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## Juvenile Law

Michael J. Dale\*

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# Juvenile Law: 1998 Survey of Florida Law

Michael J. Dale\*

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## I. INTRODUCTION

The Supreme Court of Florida resolved several issues of statutory construction this past year, which had been festering in the appellate courts, involving appeals in dependency and termination of parental rights cases and dispositions in juvenile delinquency cases. The intermediate appellate courts continued a more than decade long process of holding trial courts accountable to comply with basic statutory provisions within chapters 39 and 985 of the *Florida Statutes*.

While the legislature did not make wholesale changes to the law governing children either in the dependency system or in the juvenile delinquency system, there were several substantial changes which are referenced in this survey. One change involved adding harm from substance abuse explicitly to the grounds for dependency and, ultimately, termination of parental rights.<sup>1</sup>

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\* Professor of Law, Nova Southeastern University Shepard Broad Law Center, Fort Lauderdale, Florida. Colgate University, 1967, Boston College Law School, J.D., 1970. The author thanks Tracey McPharlin and Amy Bloom for their assistance in the preparation of this article. This article covers cases decided through June 30, 1999.

1. Ch. 99-186, § 2, 1999 Fla. Laws 1001, 1010-12 (codified at FLA. STAT. 39.01(30)(g) (1999)).

## II. JUVENILE DELINQUENCY

A. *Detention Issues*

Detention issues occur regularly in the appellate case law,<sup>2</sup> and this year was no exception. A significant issue involving use of detention for incompetent juveniles arose in *J.W. v. Department of Juvenile Justice*.<sup>3</sup> The issue involved the ability of the trial court to order the placement of an incompetent child in secure detention.<sup>4</sup> Without much analysis, the appellate court held that, although the statutes offer little guidance in dealing with a juvenile in J.W.'s circumstances, the trial court's order was consistent with Florida law, met the needs of J.W., and ensured the safety of the public.<sup>5</sup> The court thus ruled that there was an adequate basis for the trial court to conclude that "no less restrictive alternative to secure detention would protect the safety of the public, especially small children."<sup>6</sup> The appellate opinion is silent on what steps, if any, the trial court took pursuant to section 985.223 of the *Florida Statutes* to engage the Department of Children and Family Services in finding an appropriate placement for the child, nor what steps would be taken to develop a treatment plan for the child's restoration to competency.<sup>7</sup> It is hard to visualize how placement in detention constitutes a remedy consistent with section 985.223 of the *Florida Statutes* and Rule 8.095(a)(8) of the *Florida Rules of Juvenile Procedure*, premised as they are on rehabilitation.<sup>8</sup>

In a significant ruling on detention and pretrial practice, the Supreme Court of Florida recently approved an amendment on an interim basis to the *Florida Rules of Juvenile Procedure* permitting juveniles to attend detention hearings via audio-video devices.<sup>9</sup> The court had initially ruled on the matter in 1996 establishing the practice on an interim basis.<sup>10</sup> The court responded to

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2. See Michael J. Dale, *Juvenile Law Issues in Florida in 1998*, 23 NOVA L. REV. 819, 831-34 (1999); Michael J. Dale, *Juvenile Law: 1991 Survey of Florida Law*, 22 NOVA L. REV. 179, 180-84 (1997); Michael J. Dale, *Juvenile Law: 1992 Survey of Florida Law*, 17 NOVA L. REV. 335, 348-53 (1992); Michael J. Dale, *Juvenile Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 333, 339-43 (1991).

3. 24 Fla. L. Weekly D1503 (1st Dist. Ct. App. June 21, 1999).

4. *Id.* at D1503.

5. *See id.*

6. *Id.*

7. *See id.*

8. See FLA. STAT. § 985.223 (1999); FLA. R. JUV. P. 8.095(a)(8).

9. Amendment to Florida Rules of Juvenile Procedure 8.100(a), 24 Fla. L. Weekly S196, S196 (Apr. 29, 1999).

10. See Amendment to Florida Rules of Juvenile Procedure 8.100(a), 667 So. 2d 195 (Fla. 1996).

the petition of several circuits and relied upon what it described as highly favorable reports to order an amended rule of procedure containing the audio visual approach for a period of ninety days from the date of the opinion after which time the court held that it would determine whether further action was necessary.<sup>11</sup> It also directed the Juvenile Procedures Committee of the Florida Bar to study the matter and make a recommendation concerning a permanent rule.<sup>12</sup> The positions of the parties, both favoring and opposing the rule, are set forth in detail in the opinion.<sup>13</sup> The benefits described included avoiding humiliation of juveniles who are paraded through the courthouse and allowing juveniles more time to attend classes and counseling sessions.<sup>14</sup> There was great support from the judiciary for continuance of the interim rule.<sup>15</sup> The shortcoming, according to the court, was a hardship to the public defender in allocating attorneys.<sup>16</sup> The countervailing considerations also relate to the depersonalization of the initial appearance process.<sup>17</sup> Children who are seen on television, it may be argued, are less likely to be viewed individually and personally by the court.<sup>18</sup> The court is thus unable to evaluate the personal characteristics of the child.<sup>19</sup>

As noted earlier in this survey, the *Florida Statutes* provide for services to juveniles who have been found incompetent to stand trial.<sup>20</sup> In *Department of Children & Families v. Morrison*,<sup>21</sup> the trial court ordered a child charged with first-degree premeditated murder who was adjudged incompetent to stand trial to be committed to the Department of Children and Family Services for placement in a secure facility where there would be no integration with adult patients and where the child would be rehabilitated.<sup>22</sup> The Department petitioned for a writ of certiorari on the ground that the circuit court was without authority to order the child to a special mental health facility.<sup>23</sup> The appellate court agreed, finding that Florida law does not provide the trial court with authority in a commitment order to order a defendant's placement in a

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11. *Amendment*, 24 Fla. L. Weekly at S198.

12. *Id.*

13. *See id.* at S196-99.

14. *Id.* at S197-98.

15. *Id.* at S197.

16. *Amendment*, 24 Fla. L. Weekly at S198.

17. *Id.* at S197.

18. *See id.*

19. *See id.* at S199.

20. *See supra* Part II.A. ¶ 1.

21. 727 So. 2d 404 (Fla. 3d Dist. Ct. App. 1999), *review denied*, 741 So. 2d 1136 (Fla. Aug. 19, 1999).

22. *Id.* at 405.

23. *Id.*

specific facility or to issue instructions on the defendant's treatment.<sup>24</sup> The appellate court ruled that the trial court can make a nonbinding recommendation regarding placement.<sup>25</sup> However, the court did differ with the Department on the issue of housing and treating the indicted child separately from adults.<sup>26</sup> The court held that section 985.215(4) of the *Florida Statutes* requires that when a child is prosecuted as an adult, including where indicted as such, the child should be housed in a jail or facility separately from adult inmates.<sup>27</sup> Finding an apparent contradiction in the provisions of chapter 985 of the *Florida Statutes*, the court sought to harmonize and reconcile them.<sup>28</sup> It concluded that it would be anomalous to say that section 985.215 mandated separation of juveniles and adults when an indicted juvenile is held in jail, but that section 985.225 commands that juveniles and adults be lodged together when committed to a mental health facility.<sup>29</sup> The court did not decide the issue, finding that the Department was not given notice of the proceedings, and that the trial court and the Department did not have an opportunity to address the question of separate confinement for mental health treatment apart from adults.<sup>30</sup>

Under Florida law, in addition to pretrial detainees, a child committed to the Department of Juvenile Justice awaiting dispositional placement who has already been adjudicated, may be placed in secure detention for a short period of time.<sup>31</sup> In *L.K. v. State*,<sup>32</sup> the court held that, notwithstanding the child's acquiescence to a longer period of detention, the plain language of the Florida statute precludes a trial judge ordering detention in excess of fifteen days after commitment.<sup>33</sup>

## B. Adjudicatory Issues

The *Florida Rules of Juvenile Procedure* contain detailed discovery provisions,<sup>34</sup> which have generated appellate decisions in the past.<sup>35</sup> In a recent case, a mother petitioned the appellate court to quash an order

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24. *Id.*

25. *Id.* at 406.

26. *Morrison*, 727 So. 2d at 406–07.

27. *Id.* at 406. See FLA. STAT. § 985.215(4) (1999).

28. *Morrison*, 727 So. 2d at 406–07.

29. *Id.* at 407.

30. *Id.*

31. See FLA. STAT. § 985.215(10)(a) (1999).

32. 729 So. 2d 1011 (Fla. 4th Dist. Ct. App. 1999).

33. *Id.* at 1011.

34. See FLA. R. JUV. P. 8.060.

35. See Michael J. Dale, *Juvenile Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 333, 344–45 (1991).

denying her discovery of information in the possession of the medical examiner and a law enforcement agency who were investigating criminal charges against her for the death of her infant child.<sup>36</sup> The mother sought the information as part of her preparation to defend the petition for dependency of her other two children.<sup>37</sup> The sheriff's department moved for a protective order, arguing that the information sought both from the office itself and the medical examiner was exempt from disclosure under Florida law since it was related to a current criminal investigation of the death of the mother's infant child.<sup>38</sup> The problem was exacerbated by the fact that the two other children had been removed from the custody of their mother for over seventeen months based upon the death of the infant.<sup>39</sup> There had never been any report or indication that the mother inflicted any type of injury upon the children although the mother was a suspect because she was one of the many individuals who had access to the infant.<sup>40</sup> The court recognized that broad discovery is provided under the juvenile rules because of the important interests at stake.<sup>41</sup> The court concluded that although the child's welfare and best interest must remain paramount, the court was also obligated to carefully safeguard fundamental liberty interests of the parent in the care, custody, and management of the child.<sup>42</sup> It then granted the writ of certiorari and quashed the trial court's order.<sup>43</sup>

### C. *Dispositional Issues*

Inexplicably, the trial courts have a problem with the proposition that under Florida law, a child may not be sentenced to a juvenile commitment for a period of time longer than the maximum sentence for an adult who commits the same crime.<sup>44</sup> Two recent cases are illustrative of the issue.<sup>45</sup> Thus, in *D.S. v. State*,<sup>46</sup> the Fifth District Court of Appeal held that it was reversible error for the trial court to place a child on community control until the youngster's nineteenth birthday where the maximum penalty for an adult

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36. *B.B. v. Department of Children & Family Servs.*, 731 So. 2d 30, 31 (Fla. 4th Dist. Ct. App. 1999).

37. *Id.* at 32.

38. *Id.*

39. *Id.* at 33.

40. *Id.*

41. *B.B.*, 731 So. 2d at 34.

42. *Id.*

43. *Id.*

44. See FLA. STAT. § 985.231(1)(d) (1999).

45. See *D.S. v. State*, 730 So. 2d 398 (Fla. 5th Dist. Ct. App. 1999); *D.P. v. State*, 730 So. 2d 414 (Fla. 5th Dist. Ct. App. 1999).

46. 730 So. 2d 398 (Fla. 5th Dist. Ct. App. 1999).

charged with the same offense was shorter.<sup>47</sup> Based on the facts of the case, the child could only have been committed or placed on community control for one year.<sup>48</sup> In *D.P. v. State*,<sup>49</sup> the Fifth District Court of Appeal reversed the trial court's order committing a juvenile to a high risk facility for sex offenders for a period not to extend beyond his nineteenth birthday, followed by community control and aftercare to be planned by the Department of Juvenile Justice and approved by the court because it exceeded the maximum adult penalty.<sup>50</sup>

In an effort to provide a greater variety of, as well greater severity in, juvenile dispositions, Florida has instituted a serious offender program.<sup>51</sup> The habitual offender provisions of Florida law create procedures to be followed in order to have a child placed in the serious or habitual juvenile offender program.<sup>52</sup> Such procedures include a requirement that the state file a petition seeking serious or habitual juvenile offender placement, service of such a petition on the child, the child's attorney, and a representative of the Department of Juvenile Justice, and a reasonable time allowance for the child to prepare a response.<sup>53</sup> In *D.A.C. v. State*,<sup>54</sup> the issue was whether the court could authorize the prosecution of a child as a serious offender even where the state attorney as prosecutor did not file a petition to do so.<sup>55</sup> The appellate court held that the statute does not prohibit the trial court from imposing habitual offender sentences unless the prosecutor files the petition the classification.<sup>56</sup> The rule permits, but does not require, the prosecutor to file the petition and thus allows the court to prosecute habitual or serious offenders in the absence of a filing by the prosecutor.<sup>57</sup> The statute also requires the court to decide if the child meets serious offender criteria.<sup>58</sup> In addition, the court held that there is no separation of powers problem

47. *Id.* at 400. See also *J.D. v. State*, 732 So. 2d 1135, 1135 (Fla. 2d Dist. Ct. App. 1999) (finding error where the trial court imposed indefinite term of community control for marijuana and cocaine possession).

48. *D.S.*, 730 So. 2d at 400 (citing *J.W. v. State*, 709 So. 2d 199 (Fla. 5th Dist. Ct. App. 1998)); *V.W. v. State*, 693 So. 2d 722 (Fla. 5th Dist. Ct. App. 1997); *G.R.A. v. State*, 688 So. 2d 1027 (Fla. 5th Dist. Ct. App. 1997). See also Michael J. Dale, *Juvenile Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 179, 196 (1997) (discussing precisely the same problem).

49. 730 So. 2d 414 (Fla. 5th Dist. Ct. App. 1999).

50. *Id.* at 415.

51. See FLA. STAT. § 985.31 (1999).

52. See FLA. R. JUV. P. 8.115(d).

53. *Id.*

54. 728 So. 2d 828 (Fla. 5th Dist. Ct. App. 1999), *review denied*, (Fla. Oct. 28, 1999).

55. *Id.* at 829.

56. *Id.* at 830.

57. *Id.* at 829-30.

58. *Id.*

because the purpose of the juvenile proceeding is remedial in nature as opposed to punitive.<sup>59</sup>

An interesting dispositional issue arises when a child with a pending juvenile delinquency case is the subject of a direct filed information, charging him or her as an adult.<sup>60</sup> In *Medina v. State*,<sup>61</sup> a child appealed from the imposition of adult sentences on juvenile cases which would be disposed of together with adult cases in the adult court.<sup>62</sup> The appellate court held that once transferred, post-adjudicatory juvenile cases still retain their juvenile status, and thus the felony division judge or adult criminal court judge did not have the authority to impose an adult sentence on a child on these cases as to which the child has been adjudicated in the juvenile division.<sup>63</sup>

Florida's appellate courts are split on a technical issue of court jurisdiction to extend the dispositional alternative of community control.<sup>64</sup> In *N.W. v. State*,<sup>65</sup> the Second District Court of Appeal agreed with the Fourth District Court of Appeal opinion in *M.B. v. State*<sup>66</sup> that the statutory provision that a child adjudicated delinquent for a second-degree misdemeanor is subject to supervision and community control only for six months where the juvenile has been adjudicated delinquent.<sup>67</sup> However, where a child is not adjudicated delinquent, but rather has had the adjudication withheld (a permissible alternative in Florida),<sup>68</sup> the court may impose a penalty that is harsher than the one that would be permitted if the juvenile were adjudicated delinquent.<sup>69</sup> The holdings in *N.W.* and *M.B.* are contrary to the ruling of the Fifth District Court of Appeal in *G.R.A. v. State*;<sup>70</sup> thus, the court in *N.W.* certified the conflict with the Fifth District.<sup>71</sup>

At both the adjudicative and dispositional stages of delinquency cases, juveniles have an absolute right to counsel.<sup>72</sup> However, juveniles may, on

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59. *D.A.C.*, 728 So. 2d at 830.

60. *See Medina v. State*, 732 So. 2d 1153 (Fla. 3d Dist. Ct. App. 1999).

61. 732 So. 2d 1153 (Fla. 3d Dist. Ct. App. 1999).

62. *Id.* at 1154.

63. *Id.* at 1155.

64. *N.W. v. State*, 736 So. 2d 710, 710 (Fla. 2d Dist. Ct. App. 1999).

65. *Id.*

66. 693 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1997).

67. *N.W.*, 736 So. 2d at 711.

68. *See FLA. STAT.* §§ 985.228(4), .23(4) (1999).

69. *See id.*; *M.B.*, 693 So. 2d at 1067.

70. 688 So. 2d 1027 (Fla. 5th Dist. Ct. App. 1997).

71. *N.W.*, 736 So. 2d at 711.

72. *See In re Gault*, 387 U.S. 1 (1967); *J.R.V. v. State*, 715 So. 2d 1135 (Fla. 5th Dist. Ct. App. 1998).



occasion, be represented by a certified legal intern.<sup>73</sup> In *A.D. v. State*<sup>74</sup> the record was silent as to whether the child knowingly and intelligently waived the right to legal representation in return for representation by the intern.<sup>75</sup> Nor was there any showing or assertion that a supervising attorney was present at the dispositional hearing.<sup>76</sup> Therefore, the court was obligated to quash the dispositional order and remand for further proceedings based on Florida case law establishing that there must be approval by the minor of the intern.<sup>77</sup>

Periodically, the appellate courts must review appeals on the ground that the child's waiver of the right to remain silent and have an attorney present during questioning should be suppressed because the waiver was not knowing and intelligent.<sup>78</sup> In *T.S.D. v. State*,<sup>79</sup> a twelve-year-old with a history of psychological problems, an IQ of sixty-two, and a third grade reading level moved to suppress his confession.<sup>80</sup> The court applied the totality of circumstances approach, evaluating the child's intelligence, education, experience, and his ability to comprehend the meaning and effect of his statement, in finding that his confession was clearly not admissible.<sup>81</sup> Significantly, the court held that contrary to the State's assertion, the record demonstrated that the child's prior exposure to the juvenile justice system did not aid in his comprehension of his rights.<sup>82</sup>

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73. See RULES REGULATING THE FLA. BAR 11-1.2(a)-(e) (providing that a law student may directly provide representation to individuals so long as the student is participating in a law school credit-bearing clinical program coordinated by the law school and supervised by a lawyer).

74. 24 Fla. L. Weekly D1494 (5th Dist. Ct. App. June 25, 1999).

75. *Id.* at D1494.

76. *Id.*

77. See *id.* (citing *L.R. v. State*, 698 So. 2d 915 (Fla. 4th Dist. Ct. App. 1997); *In re J.H.*, 580 So. 2d 162 (Fla. 4th Dist. Ct. App. 1991)).

78. See FLA. R. JUV. P. 8.165. See generally Michael J. Dale, *Juvenile Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 179, 188 (1997); Michael J. Dale, *Juvenile Law: 1992 Survey of Florida Law*, 17 NOVA L. REV. 335, 343-44 (1992); Michael J. Dale, *Juvenile Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 333, 335-39 (1991).

79. 24 Fla. L. Weekly D1149 (3d Dist. Ct. App. May 12, 1999).

80. *Id.* at D1149.

81. *Id.*

82. *Id.*

### D. *Appellate Issues*

The issue of the proper way to take up on appeal a challenge to the adequacy of a plea colloquy arose in *J.M.B. v. State*.<sup>83</sup> The appellate court held that a juvenile may not challenge the voluntariness of his plea on direct appeal without first moving to withdraw the plea.<sup>84</sup> A criminal defendant can contest the voluntariness of the plea after sentencing by filing a motion under the *Florida Rules of Criminal Procedure*.<sup>85</sup> However, because the rule does not apply in juvenile proceedings, the court held that the only remedy for the juvenile under the circumstances of the case was the filing of a writ of habeas corpus in the circuit court.<sup>86</sup> Although the court in *J.M.B.* did not explain whether the failure to appeal was significant, the Supreme Court of Florida has held that the failure of the defendant to raise the issue of the validity of a plea by appeal does not prohibit the individual thereafter from seeking collateral relief if the issue had not been previously addressed and ruled on.<sup>87</sup>

## III. TERMINATION OF PARENTAL RIGHTS

### A. *Adjudicatory Issues*

Florida law provides that a parent who is served with a petition for termination of parental rights must appear at an advisory hearing or in another manner respond to the notice of the hearing.<sup>88</sup> The failure to respond or appear at an advisory hearing is deemed to constitute consent to the petition to terminate parental rights.<sup>89</sup> In *J.B. v. Department of Children & Family Services*,<sup>90</sup> the appellate court was asked to decide whether the father had been denied due process of law by giving him only twenty-four hours notice of the advisory hearing.<sup>91</sup> The court held that twenty-four hours was sufficient to meet the minimum due process requirements as an advisory hearing in a termination of parental rights case is merely a preliminary step in the process where no rights are finally adjudicated.<sup>92</sup> The court felt that a

83. 24 Fla. L. Weekly D1485 (2d Dist. Ct. App. June 25, 1999).

84. *Id.* at D1485 (citing FLA. R. APP. P. 9.140(2)(B)(iii)).

85. *See* FLA. R. CRIM. P. 3.850.

86. *J.M.B.*, 24 Fla. L. Weekly at D1485 (citing *In re W.B.*, 428 So. 2d 309, 312 (Fla. 4th Dist. Ct. App. 1983)).

87. *See* *Robinson v. State*, 373 So. 2d 898, 903 (Fla. 1979).

88. *See* FLA. STAT. § 39.801(3)(a) (1999).

89. *Id.* § 39.801(3)(d).

90. 734 So. 2d 498 (Fla. 1st Dist. Ct. App. 1999).

91. *Id.* at 500.

92. *Id.*

parent was not required to prepare for an advisory hearing and retain counsel in advance and need simply appear and request a postponement.<sup>93</sup> Where the father did not inform the court that he was not able to attend and did not have an adequate excuse, the court rejected the claim that he was denied due process.<sup>94</sup> Over a vigorous dissent, the majority held that while there is a great deal at stake for the parents, there is also a great deal at stake for the child, making it unfair to the child to delay the proceedings.<sup>95</sup> The dissent, describing in detail the constitutionally protected interests in preserving the family unit in raising children, argued that the abruptness of the resolution of such an important matter constituted inadequate notice of the hearing.<sup>96</sup> Recognizing that the father had no lawyer in the trial court until after the cases had been remanded following an appeal and that the Department only gave the father twenty-four hours notice of the termination proceeding, the dissent concluded that the notice of hearing to terminate the father's parental rights was constitutionally inadequate.<sup>97</sup>

The courts have also been faced with the question of whether the appearance by counsel at the advisory hearing is adequate to constitute an appearance so as to avoid a default termination of parental rights.<sup>98</sup> In *In re E.L.*,<sup>99</sup> the Second District held that appearance by counsel at an advisory hearing avoids a default.<sup>100</sup> Where the court previously had appointed an attorney for the parent, it was not necessary for the parent to be present, as her attorney could have told the court whether she consented to the termination.<sup>101</sup>

A third case involving the question of whether the failure to appear may result in a default judgment of termination of parental rights is *In re B.A.*<sup>102</sup> In this case, the mother failed to appear at the adjudicatory hearing, and the

93. *Id.*

94. *Id.*

95. *J.B.*, 734 So. 2d at 501-02.

96. *Id.* at 503-04.

97. *Id.* at 505. See also *In re S.S.*, 735 So. 2d 576, 577 (Fla. 2d Dist. Ct. App. 1999) (holding that it was error to terminate parental rights because notice was inadequate where a parent failed to appear at an advisory hearing, but attorney did attend, and where notice failed to include the 1998 change which states, "FAILURE TO PERSONALLY APPEAR AT THIS ADVISORY HEARING CONSTITUTES CONSENT TO THE TERMINATION OF PARENTAL RIGHTS OF THIS CHILD (OR CHILDREN)." FLA. STAT. § 39.801(3)(a) (1999) (emphasis added)).

98. See *In re M.A.*, 735 So. 2d 578 (Fla. 2d Dist. Ct. App. 1999); *In re S.S.*, 735 So. 2d 576 (Fla. 2d Dist. Ct. App. 1999).

99. 732 So. 2d 37 (Fla. 2d Dist. Ct. App. 1999).

100. *Id.* at 39.

101. *Id.* See *M.A.*, 735 So. 2d at 578-79.

102. 24 Fla. L. Weekly D1086 (2d Dist. Ct. App. Apr. 28, 1999).

court entered a default of consent to the termination petition.<sup>103</sup> The appellate court held that despite the mother's failure to appear at a prior advisory hearing, the mother's court appointed lawyer was present at the advisory hearing and suggested that the mother may not have had the ability to understand her duty to appear in court.<sup>104</sup> The trial court did not enter a default and granted counsel's request for a competency evaluation.<sup>105</sup> The case then proceeded and resulted in the adjudicatory hearing.<sup>106</sup> Having found that the case proceeded beyond the advisory stage and onto the adjudicatory stage, the appellate court held that the trial court lacked authority to enter a default.<sup>107</sup>

*M.E. v. Department of Children & Family Services*<sup>108</sup> is a fourth case involving the issue of failure to appear at an adjudicatory hearing of termination of parental rights.<sup>109</sup> Before the commencement of trial, the mother's counsel advised the court of difficulty reaching the client but informed the court that the client wished to defend against the termination petition.<sup>110</sup> The appellate court rejected the mother's contention that it was required that she be personally served with notice of the termination of parental rights trial date.<sup>111</sup> The *Florida Rules of Juvenile Procedure* provide that after service of the petition for termination of paternal rights together with notice of an advisory hearing, all other pleadings and papers must be served on each party or the party's attorney.<sup>112</sup> It is thus the parent's obligation to remain in reasonable touch with the attorney regarding the progress of the case.<sup>113</sup>

Matters may have been rendered more complicated as a result of a change in Florida law discussed in a fifth case involving the failure to appear—*In re S.S.*<sup>114</sup> In *S.S.*, the mother did not appear at the advisory hearing, but an attorney appeared on her behalf and pointed out that the language in the notice did not conform to the amendments to the notice statute which were effective October 1, 1998.<sup>115</sup> Effective October 1, 1998, the Florida law was changed to provide that the notification would include

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103. *Id.* at D1086.

104. *Id.* at D1087.

105. *Id.*

106. *Id.*

107. *B.A.*, 24 Fla. L. Weekly at D1087.

108. 728 So. 2d 367 (Fla. 3d Dist. Ct. App. 1999).

109. *Id.* at 368.

110. *Id.*

111. *Id.*

112. *Id.* (citing FLA. R. JUV. P. 8.225(c)(3)).

113. *M.E.*, 720 So. 2d at 368.

114. 735 So. 2d 576 (Fla. 2d Dist. Ct. App. 1999).

115. *Id.* at 577.

the following language, "FAILURE TO PERSONALLY APPEAR AT THIS ADVISORY HEARING CONSTITUTES CONSENT TO THE TERMINATION OF PARENTAL RIGHTS OF THIS CHILD (OR CHILDREN)."<sup>116</sup> The issue the court did not have to decide in *S.S.* was whether the 1998 amendments precluded an appearance by counsel with the result that there would be a waiver and thus termination of parental rights.<sup>117</sup>

There is a growing body of case law in Florida dealing with the question of the failure to appoint a guardian ad litem in a dependency or termination of parental rights proceedings.<sup>118</sup> In *Vestal v. Vestal*,<sup>119</sup> the trial court failed to appoint a guardian ad litem at the outset of a termination of parental rights case.<sup>120</sup> The *Vestal* court noted that in several earlier cases both the Second and Fifth District Courts of Appeal held that the failure to appoint a guardian in a termination case is not fundamental error.<sup>121</sup> In the preceding cases which are cited in *Vestal*, the appellate courts found that the trial court had sought a guardian but none was available, and based upon the facts of those cases, there had been no harm to the parent.<sup>122</sup> In *E.F.*, the child had been adequately protected, and the error in not appointing a guardian was not fundamental.<sup>123</sup> In *Fisher*, where a guardian had resigned and efforts to replace the guardian were unsuccessful, the court held that the child's rights had been adequately protected.<sup>124</sup> In contrast, in *Vestal*, the trial court made no attempt to appoint a guardian and, as a result, no guardian was appointed, and there was very little involvement by the Department.<sup>125</sup> Thus, there was no testimony from third parties, such as a guardian, with the result that the case was a credibility contest between an ex-wife and ex-husband.<sup>126</sup> Under the circumstances of the case, the court found that the failure to appoint a guardian ad litem was reversible error.<sup>127</sup> Although *Vestal* upheld the right to a guardian ad litem under the facts of the case, the problem with the opinion and the early cases is that the Florida

116. FLA. STAT. § 39.801(3)(a) (1999) (emphasis added); FLA. R. JUV. P. 8.505(b).

117. See *S.S.*, 735 So. 2d at 577.

118. See Michael J. Dale, *Juvenile Law in Florida in 1998*, 23 NOVA L. REV. 819, 824-25 (1999); Michael J. Dale, *Juvenile Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 179, 209 (1997).

119. 731 So. 2d 828 (Fla. 5th Dist. Ct. App. 1999).

120. *Id.* at 828.

121. *Id.* at 828-29 (citing *Fisher v. Department of Health & Rehabilitative Servs.*, 674 So. 2d 207 (Fla. 5th Dist. Ct. App. 1996); *In re E.F.*, 639 So. 2d 639 (Fla. 2d Dist. Ct. App. 1994)).

122. *Fisher*, 674 So. 2d at 208; *E.F.*, 639 So. 2d at 643-44.

123. *E.F.*, 639 So. 2d at 644.

124. *Fisher*, 674 So. 2d at 208.

125. *Vestal*, 731 So. 2d at 829.

126. *Id.*

127. *Id.*

courts are carving out an exception to the child's right to a guardian ad litem where none exists.<sup>128</sup> The Florida statute is absolute on its face.<sup>129</sup> Section 39.807(2)(a) of the *Florida Statutes* provides as follows, "[t]he court shall appoint a guardian ad litem to represent the child in any termination of parental rights proceedings and shall ascertain at each stage of the proceedings whether a guardian ad litem has been appointed."<sup>130</sup> This mandatory language follows from the federal funding statute known as the Child Abuse Prevention and Treatment Act ("CAPTA"), which provides for guardians ad litem in Florida.<sup>131</sup> It is unclear why the courts disregard the language of the statute and the applicability of federal law.

Under Florida law, cases involving termination of parental rights are confidential and closed to the public.<sup>132</sup> The issue before the Fourth District Court of Appeal in *Department of Children & Family Services v. Natural Parents of J.B.*<sup>133</sup> was whether the statute closing all hearings throughout the case to the public and the media was unconstitutional.<sup>134</sup> The appeals court held that the mandatory closure statute was not unconstitutional under either the Sixth or Fourteenth Amendments and that termination of parental rights cases are not indistinguishable from criminal prosecutions.<sup>135</sup> The Fourth District Court of Appeals upheld the closure, finding no constitutional violation.<sup>136</sup>

Florida's termination of parental rights statute provides that termination may be based upon a child's adjudication as dependent, the filing of the case plan, and the finding that the child continues to be abused, neglected or abandoned.<sup>137</sup> The statute also provides that the failure of the parent to substantially comply with the case plan for a period of twelve months after the child has been adjudicated may constitute evidence of continuing abuse and neglect or abandonment.<sup>138</sup> Exceptions to this requirement occur when the failure to substantially comply with the case plan results from either lack of financial resources or when the Department fails to make reasonable efforts to reunify the family.<sup>139</sup> *In re K.C.C.*<sup>140</sup> dealt with the factual

128. Compare FLA. STAT. §§ 39.807(2)(a), .822(1) (1999) and *Vestal*, 731 So. 2d at 829 with *Fisher*, 674 So. 2d 208 and *E.F.*, 639 So. 2d 644-45.

129. See *id.*

130. *Id.*

131. 42 U.S.C.A. §§ 5101-19 (1995 & Supp. 1999).

132. FLA. STAT. § 39.809(4) (1999).

133. 736 So. 2d 111 (Fla. 4th Dist. Ct. App. 1999).

134. *Id.* at 112.

135. *Id.* at 117-18.

136. *Id.* at 118.

137. FLA. STAT. § 39.806(1)(e) (1999).

138. *Id.*

139. *Id.*

question of what constitutes proper financial resources.<sup>141</sup> At issue was the situation a father whose physical and mental problems precluded his employment.<sup>142</sup> The father admitted to having no income at the time of the dependency adjudication, but said that since the adjudication he had become eligible for social security disability payment and an increase in his veteran administration benefits.<sup>143</sup> He also attributed his failure to attend parenting classes to the family's financial circumstances.<sup>144</sup> Thus, under the facts of the case, the court found that it could not find by clear and convincing evidence that his parental rights should be terminated.<sup>145</sup>

### B. *Appellate Issues*

In *W.J.E. v. Department of Children & Family Services*,<sup>146</sup> the question was how far must counsel proceed in preserving the appellate rights of a parent in a termination of parental rights case.<sup>147</sup> In *W.J.E.*, as a matter of caution, the father's court appointed lawyer filed an appeal without direction from the client after the client was served with a summons for trial but did not appear.<sup>148</sup> Counsel filed an order to protect the client's rights on appeal.<sup>149</sup> The lawyer was unable to contact the father to confirm his desire to seek review.<sup>150</sup> The appeals court held that by not responding to counsel's efforts, the father had abandoned his appeal.<sup>151</sup> The appellate court ruled that where counsel does not know the client's wishes, he or she should write to the client at the last known address advising of the deadline for appeal and seeking confirmation of the client's wishes.<sup>152</sup> If the client does not respond prior to the expiration of the appeal period, counsel has fulfilled his or her ethical obligations and duties and therefore need not file the appeal.<sup>153</sup>

The Supreme Court of Florida recently cleared up confusion concerning the timing of appeals from dependency and termination of parental rights

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140. 24 Fla. L. Weekly D1027 (2d Dist. Ct. App. Apr. 21, 1999).

141. *Id.* at D1027.

142. *Id.*

143. *Id.*

144. *Id.* at D1027-28.

145. *K.C.C.*, 24 Fla. L. Weekly at D1027.

146. 731 So. 2d 850 (Fla. 3d Dist. Ct. App. 1999).

147. *Id.* at 850.

148. *Id.*

149. *Id.*

150. *Id.*

151. *W.J.E.*, 731 So. 2d at 850.

152. *Id.*

153. *Id.*

adjudications.<sup>154</sup> The problem in two cases arose from the ambiguity in the statute as to whether the appeal on the issue of either dependency or termination of parental rights should be raised from the adjudicatory order or from the dispositional order.<sup>155</sup> In *G.L.S. v. Department of Children & Families*,<sup>156</sup> the supreme court held that an order which initially terminated parental rights in a child dependency case may be challenged upon appeal from a subsequent final disposition order.<sup>157</sup> While it was proper and preferable to appeal from the earlier termination order, because of the ambiguity in the statute, a termination order was subject to review from the final disposition.<sup>158</sup> In *A.G. v. Department of Children & Family Services*,<sup>159</sup> the court held that the same ambiguity existed in the dependency statute and thus the issue of dependency could be raised on appeal from the later dispositional order in a dependency case.<sup>160</sup>

#### IV. STATUTORY CHANGES

##### A. *Dependency and Termination of Parental Rights*

The legislature continued to make changes to chapter 39 during the 1999 legislative session, focusing on a number of specific areas. For example, the legislature amended the definitional language in section 39.01 of the *Florida Statutes* governing harm to the child to include exposure to controlled substances and alcohol.<sup>161</sup> In 1998, the legislature provided parents the right to be represented by counsel and, if indigent, to be appointed counsel in dependency cases.<sup>162</sup> This past year, the statute governing shelter hearings was amended to provide that parents who appear at the shelter hearing without counsel may have the shelter hearing continued for up to seventy-two hours to enable them to consult legal counsel.<sup>163</sup>

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154. See *G.L.S. v. Department of Children & Families*, 724 So. 2d 1181 (Fla. 1998); *A.G. v. Department of Children & Family Servs.*, 731 So. 2d 1260 (Fla. 1999).

155. *Id.*

156. 724 So. 2d 1181 (Fla. 1998).

157. *Id.* at 1182.

158. *Id.* at 1185.

159. 731 So. 2d 1260 (Fla. 1999), *on remand*, 24 Fla. L. Weekly D2199 (4th Dist. Ct. App. Sept. 22, 1999) (dismissing the appeal without prejudice).

160. *Id.* at 1261-62.

161. Ch. 99-186, § 2, 1999 Fla. Laws 1001, 1012 (codified at FLA. STAT. § 39.01(30)(g) (1999)).

162. Ch. 98-403, § 24, 1998 Fla. Laws 3081, 3122 (codified at FLA. STAT. § 39.013(1) (1999)).

163. Ch. 99-193, § 23, 1999 Fla. Laws 1103, 1131 (codified at FLA. STAT. § 39.402(5)(b)2 (1999)).



During that time, the child may be continued in shelter care if granted by the court.<sup>164</sup>

In a further effort to articulate grounds for loss of custody as part of a dependency proceeding,<sup>165</sup> the court amended the statute provision governing arraignment hearings.<sup>165</sup> When an individual appears for the arraignment hearing and the court orders the individual to personally appear at the adjudicatory hearing for dependency and provides appropriate information about the time, date, and place of that hearing, then the individual's failure to appear at the adjudicatory hearing constitutes consent to a dependency adjudication.<sup>166</sup> This additional change in the statute leaves undecided the issue of whether counsel's presence without the parent causes the same result as described in several cases reported earlier in this survey.<sup>167</sup>

A highly significant change in chapter 39 is the passage of a set of goals for dependent children in shelter or foster care.<sup>168</sup> While the goals do not create rights, they articulate aspirational concepts for these children including the right "to enjoy individual dignity, liberty, pursuit of happiness, and the protection of their civil and legal rights as persons in the custody of the state."<sup>169</sup>

Finally, the legislature made a significant change in the methodology for carrying out child protective services.<sup>170</sup> It amended Florida law to provide that the sheriffs of Pasco, Manatee, and Pinellas counties shall provide child protective investigative services and authorized the entry of a contract between the Department of Children and Family Services and the sheriff's departments of each county to carry out this task.<sup>171</sup>

## B. *Juvenile Delinquency*

The legislature recently broadened the crimes for which juveniles may now be charged as adults. With its amendment to section 985.227 of the *Florida Statutes*, the legislature continued to expand the list of crimes for which a fourteen or fifteen-year-old child may be tried as an adult.<sup>172</sup> The

164. *Id.*

165. *Id.* § 29, 1999 Fla. Laws at 1137 (codified at FLA. STAT. § 39.506(e) (1999)).

166. *Id.*

167. See discussion *supra* Part III.A.

168. Ch. 99-206, § 5, 1999 Fla. Laws 1245, 1253-55 (codified at FLA. STAT. § 39.4085 (1999)).

169. *Id.*

170. Ch. 98-180, § 2, 1998 Fla. Laws 1601, 1605-07 (codified at Fla. Stat. § 39.3065(2) (1999)).

171. *Id.*

172. Ch. 99-257, § 1, 1999 Fla. Laws 2993, 2993-94 (codified at FLA. STAT. § 985.227 (1999)).

statute now provides that a child may be charged as an adult for grand theft of an automobile if the child has previously been adjudicated for grand theft of a motor vehicle.<sup>173</sup> The state attorney may file an information if in his or her discretion he or she believes public interest requires adult sanctions.<sup>174</sup> The criteria for discretionary direct filing of an information has been amended to include the phrase “for the commission of, attempt to commit, or conspiracy to commit” any of the crimes listed in section 985.227 of the *Florida Statutes*.<sup>175</sup> Burglary with an assault or battery, possessing or discharging any weapon or firearm on school grounds, home invasion robbery, and carjacking have been added to the list of discretionary direct file offenses.<sup>176</sup>

Section 985.225 has been amended to require transfer of certain juvenile felony cases to criminal court for prosecution as an adult in instances where a guilty plea, *nolo contendere*, or a finding of guilt has not been made.<sup>177</sup> The same penalties will be applied to felony cases that were transferred to adult court if the child is acquitted of all charged or lesser included offenses in the indictment case.<sup>178</sup> A mandatory waiver application has been added requiring the state attorney to request a waiver to prosecute the child as an adult if the child is fourteen years or older and has previously been adjudicated delinquent for a felony.<sup>179</sup>

The legislature has also authorized law enforcement agencies and school districts to establish pre-arrest diversion programs in cooperation with the state attorney.<sup>180</sup> As part of the program, a child who allegedly commits a delinquent act may be required to relinquish his driver’s license or refrain from applying for one.<sup>181</sup> The state attorney may notify the Department of Motor Vehicles to suspend the child’s driver’s license for a maximum of ninety days if the child fails to comply with the program.<sup>182</sup>

Possession or discharge of a weapon or firearm at a school event or on school property is now included as one of the offenses for which a child may

173. *Id.*

174. *Id.*

175. Ch. 99-284, § 26, 1999 Fla. Laws 3087, 3119–20 (codified at FLA. STAT. § 985.227(1)(a) (1999)).

176. *Id.* at 3120.

177. *Id.* § 35, 1999 Fla. Laws at 3131 (codified at FLA. STAT. § 985.225(4)(b) (1999)).

178. *Id.*

179. *Id.* § 37, 1999 Fla. Laws at 3131–33 (codified at FLA. STAT. § 985.226(2)(b)1 (1999)).

180. Ch. 99-267, § 1, 1999 Fla. Laws 3022, 3023 (codified at FLA. STAT. § 985.3065 (1999)).

181. *Id.*

182. *Id.*

be fingerprinted.<sup>183</sup> The fingerprints may be given to the Department of Law Enforcement to become part of the state criminal history records and may be used by criminal justice agencies.<sup>184</sup>

A number of changes were also made relating to school children possessing weapons on school property or at school sponsored events.<sup>185</sup> The purpose of the amendments is to prevent children who have been charged with possession of a firearm on school property from returning to the school to cause injury.<sup>186</sup> The law requires placement of a child charged with possessing or discharging a firearm in secure detention and that a probable cause hearing is held within twenty-four hours once the state acquires custody of the minor.<sup>187</sup> At the hearing, the court may order the child to remain in secure detention for up to twenty-one days, during which time the child will receive "medical, psychiatric, psychological, or substance abuse examinations," followed by a written report of examination findings.<sup>188</sup> The state attorney may authorize the release of the minor before the probable cause hearing where the child was wrongfully charged.<sup>189</sup>

Carjacking, home invasion robbery, and burglary with an assault or battery are added to the list of offenses for which a youth, thirteen years of age at the time of the disposition, may be committed to a juvenile correctional facility or juvenile prison.<sup>190</sup> "Juvenile correctional facilit[ies]" or "juvenile prison[s]" replace the term "maximum-risk residential program."<sup>191</sup>

Although a significant portion of recent legislation increases the child's criminal accountability, the legislature created several projects that promote child development while the child is in the custody of the Department of Juvenile Justice. Emphasizing that education is the most significant factor in the rehabilitation of a delinquent child, section 230.23161 of the *Florida Statutes* now designates the Department of Education as the lead agency for

183. Ch. 99-284, § 14, 1999 Fla. Laws 3087, 3105-06 (codified at FLA. STAT. § 985.212(1)(b)13 (1999)).

184. *Id.* at 3106.

185. *Id.* § 3, 1999 Fla. Laws at 3095-97 (codified at FLA. STAT. § 790.115 (1999)); *Id.* § 14, 1999 Fla. Laws at 3105-06 (codified at FLA. STAT. § 985.212(1)(b) (1999)).

186. House of Representatives Committee on Law Enforcement and Crime Prevention Bill Analysis & Economic Impact Statement. Jan. 12, 1999. HB. 349.

187. Ch. 99-284, § 3, 1999 Fla. Laws 3087, 3097 (codified at FLA. STAT. § 790.115(4) (1999)).

188. *Id.*

189. *Id.*

190. *Id.* § 40, 1999 Fla. Laws at 3133-35 (codified at FLA. STAT. § 985.313(1) (1999)).

191. *Id.* at 3133.

educational programs in the juvenile justice system.<sup>192</sup> The new law requires extensive collaboration between the Department of Education and the Department of Juvenile Justice to implement and/or expand effective educational and technical programs for youth in the Department of Juvenile Justice programs.<sup>193</sup> Public schools shall provide instruction for juveniles in the Juvenile Justice programs<sup>194</sup> and model procedures for the transition of youth in and out of juvenile justice programs must be developed.<sup>195</sup>

## V. CONCLUSION

The Supreme Court of Florida cleared up several conflicts among Florida's district courts of appeals involving appeals from dependency and termination cases and dispositional matters in delinquency cases this year. The legislature made several substantial changes in the dependency and termination field, although there were no wholesale changes. One problematic area left unresolved by the legislature is the reduction, without explanation, in the provision of *guardians ad litem* to children in dependency and termination parental rights cases.

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192. Ch. 99-284, § 48, 1999 Fla. Laws 3087, 3144 (codified at FLA. STAT. § 230.23161(1) (1999)).

193. *Id.* See also *id.* § 43, 1999 Fla. Laws at 3136-37 (codified at FLA. STAT. § 228.081(2) (1999)).

194. *Id.* § 42, 1999 Fla. Laws at 3135 (codified at FLA. STAT. § 228.051 (1999)).

195. *Id.* § 43, 1999 Fla. Laws at 3137 (codified at FLA. STAT. § 228.081(3)(b) (1999)).