that commitment until the child was accepted and completed a Level Six boot camp, and then

48. FLA. STAT. § 985.201(4)(a) (2001).
49. § 985.231(1)(a)1.a.
50. *Id.*
51. *Id.*
52. *See* M.B. v. State, 693 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1997); N.W. v. State, 736 So. 2d 710 (Fla. 2d Dist. Ct. App. 1999) *reh'g granted*, 744 So. 2d 455 (Fla. 1999); M.G. v. State, 696 So. 2d 1340 (Fla. 2d Dist. Ct. App. 1997) *overruled by* G.R.A. v. State, 688 So. 2d 1027 (Fla. 5th Dist. Ct. App. 1997).
53. 688 So. 2d at 1027.
54. *S.R.A.*, 766 So. 2d at 280.
55. S.R.A. v. State, 772 So. 2d 1217 (Fla. 2000).
56. *See* FLA. STAT. § 985.201(4)(a) (2001).
57. § 985.231(1)(a)(IV)d.3.
58. 776 So. 2d 1062 (Fla. 4th Dist. Ct. App. 2001).

retained jurisdiction over the child until he reached the age of twenty-one.[59] The appellate court reversed because the Department of Juvenile Justice's commitment statutory provision allows the retention of jurisdiction in the event that the commitment extends until the child's twenty-first birthday, but does not allow the court to continue to retain jurisdiction if the child is discharged from the commitment prior to the age of twenty-one.[60]

F.T. v. State[61] involved an appeal from a delinquency adjudication where the child was placed on probation.[62] As this section of the article explains, in general, when a child is placed on probation after a delinquency adjudication, the maximum sentence cannot exceed that for which an adult would serve time for the same offense. The issue in *F.T.* was whether, under the facts of the case, the trial court had jurisdiction to adjudicate a violation of probation.[63] The child had initially been placed on probation on July 6, 1998.[64] The child subsequently admitted a violation of probation and on February 5, 1999 was adjudicated delinquent and placed on probation with a suspended commitment to a Level Four facility.[65] A second petition for violation of probation was filed against the child on August 10, 1999 and amended on September 23, 1999, and a hearing was held on October 7, 1999.[66] The issue involved whether, in October 1999, the trial court had jurisdiction to consider the affidavit of violation of probation.[67] The appellate court held that it did not because the one-year probation term, the maximum term for the offense had the child been charged as an adult, had expired.[68] Thus, the trial court lacked jurisdiction.[69]

Florida's juvenile delinquency dispositional statute contains a provision for dealing with juvenile sex offenders.[70] The question in *C.C.M. v. State*[71] was whether the sex offender probation conditions contained in the *Florida Statutes* governing adult criminal defendants apply in juvenile delinquency

59. *Id.*
60. *Id.* at 1065.
61. 766 So. 2d 1182 (Fla. 4th Dist. Ct. App. 2000).
62. *Id.*
63. *Id.* at 1183.
64. *Id.* at 1182.
65. *Id.* at 1182-83.
66. *F.T.*, 766 So. 2d at 1183.
67. *Id.*
68. *Id.*
69. *Id.*
70. *See* FLA. STAT. § 985.03(31) (2001).
71. 782 So. 2d 537 (Fla. 1st Dist. Ct. App. 2001).

proceedings.[72] *C.C.M.* involved a thirteen-year-old who was found to have committed a lewd and lascivious act upon another child.[73] At a review hearing, after a dispositional hearing at which the child was committed to the Department of Juvenile Justice for placement in a moderate risk residential program, the court entered a modified order of adjudication and disposition, imposing the sex offender probation conditions under the adult act.[74] The appellate court reversed, finding first that the adult statute containing mandatory conditions of probation did not apply to juveniles because it was silent as to its application to juveniles and because the content of the statute also referred specifically to adult settings.[75] Although it found that the statute applied exclusively to adults and juveniles sentenced as adults, the appellate court commented in dicta that the lower court might have used its discretion to impose adult-like conditions.[76] However, it could not do so on a mandatory basis because of the language of the adult probation statute.[77] Because the court did not take discretionary authority at the time of the original disposition, it was foreclosed from doing so at a later date.[78]

The juvenile delinquency disposition section of chapter 985 of the *Florida Statutes* does not provide for what are often described in the adult system as split sentences, whereby a judge orders commitment but suspends the commitment and orders completion of a probation program.[79] The First District Court of Appeal recently rejected such an approach in *Department of Juvenile Justice v. K.B.*[80] In the *K.B.* case, the trial court ordered that if a child failed to complete or violated a probation program through the Tallahassee Marine Institute, the Department of Juvenile Justice would immediately place the juvenile in a residential commitment facility without the need for a probation violation proceeding.[81] The appellate court recognized that such an approach was creative, but that it was not available within chapter 985.[82] It then concluded, as other appellate courts have, that

72. FLA. STAT. § 948.03(5) (2001).
73. *C.C.M. v. State*, 782 So. 2d 537, 538 (Fla. 1st Dist. Ct. App. 2001).
74. *Id.*
75. *Id.* at 539.
76. *Id.*
77. *Id.* at 539-40.
78. *C.C.M.*, 782 So. 2d at 540.
79. FLA. STAT. § 985.03 (2001).
80. 784 So. 2d 556, 557 (Fla. 1st Dist. Ct. App. 2001).
81. *Id.*
82. *Id.* (citing FLA. STAT. § 985.231 (2000)).

trial courts do not have unlimited discretion in establishing dispositions.[83] They may not place juveniles in particular facilities.[84] That is left to the discretion of the Department of Juvenile Justice.[85]

C. *Appellate Issues*

A technical, but nonetheless important issue of appellate practice, came before the Fourth District Court of Appeal in *J.C.R. v. State*.[86] The issue involved preservation of a right to appeal an order by a trial court withholding adjudication of delinquency but impermissibly placing the child under "community control for an indeterminate amount of time not to exceed the child's twenty-first birthday. . . ."[87] The state conceded that the court lacked authority to set the term of community control beyond the child's nineteenth birthday but argued that the issue was not preserved for appeal.[88] Florida law provides that the appeal must be timely and pursuant to the statute governing criminal appeals and the *Florida Rules of Appellate Procedure*.[89] However, the court concluded that because the sentence imposed in the case was similar to one that exceeds statutory maximum, it is the type of fundamental sentencing error that can be raised on appeal without preservation of rights.[90]

A second issue relates to the ability of the state to appeal from an order denying its request to impose restitution liens in a delinquency proceeding. In *State v. M.K.*,[91] the appellate court held that it lacked jurisdiction because "there is no statute or court rule authorizing the state to appeal the [particular] order at issue."[92] Recognizing that the state's right to appeal is purely statutory, the court could find nothing in chapter 985's list of orders that can be appealed by the state which would allow an appeal in the

83. *Id.*

84. *Id.*

85. 784 So. 2d at 557 (citing R.L.B. v. State, 693 So. 2d 130, 131 (Fla. 1st Dist. Ct. App. 1997)); Dep't of Juvenile Justice v. J.R., 716 So. 2d 872 (Fla. 1st Dist. Ct. App. 1998); Dep't of HRS v. State, 616 So. 2d 91, 91–92 (Fla. 5th Dist. Ct. App. 1993) (citing *In re* K.A.B., 483 So. 2d 898 (Fla. 5th Dist. Ct. App. 1998)).

86. 785 So. 2d 550 (Fla. 4th Dist. Ct. App. 2001).

87. *Id.* at 551.

88. *Id.*

89. *See* FLA. STAT. § 985.234(1) (2001); *J.C.R.*, 785 So. 2d at 551 n.1.

90. *J.C.R.*, 785 So. 2d at 551.

91. 786 So. 2d 24 (Fla. 1st Dist. Ct. App. 2001).

92. *Id.* at 25.

particular instance.[93] The court in *M.K.* then dismissed the appeal after commenting that the problem had existed in the adult criminal appeal arena but had been corrected by statute.[94]

III. DEPENDENCY PROCEEDINGS

Chapter 39 of the *Florida Statutes*, as it governs dependency proceedings, is not a model of clarity and logic.[95] For example, none of the subdivisions of the chapter are actually entitled "Dependency Proceedings."[96] The definitional subpart of chapter 39 speaks of a child who is found to be "dependent" and includes several categories of children.[97] They are children who have been abandoned, abused, or neglected, who have been surrendered to the Department of Children and Families Services or to a licensed child placing agency for purposes of adoption, who have been voluntarily placed with a child caring agency or the Department, who have no parent or legal custodian capable of providing supervision and care, or who are in substantial risk of imminent abandonment, abuse, or neglect by a parent or legal custodian.[98] These categories of dependent children are then further defined in the statute,[99] but lacking precision, have been the subject of appellate review.

An abandoned child is defined in section 39.01(1) of the *Florida Statutes* as being in a situation in which the parent or custodian, through his or her absence, fails to provide for the child's support, fails to communicate with the child, thus evidencing a willful rejection of parental obligations.[100] The facts must demonstrate to the court a settled purpose not to assume parental duties.[101] Incarceration may constitute abandonment.[102]

The issue of how to evaluate abandonment as an evidentiary matter was recently before the Fifth District Court of Appeal in *S.C. v. Department of*

93. *Id.* at 26 (citing FLA. STAT. § 985.234(1)(b) (2000)).

94. *Id.* (citing State v. MacLeod, 600 So. 2d 1096 (Fla. 1992)).

95. *C.f.* Z.J.S. v. Dep't of Children & Families, 787 So. 2d 875, 878 (Fla. 2d Dist. Ct. App. 2001).

96. *But see* Part II of the *Florida Rules of Juvenile Procedure*, which is entitled "Dependency and Termination of Parental Rights Proceedings."

97. FLA. STAT. § 39.01(14) (2001).

98. *Id.*

99. *See id.*

100. § 39.01(1).

101. *Id.*

102. *Id.*

Children & Families.[103] The court recognized that there had to be a showing of willful rejection of parental responsibilities or marginal efforts to support and communicate with the child, such that there was a failure to evince the settled purpose to assume parental duties.[104] The appellate court's decision, as one would expect, was fact driven. The court found that there was some contact between the mother and the child while the child was not in the mother's physical custody and that the mother did not fail to provide financial support sufficient to establish abandonment because the husband and wife were used to supporting the children fully whenever that parent had custody of the child.[105] There had been no request for support made until the dependency proceeding was filed by the paternal great-aunt and great-uncle with whom the child periodically lived.[106] The court concluded that the pattern of conduct in evidence in the case was beneath the statutory threshold for abandonment.[107]

Approximately ten years ago, the Supreme Court of Florida decided *Padgett v. Department of Health & Rehabilitative Services*,[108] in which it held that permanent termination of a parent's rights to one child under circumstances evidencing abuse and neglect may serve as grounds for termination of parental rights to a different child.[109] In *M.F. v. Department of Children & Families*,[110] the issue before the Supreme Court of Florida was whether a court may base a final ruling of dependency "*solely* on the fact that the parent committed a sex act on a different child."[111] The court held that a simple showing by the Department of Children and Family Services "that a parent committed a sex act on one child does not by itself constitute proof that the parent poses a substantial risk of *imminent* abuse or neglect to the child's sibling, as required by [Florida law]."[112] The court recognized that the act may be quite relevant, but it is not automatically dispositive of the question of dependency, and therefore the court should focus on all the

103. 767 So. 2d 579 (Fla. 5th Dist. Ct. App. 2000).
104. *Id.* at 582.
105. *Id.*
106. *Id.*
107. *Id.*
108. 577 So. 2d 565 (Fla. 1991).
109. *Id.* at 571.
110. 770 So. 2d 1189 (Fla. 2000).
111. *Id.* at 1193.
112. *Id.* at 1194 (citing FLA. STAT. § 39.01(11) (1997)).

circumstances surrounding the petition in the particular case.[113] The court thus refused to apply a *per se* rule.

The application of dependency proceedings to cases involving domestic violence was before the Fifth District in *D.D. v. Department of Children & Families*.[114] In that case, the appellate court affirmed an adjudication of dependency in light of the trial court's finding of what Florida calls "prospective neglect" based upon proof that the child witnessed multiple incidents of domestic violence of both a physical and verbal nature, and that the violence was proof of prospective neglect sufficient to support a determination even in the absence of medical or other expert testimony.[115] The appellate court first found that chapter 39's definition of neglect covers the situation of domestic violence,[116] and that the state need not wait for a child to be neglected before instituting dependency proceedings.[117] Relying upon an earlier Fourth District Court of Appeal opinion in *D.H. v. Department of Children & Families*,[118] the court in *D.D.* held that the child must view the acts of violence.[119] The court then added that the child's observation must be taken together with evidence indicating that the parents would more likely than not resume their relationship in the future and thus resume a cycle of domestic violence in the presence of the child in order to prove prospective neglect for purposes of a finding of dependency.[120] Finally, the court held that, unlike in the termination of parental rights setting,[121] the state need not prove in a dependency proceeding that there was no prospect existing that the parent could improve his or her behavior.[122] The rationale is that there is a different standard of proof in a termination case than in a dependency case because in the dependency proceeding, the goal is to improve the parents' behavior for the purpose of reunification in order to avoid termination.[123]

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113. *Id.*

114. 773 So. 2d 615 (Fla. 5th Dist. Ct. App. 2000).

115. *Id.* at 616.

116. *Id.* at 617; FLA. STAT. § 39.01(45) (2001).

117. *Id.* at 617.

118. 769 So. 2d 424 (Fla. 4th Dist. Ct. App. 2000).

119. *D.D.*, 773 So. 2d at 618.

120. *Id.*

121. *See* Palmer v. Dep't of Health & Rehabilitative Services, 547 So. 2d 981 (Fla. 5th Dist. Ct. App. 1989).

122. *D.D.*, 773 So. 2d at 618.

123. *Id.*

Corporal punishment periodically forms the basis for a charge of dependency.[124] In *J.C. v. Department of Children & Families*,[125] a stepfather of one child, and father of a younger child, was charged with excessive parental discipline.[126] Noting that the stepfather, while not the biological father of the older child, was in a position with approval of the mother to discipline both children, dependency might flow to him.[127] The allegations of dependency were made related to physical, mental, and emotional injury under chapter 39.[128] Florida law allows for corporal discipline so long as it is not excessive or abusive.[129] The court found that there was no evidence that the bruises were significant or that they constituted temporary disfigurement.[130] Nor was there any evidence that the children were likely to be harmed if they were returned to their home.[131] Finally, the court referred to the Supreme Court ruling in *Beagle v. Beagle*,[132] in which the high court, in the context of grandparent visitation, relied upon the privacy provisions of the Florida Constitution, which do not allow state involvement unless there is a threat of harm.[133]

Florida, like other states, provides that in dependency proceedings, hearsay statements of a child may be offered to prove abuse or neglect.[134]

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124. *See* Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91 (2001); Michael J. Dale, *Juvenile Law Issues in Florida in 1998*, 28 NOVA L. REV. 819 (1999); Michael J. Dale, *Juvenile Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 179 (1997); Michael J. Dale, *Juvenile Law: 1996 Survey of Florida Law*, 21 NOVA L. REV. 189 (1996); Michael J. Dale, *Juvenile Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 191 (1995). Corporal punishment may also form the basis for a criminal charge. *See generally* State v. MacDonald, 785 So. 2d 640 (Fla. 2d Dist. Ct. App. 2001); Raiford v. State, 736 So. 2d 155 (Fla. 4th Dist. Ct. App. 2001) (holding that discipline of a child does not bar prosecution for simple child abuse if the beating produces severe bruises enough to require treatment at a hospital).

125. 773 So. 2d. 1220 (Fla. 4th Dist. Ct. App. 2000).

126. *Id.*

127. *Id.* at 1220–21.

128. *See* FLA. STAT. § 39.01(30)(a) (2001).

129. *J.C.*, 773 So. 2d at 1221 (citing FLA. STAT. § 39.01(30)(a)(4.) (2001)).

130. *Id.*

131. *Id.* at 1222 (citing FLA. STAT. § 39.01(2) (2001)).

132. 678 So. 2d 1271 (Fla. 1996).

133. *J.C.*, 773 So. 2d at 1222. For a discussion of Florida grandparent visitation law, see Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L.REV. 91, 98–100 (2000).

134. *See generally*, Michael J. Dale, REPRESENTING THE CHILD CLIENT, 1-38–3-41 (Matthew Bender & Co., Inc. 2001).

However, under Florida law there must be other corroborative evidence of the abuse or offense in order for the hearsay to be received in evidence.[135] In *R.U. v. Department of Children & Families*,[136] the court recognized that the corroborative evidence must tend "to confirm the unlawful sexual act," that is to say, "the abuse or the offense."[137] The problem with the case at bar was that the only evidence supporting the child's hearsay statements was other hearsay statements made by the same child to the same therapist who testified as to the original declarations.[138] These other statements, the court concluded, do not constitute other corroborating evidence within the meaning of the Florida statute.[139] The court concluded that the word "other" refers to evidence derived from a source other than the child victim's own statements.[140]

Florida provides by statute that a parent has a right to counsel in a dependency proceeding.[141] Despite the fact that counsel may be present and may agree to the parents' consent to an adjudication of dependency of a child, it is nonetheless incumbent upon the trial court to question the parent concerning whether he or she understands the nature of the allegations against him or her and the possible consequences of consent to the dependency adjudication.[142] Because the *Florida Rules of Juvenile Procedure* so require,[143] the court in *I.D.M. v. State*[144] held that consent by counsel alone without court colloquy with the mother on these issues was reversible error.[145]

The need to move a dependency case in order that there be timely disposition and decision about what should happen to the child is contained both in Florida law and in federal funding statutes.[146] The need to move expeditiously was made clear in dicta in *A.R. v. Department of Children &*

135. FLA. STAT. § 90.803(23) (2001).

136. 777 So. 2d 1153 (Fla. 4th Dist. Ct. App. 2001).

137. *Id.* at 1159.

138. *Id.* at 1160.

139. *Id.* (citing FLA. STAT. § 90.803(23)(a)2.b. (2001)).

140. *Id.*

141. FLA. STAT. § 39.013 (2001). There is no constitutional right to counsel. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 30–32 (1981).

142. § 39.013

143. FLA. R. JUV. P. 8.325(c) (2001).

144. 779 So. 2d 526 (Fla. 2d Dist. Ct. App. 2001).

145. *Id.* at 527.

146. Florida Adoption Act, FLA. STAT. §§ 63.012–63.235 (2001); Adoption and Safe Families Act of 1997, 42 U.S.C. § 671 (1997).

Families.[147] After ruling that the evidence did not support a finding that the mother's two children were dependent, the court explained that it was "compelled to explicate a concern presented by this case even though our reversal is not predicated on the point."[148] The court then explained that the record in the case contained no reason for a nearly eleven-month delay between the commencement of the dependency hearing and its completion.[149] Explaining that the delay was "indefensible" in light of the fundamental nature of the interest at stake, and given that the legislature had indicated that proceedings should be handled quickly and that the Supreme Court had further enunciated time standards, the court concluded "[b]y publication of this opinion, we hereby advise that delays such as those involved in this case will not be countenanced."[150]

In *K.R. v. Department of Children & Families*,[151] the issue was whether verbal arguments between parents may be sufficient to constitute neglect within the statutory definition which would be adequate to support an adjudication of dependency.[152] The appellate court concluded that absent evidence of injury or the risk of injury to the child, there could be no finding of dependency.[153] Specifically, there was no evidence of psychological problems, which the child was experiencing, nor any deviation from normal performance and behavior.[154] Recognizing that arguments are commonplace and that they can be frequent and loud, verbal abuse between parents alone is insufficient for state intervention.[155]

On the other hand, failure to protect a child from abuse may constitute grounds for adjudication of dependency. In *M.R. v. Department of Children & Families Services*,[156] over a vigorous dissent, the appellate court upheld a finding of dependency based upon a preponderance of the evidence that the children had been abused and that the parents had failed to protect them

147. 784 So. 2d 622 (Fla. 5th Dist. Ct. App. 2001).

148. *Id.* at 623.

149. *Id.*

150. *Id.* at 623–24.

151. 784 So. 2d 594 (Fla. 4th Dist. Ct. App. 2001).

152. *Id.* at 598. *See* FLA. STAT. § 39.01(43) (2001) (providing that neglect may involve a significant impairment, an injury which may be defined as "an injury to the intellectual or psychological capacity of a child as evidenced by a discernable and substantial impairment in the ability to function within the normal range of performance and behavior.").

153. *K.R.*, 784 So. 2d at 598.

154. *Id.*

155. *Id.*

156. 783 So. 2d 277 (Fla. 3d Dist. Ct. App. 2001).

from abuse.[157] The evidence was unrebutted that there had been vaginal penetration of two children.[158] The issue before the court was whether the father had sexually abused the children.[159] The court held that the evidence showed that the children had been abused and that the parents had failed to protect them even though there was no showing as to the cause of the children's injuries.[160] Judge Jorgenson vehemently dissented stating that "[b]y its decision today, the court established a new evidentiary standard in dependency cases: 'if we can't figure out what happened, Dad must have done it and Mom must have failed to stop it.'"[161] The detail of the concurrence and the dissent demonstrate the factual difficulties that can arise in intra family dependency proceedings.

IV. TERMINATION OF PARENTAL RIGHTS

Florida law authorizes nine separate grounds for termination of parental rights.[162] They include a voluntarily executed written surrender, abandonment, conduct which demonstrates continuing involvement of the parent or parents in the relationship with the child, which threatens the life, safety, well-being, or physical, mental or emotional health of the child irrespective of the provision of services,[163] the parent is incarcerated under certain circumstances and for certain times subsequent to an adjudication of dependency, the filing of a case plan, and continued abuse and neglect or abandonment, egregious conduct that threatens the life, safety, or mental or emotional health of the child or a sibling, subjection of the child to aggravated child abuse, sexual abuse or battery or chronic abuse, commission or murder or voluntary manslaughter of another child or felonious assault resulting in bodily injury to the child or another, and finally when parental rights of the parent to a sibling have been involuntarily terminated.[164] Several of the provisions of the Florida termination law relate to the development and application of what is known as a "case plan."[165] A

157. *Id.* at 278.
158. *Id.* at 279.
159. *Id.*
160. *Id.* at 280.
161. *M.R.*, 783 So. 2d at 281.
162. FLA. STAT. § 39.806(1) (2001).
163. *Id.*
164. § 39.806(1)(a).
165. § 39.601.

parent's failure to comply with the case plan for a period of twelve months can result in termination of parental rights.[166]

The issue before the Third District Court of Appeal in *J.M. v. Florida Department of Children & Families*[167] was whether a termination of parental rights petition was prematurely filed because the time period within which the parents had to comply with the case plan had not passed.[168] The Florida termination statute provides for different case plan compliance time frames dependent upon which ground for termination is alleged.[169] Thus, for example, if it is determined that continuing parent involvement with the child threatens life, safety, and well-being, there is no requirement for any particular period of time under a case plan.[170] On the other hand, a separate section of the law provides that a petition may be filed when the child has been adjudicated dependent, a case plan has been filed, and the child continues to be abused and neglected.[171] Under those circumstances, there must be a failure of the parent to substantially comply for a period of twelve months after adjudication of the child as a dependent child.[172] This time period begins to run after the disposition.[173] In *J.M.*, the mother argued that the six-month period had run.[174] In fact, the petition was filed under the section which did not contain a time frame. Under the facts of the case, no time frame was required although the case plan contained a six-month period. The petition for termination of parental rights was filed eight months later and the court therefore affirmed the termination.[175]

A second case involving application of the case plan is *Z.J.S. v. Department of Children & Families*.[176] The facts of the case are strange. The case plan called for a goal of termination of parental rights and then set forth tasks for the parent to complete which are the type of tasks required to achieve reunification.[177] At the same time, according to the appellate court, no services were offered to the parent to assist in accomplishing any of the

166. § 39.806(1)(e).
167. 762 So. 2d 1029 (Fla. 3d Dist. Ct. App. 2000).
168. *Id.*
169. FLA. STAT. § 39.806 (2001).
170. *Id.*
171. § 39.806(1)(e).
172. *Id.*
173. *Id.*
174. *J.M.*, 762 So. 2d at 1029–30.
175. *Id.*
176. 787 So. 2d 875 (Fla. 2d Dist. Ct. App. 2001).
177. *Id.* at 876–77.

tasks assigned.[178] The appellate court reversed because the ground for termination of parental rights urged by the Department was the failure to comply with the case plan. The problem was that the section governing compliance with the case plan deals with a situation where the case plan has the goal of reunification.[179] The Department conceded that it did not offer a case plan with a goal of reunification with the result that it had to establish one of the other bases for termination of parental rights. Because it only sought to terminate parental rights on the basis of the case plan, it could not meet the standard, and therefore the case was reversed and remanded for further proceedings.[180]

The issue of what to do when a strong bond exists between a parent and children, but where termination of parental rights is in the child's best interests, came before the Second District Court of Appeal in *D.W. v. Department of Children and Families.*[181] In that case the trial court upheld the termination of parental rights, although it recognized that the children were not likely to be adopted because of their age and special needs. The court opined that the children's best interests would be served by continued contact with the father as well as with the biological grandparents. The appellate court noted that structured contact with the parent is provided by Florida law.[182] The appellate court then remanded in order to allow the trial court to obtain additional evidence prior to exercising discretion on the question of future contact between the parent and children as well as the right of grandparent contact, which is also protected by statute.[183]

Because termination of parental rights involves such fundamental interests,[184] the process by which the rights are terminated is replete with protections for the parties. In *K.S.* ex rel. *A.S. v. B.C.*,[185] the Fifth District Court of Appeal affirmed the judgment of termination of parental rights with an important concurrence by Judge Sharpe. What disturbed Judge Sharpe was that the evidence to support the finding of termination was hearsay.[186] Witnesses who testified lacked first hand knowledge of the facts. Two case workers said that the parent had refused drug screenings as required by the

178. *Id.* at 877.
179. *Id.* at 878.
180. *Id.*
181. 763 So. 2d 497 (Fla. 2d Dist. Ct. App. 2000).
182. *See* FLA. STAT. § 39.811(7)(b) (2001).
183. *D.W.*, 763 So. 2d at 498.
184. *See* Santosky v. Kramer, 455 U.S. 745 (1982); *Lassiter*, 452 U.S. at 46–47.
185. 766 So. 2d 1224 (Fla. 5th Dist. Ct. App. 2000).
186. *Id.* at 1225–26 (Sharpe, J., concurring).

case plans although one refusal had occurred before the case plans were adopted, and neither worker was able to document any of from the case file.[187] Furthermore, the guardian ad litem who had recommended termination had only seen the child with the parent once and based an opinion that the parent acted inappropriately with the child upon observations of the mother's interactions with other children.[188] The court noted that no hearsay objections were made below and thus the issue was not preserved for appeal and waived.[189] Significantly, in Florida termination cases, children are not appointed counsel.[190] They receive the assistance of guardians ad litem on an ad hoc basis, and in this case the guardian testified. Thus, the child had no lawyer. Furthermore, while parents are appointed lawyers by statute in Florida,[191] there is a cap on the amount that lawyers get paid unless they can convince the court of the need for additional fees.[192]

The issue of whether Florida law, which requires a mandatory closure of all hearings in termination of parental rights proceedings, violates either the United States or the Florida Constitution was before the Supreme Court of Florida in *Natural Parents of J.B. v. Florida Department of Children & Families Services*.[193] The case was notorious, involving allegations that the mother of the child suffered from Munchausen by Proxy Syndrome and intentionally caused illness to the child involving many hospitalizations.[194] Initially, at the dependency hearing stage, the parents sought closure of the proceedings as well as a gag order to prohibit release of information, arguing that closure was in the best interest of the child.[195] The parents then changed their position at the termination of parental rights stage claiming that the Florida statute was unconstitutional in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16(a) of the Florida Constitution.[196] The Court rejected all of the parents' arguments

187. *Id.* at 1225.

188. *Id.*

189. *Id.*

190. FLA. STAT. § 39.807 (2001); *see* Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769 (2001).

191. FLA. STAT. § 39.013(1) (2001).

192. § 39.0134(2).

193. 780 So. 2d 6 (Fla. 2001).

194. *Id.* at 7.

195. *Id.* at 7–8.

196. *Id.*

and found that the statute was constitutional.[197] Judges Anstead and Pariente dissented.[198]

Discovery issues do not appear often in either dependency or termination of parental rights appellate opinions. However, the ability to take a deposition did come before the appeals court in *S.S. v. Department of Children & Families Services*.[199] In that case, the parents were provided with discovery, including a witness list as a result of what the court described as continuing demands for discovery.[200] On the Wednesday before a Monday trial, the Department of Children and Families Services filed an amendment to its discovery response in which it disclosed previously undisclosed taped statements of the parties as well as adding new witnesses, including an expert witness.[201] On the morning of trial, the court allowed a continuance until the early afternoon to take the deposition of the expert.[202] When counsel for the parent, due to time constraints, only briefly spoke with the expert, the attorney renewed a motion for a continuance, which was denied, and the expert then testified.[203] Parental rights were then terminated.[204] On appeal, the Fourth District concluded that disclosure is required under the *Florida Rules of Juvenile Procedure* of persons having information relevant to the case.[205] Furthermore, the court held that while the juvenile rules do not provide for what is known as a Richardson hearing,[206] based upon the Third District Court of Appeal ruling in *B.M. v. Department of Children & Families Services*,[207] if the failure to produce the material is prejudicial, there must be a reversal. Such was the case in *S.S v. Department of Children & Family Services*.[208]

Under Florida law, one of the grounds for termination of parental rights is when parents are engaged in conduct that demonstrates that continuing involvement of the parent threatens the life, safety, or well-being of the child

197. *Id.* at 11 (citing FLA. STAT. § 39.467(4), *renumbered by* § 39.809(4)(2001)).
198. *J.B.*, 780 So. 2d at 12–17.
199. 784 So. 2d 479.
200. *Id.* at 479.
201. *Id.*
202. *Id.* at 480.
203. *Id.*
204. *S.S.*, 784 So. 2d at 480.
205. *See* FLA. R. JUV. P. 8.245(b)(2)(A) (2001).
206. *S.S.*, 784 So. 2d at 480; Richardson v. State, 246 So. 2d 771 (Fla. 1971).
207. 711 So. 2d 616 (Fla. 3d Dist. Ct. App. 1998)
208. *S.S.*, 784 So. 2d at 480.

irrespective of the provisions services.[209] In *In re C.W.W.*,[210] the Second District Court of Appeal, *inter alia*, discussed how the state may prove that continuing involvement of a parent with a child may threaten a child's life, safety, or health irrespective of the provision of services.[211] In that case, a child was born prematurely with the presence of cocaine in its bloodstream.[212] As a result, the state filed a dependency petition and also sought a judgment terminating parental rights.[213] The appeals court found that the trial court's order was not based upon the evidence in the record.[214] It was premised upon speculation by the trial court that the mother would fail to comply with the case plan which had a goal of reunification.[215] The appellate court held that speculation is not a valid basis for termination of parental rights.[216] In addition, there had to be a showing that any provision of services would be futile or that the child would be threatened with harm despite the services provided to the parent.[217] Because the trial court made no finding and there was no evidence to support its determination, apparently premised solely on the birth of a drug dependent child, the appeals court reversed.[218] It noted further that in every reported Florida case involving a newborn drug dependent child, there is a finding of a failed attempt at a case plan or other evidence of abuse or neglect to support a decision to terminate parental rights.[219]

V. STATUTORY CHANGES

A. *Juvenile Delinquency*

The legislature added language to the introductory provisions of chapter 985 providing that, among other things, it is the intent of the legislature to preserve and strengthen a child's family ties.[220] The emotional, legal and

209. FLA. STAT. § 39.806(1)(c) (2001).
210. 788 So. 2d 1020 (Fla. 2d Dist. Ct. App. 2001).
211. *Id.* at 1023.
212. *Id.* at 1021-22.
213. *Id.* at 1022.
214. *Id.* at 1023.
215. *In re C.W.W.*, 788 So. 2d at 1023.
216. *Id.*
217. *Id.*
218. *Id.* at 1025.
219. *Id.* at 1024.
220. FLA. STAT. § 985.02(7) (2001).

financial responsibilities of the child's caretaker shall continue while the child is in the care of the Department of Juvenile Justice.[221] Unfortunately, with the exception of the caretaker's ongoing financial obligations, which are enforceable against the caretaker,[222] the language is simply laudatory and thus unenforceable.

The legislature added a new paragraph to the definitional language of chapter 985 providing for a "respite" placement for juveniles "charged with domestic violence as an alternative to secure detention . . . when a shelter bed for a child in need of services or a family in need of services . . . is unavailable."[223] The legislature also amended chapter 985 to protect victims of youth crime while in school.[224] When the court determines that a victim or sibling of a victim attends or is eligible to attend the same school as the child who committed the delinquent offense, the court may enter a no-contact order in favor of the victim or sibling.[225] It may alternatively note in its disposition order that the parents of the victim or sibling do not object to the offender attending the same school or riding the same bus.[226]

The legislature passed a complicated scheme for the expunction of nonjudicial arrest records of a minor who prior to filing the application for expunction has never been charged with a criminal offense and who has successfully completed a pre-arrest diversion program.[227] The child's parent, or the child, if over eighteen, may file a signed application for expunction on a form developed by the Department of Juvenile Justice, together with an official written statement from the State Attorney certifying successful completion of the program.[228] The filing fee is $75.00 unless waived by the executive director of the Department of Law Enforcement Operating Trust Fund.[229] The application must be filed within six months of successfully completing the program.[230] Whether the parents of children who complete the diversion can successfully complete this process remains to be seen.

In the programs operations area, the legislature has explicitly authorized the department to contract with faith-based organizations to provide services

221. *Id.*
222. *See* § 985.02.
223. § 985.03(46).
224. § 985.23(1)(d).
225. *Id.*
226. §§ 985.23(4)(f) (2001), 985.23(1)(d).
227. § 943.0582.
228. § 943.0582(3).
229. § 943.0582(4).
230. § 943.0582(5).

to children.[231] It also provided that the Department collect and annually report cost data for every program it operates or with which it contracts.[232] Included is the development of a cost effective model for each commitment program.[233] The model shall include an analysis of recidivism rates for each provider among other kinds of evaluations.[234] This information, if properly collected and dissimilated, should prove helpful in analyzing dispositional alternatives.

B. *Dependency and Termination of Parental Rights*

As a probable result of legislative bargaining, the legislature introduced a system which makes mandatory the assessment of every dependent child eleven years of age or older who has been in licensed foster care and who has been moved more than once for placement in a licensed residential facility.[235] The procedure, oddly, only applies in Districts Four, Eleven, and Twelve, and in the "Suncoast Region."[236] The Department of Children and Families is obligated to report to the legislature every year on December 1st about this group of children.[237] The underlying rationale for the amendment, at least in part, is the need for this group of children to achieve stability and permanency.[238] The entire approach is subject to the availability of appropriations.[239] It is also unclear from both the legislative history and discussions by this author with a legislative staff member to the Senate Judiciary Committee whether there were any data or studies to support this legislative initiative.[240]

Finally, the legislature added language governing adoptions to the termination of parental rights post-disposition relief section of chapter 39.[241]

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231. FLA. STAT. § 404 (2000).

232. § 985.412(3) (2001).

233. § 985.412(1)(b).

234. *Id.*

235. § 39.521.

236. § 39.521(5)(a).

237. *See* § 39.521(5)(e).

238. *See* § 39.521(5)(b).

239. § 39.521(5)(f).

240. For a study suggesting that foster care and therapeutic foster care are more desirable and efficient than group/institutional care, see Richard P. Barth, *Institutions vs. Foster Homes: The Empirical Base for a Century of Action*, School of Social Work, University of North Carolina (Feb. 17, 2002).

241. § 39.812. Adoptions are generally covered in chapter 63 of the *Florida Statutes.*

The new provision requires adoption petitions to be filed in the circuit in which the termination of parental rights judgment was entered unless a motion for a change of venue is granted.[242] The adoption petition may not be filed until the termination of parental rights judgment becomes final.[243] And the petition must be accompanied by a form containing information about the child's medical and social history.[244]

VI. CONCLUSION

The legislature made no expansive changes in either the juvenile justice or child welfare systems. The appellate courts continue the process of supervision of trial court statutory compliance with chapters 39 and 985. The intermediate appellate courts have also continued a process of analysis of unclear statutes. Finally, the Supreme Court of Florida, in a significant ruling, held that termination of parental rights proceedings are not absolutely open to the public.[245]

242. § 39.812(5).

243. *Id.*

244. *Id.*

245. Natural Parents of J.B. v. Fla. Dep't of Children & Families Services, 780 So. 2d 6 (Fla. 2001).