Juvenile Law: 1990 Survey of Florida Law

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Abstract

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KEYWORDS: survey, Florida, juvenile
I. INTRODUCTION

During the past presidential campaign, President George Bush asked the American people to "read my lips" in an effort to convince the electorate of his position on a tax increase. In 1989 the Florida appellate courts employed the same strategy to convince the legislature and the lower courts of their apparent failure to cause Florida's juvenile justice and child welfare system to deal effectively with the state's delinquent and dependent children.

During the 1990 session, the legislature responded at least in part, making substantial changes in the juvenile delinquency provisions of Florida's children's code when it passed the Juvenile Justice Reform Act of 1990. On the other hand, a review of the appellate opinions decided through September 30, 1990, suggests that the trial courts were not reading the lips of the appellate judges. For example, in the twelve month period between October 1, 1988 and September 30, 1989, the intermediate appellate courts wrote seventeen separate opinions reversing the lower courts for failure to comply with statutory provisions requiring consideration of six criteria when determining if a child is suitable for sentencing and sanctioning as an adult, as opposed to disposition in the juvenile justice system after waiver or certification of the child to adult court and subsequent conviction there. This past year there were eleven additional reported opinions dealing with the same
technical issue.

The legislature's response to the perceived problems in the juvenile justice field did not carry over substantially to child welfare. And even in the juvenile justice arena, recent events suggest that resolution of the problems under the new delinquency statute may be difficult to achieve. A central component of the new statute is the appropriation of substantial state funds which, at the time of this writing, are in jeopardy because of the state's projected revenue shortfall.

This article will survey the case law in both the juvenile justice and child welfare areas of juvenile law since September, 1989. The survey is divided into two sections: Juvenile Delinquency and Dependency. The survey will not include a discussion of status offender proceedings because, for the second year in succession, there have been no reported opinions interpreting the now two year-old Part IV of the Act which governs families in need of services and children in need of services.

5. The Legislature did pass the "William and Budd Bell Prevention and Protection Act," which made a number of specific changes in the dependency and termination of parental rights parts of Chapter 39 of the Florida Statutes. See Fla Stat. § 39.002 (1990).


7. Appellate opinions which raise no significant issues of general significance will not be discussed.

8. The Florida Juvenile Justice Act, located at Chapter 39 of the Florida Statutes, is divided into six sections. Relevant here are Part II governing delinquency matters, Part III governing dependency matters and Part VI governing termination of parental rights.

II. JUVENILE DELINQUENCY

A. Detention

When a child is taken into custody—the equivalent of an adult arrest—and charged with an act of delinquency, Florida’s statute, like those in most states, allows the child to go home, be placed in non-secure detention or be held in secure detention. Florida’s approach to detention has changed dramatically on several occasions over the past decade. For example, prior to 1981 Florida had relatively narrow detention criteria. The law was rewritten in 1981 to substantially expand the grounds upon which a child could be held in secure detention. The new law narrows the grounds again.

Under current and prior law, when placed in detention “no child shall be held in non-secure or secure detention care or a crisis home under a special detention order for more than 21 days unless an adjudicatory hearing for the case has been commenced by the court.” The appellate courts have issued a substantial number of opinions over the past two years reversing trial court orders that violate the 21 day rule. Indeed, the courts became so concerned that in J.F. v. Johnson the Fourth District admonished a particular trial court that, given its repeated failure to comply with orders to comply with the 21 day rule, the trial court might find itself outside the limits of judicial immunity.

Over the past year, the failure to comply with the rule continued. In R.C. v. Fryer, the Fourth District Court of Appeal reported that the trial court had even suggested the possibility that the appeals court itself would invite the child to bring suit against the trial judge for refusing to release the child. Referring to its earlier decision in J.F. v.  

15. 543 So. 2d 471 (Fla. 4th Dist. Ct. App. 1989).
Johnson, in which it admonished the same trial court judge, the appellate court concluded, "continued and intentional disregard of the governing statutes by this trial judge will certainly invite harm to the trial judge, as well as to the reputation of our courts and judicial system." On the same day, the Fourth District ruled in L.J. v. Fryer that the trial court could not retroactively and sua sponte continue detention which had gone beyond the 21 day period on the ground that the child's parents had failed to provide an attorney to represent the boy. The court ruled that this did not constitute good cause to extend the 21 day limit. The court held further that the trial court's belief that the child was represented by the public defender's office did not change the result. Represented or not, the child was entitled to be released from detention. When the detention period under the statute runs out, the trial court lacks jurisdiction to extend the original detention.

Finally, in D.M. v. Korda, the court granted another writ of habeas corpus relating to continued detention ordered by the same trial judge. The appellate court stated: "Unfortunately, for reasons beyond our comprehension, and despite this court's opinions in J.F. and in P.R. v. Johnson, this pattern continues. Even with the purest intentions and sentiments, no judge may put himself above the law." It then explained that while judicial immunity may exist for money damages, it is not a bar to claims for injunctive relief against the judge or to an award of attorney's fees under 42 U.S.C. § 1988, the Civil Rights Attorneys' Fees Award Act. The court concluded, "[w]e will leave such considerations to the discretion of those parties who may consider such claims in the future, should the particular division continue to refuse to confine its rulings to the governing laws."

17. Id.
19. Id. at 713 (citing Fla. Stat. § 39.032(6)(d) (1990)).
20. Id. at 714.
21. Id.
22. 562 So. 2d 407 (Fla. 4th Dist. Ct. App. 1990). In prior reported opinions on this issue, the appellate court removed the name of the judge sua sponte and substituted the name of the superintendent of the detention center. This time it did not. See L.J. v. Fryer, 565 So. 2d 713 (Fla. 4th Dist. Ct. App. 1990); R.C. v. Fryer, 561 So.2d 31 (Fla. 4th Dist. Ct. App. 1990).
23. 562 So. 2d at 408 (citation omitted).
24. Id.
25. Id.; see also Dale, 1989 Survey, supra note 12, at 868 (discussing the limits of judicial immunity).
In *E.W. v. Brown*, the First District Court of Appeal was faced with a question of interpretation of the good cause exception to the 21-day detention rule. The state's attorney argued that good cause to extend detention is met when the state establishes the need for continuation of the original detention. The appellate court disagreed, holding what seems obvious - good cause relates to the reason for the delay in the commencement of the adjudicatory hearing process. Thus, if the state can show that its investigation was incomplete or that a witness could not be found, it may seek an extension of detention. However, such is not the case when the basis for extension is the original justification for detention.

In *C.S. v. Brown*, a question of first impression concerning the 21-day rule arose. The child had been detained on various charges, and on the 21st day of his detention, the state filed an information against him as an adult. The court determined that the filing of the information removed the child from the jurisdiction of the juvenile court for the purposes of pre-trial detention. Thus, the state was obligated to bring this child before a judge sitting in the criminal division for an initial appearance under the rules of criminal procedure. To do otherwise, the court reasoned, would permit the state to extend the child's period of deprivation of liberty without adequate procedural safeguards. It found that the juvenile authorities lacked the ability to continue holding the child. The court concluded that if the state did not bring the youngster before a judicial official for a first appearance within 24 hours of the time the information was filed, the child would be entitled to release by the juvenile authorities.

**B. Adjudicatory Issues**

Section 39.05(6), Florida Statutes, now renumbered as section 26. 559 So. 2d 712 (Fla. 1st Dist. Ct. App. 1990).

27. *Id.* at 713.

28. *Id.*


30. *Id.* at 319; see *Fla. R. Crim. P.* 3.131, 3.132.

31. 553 So. 2d at 317 (citing P.R. v. Johnson, 541 So. 2d 791, 793 (Fla. 4th Dist. Ct. App. 1989)). The court also relied upon Rule 8.150 of the Florida Rules of Juvenile Procedure, which provides specific procedures in order to waive jurisdiction of the juvenile court and to certify the case for trial as if the child were an adult. *Fla. R. Juv. P.* 8.150.

32. 553 So. 2d at 319.
39.048(6), provides that a petition must be filed within 45 days of the time the child is taken into custody. The courts in the past year have been faced with several appeals relating to interpretations of the 45 day rule. For example, in W.G.K. v. State, while the original petition was filed within 45 days, the state named the wrong victim, and then filed an amended petition changing the name of the victim after the 45 day period had run. The court concluded that the situation was controlled by J.H. v. State, and therefore, the adjudication of delinquency had to be reversed.

The question of when the 45 day period begins to run was raised in In Interest of S.V. The child, a suspect in a series of burglaries, voluntarily surrendered to the police. He was then arrested for several but not all of the burglaries. The state waited almost five months to file a probable cause affidavit and almost six months to file a petition alleging delinquency as to the burglary which was the subject of the appeal. The court held that while the child voluntarily surrendered himself to the police months earlier, they did not arrest him for the specific charge which was the subject of the appeal. Thus, 45 days had not run from the time the youngster was taken into custody to the time the delinquency petition was filed.

It is possible for a juvenile to waive the 45 day time period. In R.F.R. v. State, the child expressly and voluntarily waived his right to have the petition filed in 45 days in exchange for a plea agreement in which the state would place him in a youth diversionary program. When the child failed to comply with the diversionary program agreement, the state attorney filed a delinquency petition. The child’s motion to dismiss on the ground that the petition was filed beyond the 45 day

33. Section 39.05 of the 1989 Florida Statutes states:
   On motions by or on behalf of a child, a petition alleging delinquency shall
   be dismissed with prejudice if it was not filed within 45 days of the date
   the child was taken into custody. The court may grant an extension of
time, not to exceed an additional 15 days, upon such motion as by the state
   attorney for good cause shown.

34. 565 So. 2d 885 (Fla. 1st Dist. Ct. App. 1990).
35. 424 So. 2d 928 (Fla. 1st Dist. Ct. App. 1983) (filing of a defective original
petition, because it named the wrong party, does not toll the running of the 45 day
period. Thus, an amended petition not timely filed is invalid).
37. Id. at 403.
39. Id. at 1085.
limit was denied. The First District held that the child should not be allowed to agree to an alternative disposition, wait for the 45 days in which a petition could be filed to pass, and then refuse to comply with the conditions of the alternative program. Such a result is neither fair nor logical. This was a reciprocal and interdependent compact. On appeal the child argued that the waiver was not expressly provided for by statute. Thus, he argued, waiver was foreclosed as an option. The appellate court disagreed as a matter of statutory interpretation.

In M.F. v. State, the child claimed that the delinquency petition should have been dismissed because the amended petition, which was filed more than 45 days after he was taken into custody, alleged an entirely new charge. The amendment changed the type of controlled substance the child was charged with selling, delivering, or possessing with intent to sell, from cannabis to cocaine. Finding that the child was not prejudiced in the preparation of his defense, the court held that unlike a criminal case, in a juvenile delinquency proceeding, the child is not convicted of a crime. Therefore, he was adequately informed of the charges against him when he was charged with the sale and delivery of a controlled substance. This information was enough to toll the statutory filing period.

The Second District Court of Appeal was faced with a similar problem in State v. M.M. There, a child was charged with being a

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40. Id.
41. If this were not such a compact, the rehabilitative purpose of the Juvenile Code would be lost. Id. at 1086 n.3 (citing Fla. Stat. § 39.001(2)(a) (1989) (amended 1990)) ("substituting for retributive punishment, whenever possible, methods of offender rehabilitation"). The section was substantially rewritten in 1990 and the relevant provision, section 39.001(c), states:

(c) To assure due process for each child, balanced with the state's interest in the protection of society, by substituting methods of prevention, early intervention, diversion, offender rehabilitation, treatment, community services, and restitution in money or in kind for retributive punishment, whenever possible, and by providing intensive treatment sanctions only when most appropriate, recognizing that sanctions which are consistent with the seriousness of the act committed and focus on treatment should be applied in cases where necessary efforts have been made to divert the child from the juvenile justice system.

42. R.F.R., 558 So. 2d at 1085.
43. 563 So. 2d 171 (Fla. 3d Dist. Ct. App. 1990).
44. Id. at 172.
45. Id.
principal to sexual battery. Subsequently, and outside the 45 day period, the state filed amended petitions against the child charging him with two additional counts of kidnapping and aggravated assault. The appellate court concluded that the two amended petitions were a continuation of the initial petition, and therefore, the trial court's dismissal of the petitions was in error. The court suggested two rationales for upholding the amended petitions. First, they did not mislead the child or prejudice the preparation of the defense as would have occurred where the victim's name was misstated as in Interest of W.G.K. Second, where the amended charges arise from the same factual situation and where there is no showing of prejudice by the change, the amendment will be allowed.

In late 1988 the Florida Supreme Court changed the juvenile rule of procedure concerning speedy trials to match the criminal rules. In State v. A.H., the Second District had an opportunity to interpret the speedy trial rule. In that case, the defense requested discovery of the informant and a tape recording in a case involving the sale of .1 gram of rock cocaine to a confidential informant who was wearing a body transmitter.

When the defense demonstrated that the informant's testimony conflicted with the testimony of the police officers who monitored the drug transaction, it asked for a continuance to further depose the informant. The court reset the hearing for a day after the time for expiration under the speedy trial rules. The defense then moved for discharge under the rule. The trial court granted the motion and the Second District Court of Appeal reversed relying upon Rule 8.180(j)(3). That section provides that the state is allowed 10 days af-

47. Id. at 218.
48. Id.
50. Id. (citing Interest of E.M., 362 So. 2d 427 (Fla. 1st Dist. Ct. App. 1978)). See generally FED. R. CIV. P. 15(e); FLA. R. CIV. P. 1.190(c) (civil practice rules known as the "relation back doctrine"). In a civil case, when the amended complaint filed outside the statute of limitations alleges a cause of action arising out of a common nucleus of operative fact with the original claim, the cause of action will relate back and not violate the statute of limitations. See also United Mine Workers v. Gibbs, 383 U.S. 715 (1966).
52. 550 So. 2d 138 (Fla. 1989).
53. Id. at 138-39.
ter a hearing on a motion for discharge to bring the defendant to trial. It was not given this opportunity and thus reversal was appropriate. In dicta, the court stated that the trial court has discretion to dismiss a case if it finds that there has been an egregious discovery violation which materially prejudices the defendant. However, the trial court did not dismiss for this reason, but rather on the basis of the expiration of the speedy trial time.

A particularly sensitive discovery issue arose in *B.E. v. State.* In that case a 14-year old child was charged with a lewd and lascivious act upon a 3-year old girl. When the lawyer for the respondent sought to take the three-year old’s deposition, the trial court granted a protective order which not only precluded taking the deposition, but also forbade the lawyer from communicating with the child. The bases for the denial were the unsworn representation of the prosecutor that the child could not recount the events in question and thus would not be called as a witness and the judge’s personal feeling that no 3-year old should be subjected to the legal process under any circumstances. The appellate court reversed on several grounds. First, it found that the blanket preclusion violated the sixth amendment and article VI, section 16 of the Declaration of Rights of the Florida Constitution. Second, it held that the age of the child of tender years does not itself demon-

54. *Id.* at 139.
55. *Id.; see also* State v. A.J., 558 So. 2d 197 (Fla. 2d Dist. Ct. App. 1990)(reversing a dismissal on discovery abuse grounds because there was no showing of prejudice).
56. 564 So. 2d 566 (Fla. 3d Dist. Ct. App. 1990).
57. *Id.*
58. *Id.* at 567.
59. Article VI, section 16, of the Florida Constitution provides, “the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.” It is not altogether clear that a respondent in a juvenile delinquency proceeding has sixth amendment rights. In a series of cases, the United States Supreme Court has held that the juvenile delinquency proceeding is not a criminal prosecution so as to implicate the protections in the Constitution that apply to adults in criminal cases. On the other hand, the Court in these cases did hold that due process rights apply under the fourteenth amendment to the United States Constitution. Thus, it seems clear that the respondent would have the right to confront his accuser as a constitutional matter but under the due process clause. See *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971); *In re Winship,* 397 U.S. 358 (1970); *In re Gault,* 387 U.S. 1 (1967); Of course, even then there are limitations. See, e.g., *Maryland v. Craig,* 110 S. Ct. 3157 (1990)(limiting defendants’ sixth amendment rights to personally confront child accusers in sex crime cases); *B.E. v. State,* 564 So. 2d 566 (Fla. 3d Dist. Ct. App. 1990)(citing *Coy v. Iowa,* 487 U.S. 1012 (1988)).
strate lack of competency to testify. To the contrary, the court explained a body of Florida state law which suggests just the opposite.\textsuperscript{60}

The two judges assigned to the Fourth Judicial Circuit juvenile court in 1990 had a general policy that all juveniles in secure detention would be shackled at all times during court appearances. The policy was challenged in \textit{S.Y. v. McMillan}.\textsuperscript{61} The court denied a petition for a writ of certiorari challenging the blanket system on the grounds that, unlike adult cases involving the right to appear unshackled before a jury, the child has no equivalent right.\textsuperscript{62} The appellate court concluded further that the shackles were limited to juveniles being detained and took into consideration the trial court testimony of the chief bailiff in which he said that the use of shackles had a positive effect on the security and decorum of the courtroom. Additionally, he said that fights among the juveniles and escape attempts had decreased. It is not clear from the opinion whether any documentary evidence was presented.\textsuperscript{63} The public defender argued on appeal that appearing in shackles violates the presumption of innocence. The court ruled that the lack of a jury in a juvenile delinquency case was a significant distinguishing factor.\textsuperscript{64} The court, however, failed to mention decisions in other jurisdictions, including cases involving juveniles in which the courts ruled that the question of security was an individualized one.\textsuperscript{65}

The more appropriate question was whether the particular child was likely to create a security risk as balanced against the substantial bias which might be created by the appearance of a child in court in shackles. There is no explanation in the \textit{S.Y.} opinion as to why only children held in detention rather than all children charged are shackled other than the assertion that detained children meet the statutory detention criteria.\textsuperscript{66} Nor is there any explanation as to why this procedure

\textsuperscript{60.} \textit{B.E.}, 564 So. 2d at 568 (providing relevant cases).
\textsuperscript{61.} 563 So. 2d 807 (Fla. 1st Dist. Ct. App. 1990).
\textsuperscript{62.} \textit{Id.} at 808. Although the court cited to no case in this regard, the Supreme Court has distinguished between the constitutional rights of adults versus those of juveniles. \textit{See} McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
\textsuperscript{63.} 563 So. 2d at 808-09.
\textsuperscript{64.} \textit{Id.}
\textsuperscript{66.} It is not clear what conclusion the court was drawing. Perhaps it was suggesting that detained children are more dangerous or are greater security risks. \textit{But see} Levine, supra note 12, at 255 (suggesting that the criteria are expansive and include children charged with minor offenses). Nor did the court address whether any proce-
is not followed elsewhere in Florida. Finally, the use of shackles seems to run counter to the spirit of the Florida Juvenile Justice Act.\textsuperscript{67}

In what is hopefully a unique case, the Fifth District Court of Appeal was asked to decide the question of whether a trial court could refuse to allow the prosecution to put on evidence by dismissing a delinquency petition over the prosecution's objection at arraignment.\textsuperscript{68} The appellate court held in \textit{State v. S.C.} that the decision to charge rests with the prosecutor, and until both sides have an opportunity to present evidence, the court cannot make a proper decision to dismiss.\textsuperscript{69}

Technical questions concerning application of protected constitutional rights have recently come up on several occasions in the appellate courts. For example, the right to counsel, set out over 20 years ago by the United States Supreme Court in \textit{In re Gault},\textsuperscript{70} has been expanded by Florida statute so that the child shall be advised of his right to counsel at a dispositional hearing.\textsuperscript{71} In \textit{Interest of J.C.S.},\textsuperscript{72} the trial court failed to advise the child of the right to counsel\textsuperscript{73} and the court of appeal reversed.

A second technical matter which has come up frequently involves a Florida Supreme Court rule requiring written consent to employment of a certified law student intern which must be filed in the case and brought to the attention of the trial judge.\textsuperscript{74} In \textit{Interest of L.S.},\textsuperscript{75} the court reversed and remanded for a new adjudicatory hearing when the

\textsuperscript{67} See generally FLA. STAT. § 39.001(2)(a)(b) (Supp. 1990).
\textsuperscript{68} State v. S.C., 558 So. 2d 522 (Fla. 5th Dist. Ct. App. 1990).
\textsuperscript{69} Id. at 523.
\textsuperscript{70} 387 U.S. 1 (1967).
\textsuperscript{72} 560 So. 2d 426 (Fla. 4th Dist. Ct. App. 1990).
\textsuperscript{73} Id. at 427. The court followed the Florida Rules of Juvenile Procedure which provide:

\textbf{Duty of the court.} The court shall advise the child of the right to counsel. The court shall appoint counsel as provided by law unless waived by the child at each stage of the proceeding. This waiver shall be in writing if made at the time of a plea of guilty or no contest or at the adjudicatory hearing.

FLA. R. JUV. P. 8.290(a); see also B.I. v. State, 492 So. 2d 824 (Fla. 1st Dist. Ct. App. 1986).
\textsuperscript{74} RULES REGULATING THE FLORIDA BAR 11-1.2(d) (1987); see also Dale, 1989 Survey, supra note 12, at 863 (discussing earlier cases).
\textsuperscript{75} 560 So. 2d 425 (Fla. 4th Dist. Ct. App. 1990).
record was shown to be insufficient to establish that the child understood his legal options and that he knowingly waived the right to be represented by a lawyer when he consented to be represented by a certified legal intern. In *Interest of A.R.*, exactly the same issue came up when there was no evidence of a written consent to be represented by the legal intern in the file. Of similar constitutional significance is the requirement that the court determine that a guilty plea or a plea of *nolo contendere* shall be freely, knowingly, and voluntarily tendered. In two separate cases the trial court had failed to undertake the appropriate plea colloquy and as a result, in *C.W. v. State* and *M.C. v. State*, the appellate court reversed and remanded for appropriate proceedings.

Sixteen years ago the United States Supreme Court ruled that the double jeopardy clause of the fifth amendment, applied to the states through the fourteenth amendment, also applies to juveniles. In *D.L.V. v. Kirk*, the Fifth District Court of Appeal granted a writ of prohibition to prevent further proceedings in a delinquency case where the state filed a petition alleging unlawful sale and delivery of cocaine after a prior petition alleging the identical allegations was dismissed at the adjudicatory hearing. At the hearing, the state was not prepared to proceed and was unsuccessful in obtaining a continuance. The trial court ruled on the first petition that the child was not delinquent as charged. In a rather blunt opinion, the appeals court held that the order of dismissal was a final order in the first case since the trial court explicitly found that the child had not committed the act. The court then added that the state's refiling of the petition was "a blatant attempt to circumvent the court's final order of dismissal."
The First District Court of Appeal in *K.Y.E. v. State*,\(^84\) recently decided a first amendment free speech case. A child was adjudged to have breached the peace and obstructed a police officer without violence when she continually sang an obscene epithet in the presence of the police officer, which allegedly interrupted the officer's conversation with another individual. Because the record disclosed no evidence that the singing epithet evoked a response intending to inflict injury or incite breach of the peace under Florida law, the court found no breach.\(^85\) Therefore, it concluded that the speech and conduct were protected by the first amendment.\(^86\)

A recent case, *Interest of D.D.*,\(^87\) involved a question of the constitutionality of the serious habitual juvenile offender dispositional placement statute.\(^88\) The specific issue was whether arrests are a proper criterion to determine serious offender placement. Relying upon the Florida Supreme Court opinion in *State v. Potts*,\(^89\) which held that the state may not penalize someone merely for the status of being under indictment or otherwise accused of a crime, the appellate court ruled that an arrest cannot be taken into account in setting sentencing guidelines for juveniles.\(^90\) The court concluded the arrest criteria violated substantive due process under the fourteenth amendment as well as article 1, section 9 of the Florida Constitution.\(^91\)

C. Dispositional Issues

Florida's Juvenile Justice Act provides a variety of dispositional

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84. 557 So. 2d 956 (Fla. 1st Dist. Ct. App. 1990).
85. *Id.* at 957 (there was evidence that her singing was heard by others and attracted curious on-lookers).
86. *Id.*
87. 564 So. 2d 1224 (Fla. 4th Dist. Ct. App. 1990).
88. Section 39.01(47), Florida Statutes, provides:
(47) "Shelter" means a place for the temporary care of a child who is alleged to be or who has been found to be dependent, a child from a family in need of services, or a child in need of services, pending court disposition before or after adjudication or after execution of a court order. "Shelter" may include a facility which provides 24-hour continual supervision for the temporary care of a child who is placed pursuant to s. 39.422.

**FLA. STAT.** § 39.01(47) (Supp. 1990).
90. *D.D.*, 564 So. 2d at 1225.
91. *Id.*
alternatives including community control,\textsuperscript{92} commitment to the Department of Health and Rehabilitative Services (HRS),\textsuperscript{93} commitment to a licensed child-caring agency,\textsuperscript{94} restitution,\textsuperscript{95} and juvenile dispositional alternatives when the child has previously been transferred to the adult court for trial.\textsuperscript{96} Each of these dispositional alternatives has been the subject of regular appellate review over the past three years.\textsuperscript{97}

In addition to the 21 day detention requirement,\textsuperscript{98} Florida's law provides that the Department of Health and Rehabilitative Services must move a child from secure detention and place the youngster in a placement program within five days after the child has been committed.\textsuperscript{99} Seven different appellate court opinions over the past year have dealt with this problem. In \textit{C.M.T. v. Department of Health and Rehabilitative Services},\textsuperscript{100} the appellate court enforced the removal statute and ruled explicitly that the statute is not discretionary.\textsuperscript{101} In a series of three opinions, \textit{M.A. v. Coler},\textsuperscript{102} \textit{D.A.T. v. Coler},\textsuperscript{103} \textit{T.J.D. v. Coler},\textsuperscript{104} and \textit{A.M.R. v. Coler},\textsuperscript{105} the Second District Court of Appeal enforced the same five day rule adding that while it was not unsympathetic to the HRS's argument that it was unable to comply with the statute because of lack of resources, the court was obligated to enforce the statute. It further suggested that the agency's argument was more properly addressed to the legislature.\textsuperscript{106} In \textit{Interest of A.B.},\textsuperscript{107} the Fourth District Court of Appeal was faced with sixteen separate peti-

\textsuperscript{92} FLA. STAT. § 39.054(1)(a) (Supp. 1990).
\textsuperscript{93} § 39.054(1)(a)(5)(e).
\textsuperscript{94} § 39.054(1)(a)(5)(b).
\textsuperscript{95} § 39.054(1)(a)(5)(f).
\textsuperscript{96} FLA. STAT. § 39.059 (Supp. 1990).
\textsuperscript{97} See generally Dale, 1988 Survey, supra note 9, at 1163-64; Dale, 1989 Survey, supra note 12, at 870-83.
\textsuperscript{98} See supra note 13 and accompanying text.
\textsuperscript{99} FLA. STAT. § 959.12 (1989) (repealed 1990) (the HRS may petition the court for an additional 10 days to remove a child who has been committed to a placement from the detention center).
\textsuperscript{100} 550 So. 2d 126 (Fla. 1st Dist. Ct. App. 1989).
\textsuperscript{101} Id. at 127 (citing § 959.12).
\textsuperscript{102} 555 So. 2d 1247 (Fla. 2d Dist. Ct. App. 1989).
\textsuperscript{103} 552 So. 2d 319 (Fla. 2d Dist. Ct. App. 1989).
\textsuperscript{104} 555 So. 2d 1245 (Fla. 2d Dist. Ct. App. 1989).
\textsuperscript{105} 555 So. 2d 1248 (Fla. 2d Dist. Ct. App. 1989).
\textsuperscript{106} A.M.R., 555 So. 2d at 1249; M.A., 555 So. 2d at 1248; T.J.D., 555 So. 2d at 1246; D.A.T., 552 So. 2d at 320.
\textsuperscript{107} 553 So. 2d 1349 (Fla. 4th Dist. Ct. App. 1989).
tions for mandamus relating to the five day rule. Again, HRS argued that there were no placement facilities available. Citing other cases, the appellate court ruled that the statute is mandatory and requires release of the juvenile held more than five days without placement into a commitment program. 108 This issue appeared to be alleviated with the passage of the new Juvenile Justice Act and subsequent appropriations. As noted earlier, as of this writing, the availability of funds for the appropriation to HRS to develop placement options which would stop the backup of youngsters into detention, among other programs, remains uncertain.

A second dispositional alternative under Florida law is restitution. 109 Restitution is defined as money or "in kind" payment. 110 In a dozen cases this past year the appeals courts have interpreted this seemingly simple statute. In R.F. v. State, 111 the Fourth District ruled that the trial court must determine that the amount of restitution it orders is an amount which the child can reasonably be expected to pay. In this particular case, the court ordered $15,000 in restitution, which the appellate court said "would inevitably be uncollectible." 112 In D.M. v. State, 113 the court ordered restitution of $988.00 in a matter involving the theft of an automobile. The appellate court reversed because the trial court left it to the interested parties to develop the payment schedule. In addition, although the child established that the amount was beyond his financial ability to pay, he did not establish that it was beyond the financial ability of his parents. 114 Florida law states that when restitution is ordered by the court, the amount of restitution shall not be greater than the amount the child and his parents can reasonably be expected to pay or make. 115 This statute does, however, place a maximum of $2,500 on parents. 116 In J.O. v. State, 117 a case which may have significance for restitution orders, the Third District Court of Appeals recently reduced a grand theft adjudication to petty theft be-

108. Id. at 1350.
111. 549 So. 2d 1169 (Fla. 4th Dist. Ct. App. 1989).
112. Id. at 1170 (the opinion is silent as to what the restitution was for).
113. 550 So. 2d 149 (Fla. 3d Dist. Ct. App. 1989).
114. Id. at 150.
116. Id.
117. 552 So. 2d 1167 (Fla. 3d Dist. Ct. App. 1989).
cause no evidence was presented as to the value of the property stolen. In *G.C. v. State*, another restitution case, the appellate court explained the obvious. A child is responsible for that portion of the damage which he caused. In other words, as the Fourth District said *In Interest of J.C.S.*, if the damage is not the result of the child's conduct, even when damage occurs, then restitution is not a proper disposition.

Two obvious opinions are *G.R. v. State* and *L.A.R. v. State*. *G.R.* involved a theft of $70.00 in American Express Travelers Checks. The child was unable to cash the check, and the money was refunded to the customer. Neither American Express nor the customer lost any money. The court held that in order for restitution to be ordered, there must be a loss. In *L.A.R.*, the Fifth District Court of Appeals reversed because it was not shown that the losses on which the order was based were caused by the offenses to which the child plead guilty.

Florida law does provide an exception to the parents' obligation to pay restitution if it can be shown that they made "diligent good faith efforts to prevent the child from engaging in delinquent acts." In *M.D. v. State*, the court, in a case of first impression, decided what constitutes diligence. The court first ruled that the parent had the burden of establishing diligence by the greater weight of the evidence. It then defined diligence as an effort which is, over and above average, an effort that is painstaking.

Community control, Florida's term for probation, is another dispositional alternative. The maximum time one may be placed on community control is set in various respects by statute. Thus, for example, the maximum period of community control which may be imposed for petty theft is 60 days. Therefore, in *A.D.A. v. State*, the appellate court ruled that the trial court could not impose community control for

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118. 560 So. 2d 1186 (Fla. 3d Dist. Ct. App. 1990).
120. 564 So. 2d 207 (Fla. 3rd Dist. Ct. App. 1990).
121. 563 So. 2d 836 (Fla. 5th Dist. Ct. App. 1990).
122. *G.R.*, 564 So. 2d at 208.
123. 563 So. 2d at 837.
125. 561 So. 2d 1259 (Fla. 2d Dist. Ct. App. 1990).
126. *Id.* at 1261 (citing *WEBSTER'S NEW WORLD DICTIONARY* 386 (1988 ed.).)
a longer period of time than the statute allowed. In *M.G. v. State*, the Fifth District ruled that an imposition of community control may not exceed the time period to which the child could have been exposed if the court had ordered a commitment within the juvenile system. The court distinguished its holding from the adult system, where a distinction between time in prison and time on community control is allowable by statute. Finally, Florida law provides that an order of community control in a juvenile delinquency case may be revoked under certain circumstances. In *In Interest of L.S.*, the court held that evidence of arrest alone is insufficient to cause a violation of community control. The appellate courts have regularly ruled that a child may not be committed to HRS or placed on community control for a term longer than the sentence that could have been imposed if he were an adult. The Florida statute is explicit. Yet, in *J.S. v. State*, the court once again was obligated to reverse because the trial court ordered a 12-year old to be committed until his 19th birthday for the burglary of a structure where, had he been adult, he could be punished for no more than five years.

Florida law also provides that at the dispositional stage, when the court determines it will commit the child to HRS, the agency must furnish the court with a list of not less than three placement options. HRS must also rank the order of preference. The trial courts have regularly failed to employ the ranked choices and the appellate courts have reluctantly ordered them to comply. This year, in *State v. R.W.K.*, the appellate court again dealt with a frustrated trial court which had ordered HRS to place the child in a specific residential facility and fully fund the placement. The appellate court held that in the absence of commitment under the Florida statute, a residential facility

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130. *Id. See Fla. Stat. § 948.04 (1987).*
131. 553 So. 2d 345 (Fla. 4th Dist. Ct. App. 1989).
134. 552 So. 2d 327 (Fla. 1st Dist. Ct. App. 1989).
135. *Id. at 328.*
138. 556 So. 2d 815 (Fla. 5th Dist. Ct. App. 1990).
was not a proper placement alternative and, under the Florida statute the court did not have the statutory authority to place the child in a specific facility.\footnote{Id.}

Juvenile court jurisdiction exists until the child's 19th birthday.\footnote{Id.} Thus, a dispositional order suspending a child's license beyond his 19th birthday was reversed by the Second District Court of Appeal in \textit{R.M.S. v. State}.\footnote{552 So. 2d 301 (Fla. 2d Dist. Ct. App. 1989).} In addition, in \textit{Lewis v. State}, the First District held that community service may not be imposed in lieu of court costs because the court lacks authority to do so.\footnote{564 So. 2d 589 (Fla. 1st Dist. Ct. App. 1990).}

Prior to 1988, juveniles could be placed in secure detention on the basis of contempt adjudications. That year, the Florida legislature passed section 39.0321, Florida Statutes, which prohibited the placement of juveniles in secure detention for punishment.\footnote{Section 39.0321, 1988 Florida Statutes, provided: 
Prohibited use of secure detention. - A child alleged to have committed a delinquent act shall not be placed in secure detention for the following reasons:
(1) To punish, treat, or rehabilitate the child.
(2) To allow a parent to avoid his or her responsibility.
(3) To permit more convenient administrative access to the juvenile.
(4) To facilitate further interrogation or investigation.
(5) Due to a lack of more appropriate facilities. 
\textit{FLA. STAT.} § 39.0321 (1989), \textit{recodified at} \textit{FLA. STAT.} § 30.043 (Supp. 1990).} In \textit{T.D.L. v. Chinault},\footnote{570 So. 2d 1335 (Fla. 2d Dist. Ct. App. 1990).} the appellate court ruled that placement in secure detention, based upon contempt, was a clear violation of the new 1988 statute. In \textit{T.D.L.}, the contemptuous act by the juvenile consisted of wadding up commitment papers and throwing them onto the public defender's table. The court held the child in criminal contempt and entered a two-part disposition. It placed the child in secure detention for 179 days and then converted that detention to a county jail sentence when the child reached his 18th birthday some twenty days after the contemptuous act occurred. In addition to vacating the placement of the juvenile in the juvenile detention center, the appellate court also
vacated the adult jail sentence. The appellate court concluded that in order for an adult jail sentence to be properly imposed, the court had to make specific findings pursuant to section 39.111(7), Florida Statutes.\(^{145}\)

D. Transfer Issues

The juvenile delinquency provisions of the Florida Juvenile Justice Act provide that under certain circumstances the child may be tried in adult court.\(^{146}\) When a child has been tried as an adult and convicted, the court shall determine whether the child should receive adult or juvenile sanctions. Six criteria are to be considered.\(^{147}\) Application of the criteria continues to produce a significant number of appellate opinions.\(^{148}\) The appellate cases have uniformly enforced what the statute plainly states:

Suitability for adult sanctions is determined by reference to the six criteria and any decision shall be in writing and in conformity with those criteria with the court making a specific finding of fact and reasons for the decision.\(^{149}\)

Yet, the lower courts continue to fail to make written findings as required.\(^{150}\) As the Third District properly noted in *Ervin v. State*,\(^{151}\)

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145. Section 39.111(7), Florida Statutes, provides:

(7) When a child has been transferred for criminal prosecution and the child has been found to have committed a violation of Florida law, the following procedure shall govern the disposition of the case:

(a) At the disposition hearing the court shall receive and consider a predisposition report by the department regarding the suitability of the child for disposition as a child.


not only must there be a written opinion, but that decision must include specific factual findings to support the conclusion. The failure to make such findings is reversible error. In *Henschke v. State*, the First District Court of Appeal also explained that the violation of this section requires that the case be returned to the trial court for resentencing and that the child is entitled to be present. According to the Fifth District in *Youngblood v. State*, in making the written decision, the court must consider all six factors and must not only track them using conclusory language, but must provide specific underlying findings of facts and reasons. The court commented on the many prior decisions holding it reversible error to fail to make the findings under the six criteria, but also explained that the written findings need not actually be made at the sentencing, only before reaching the decision. The record need only show that the trial court considered the factors at the time of the sentencing. It would then be required to make a written explanation.

### III. Dependency Proceedings

#### A. The Right to Counsel

Issues concerning the role of counsel in dependency proceedings continue to appear in decisions of Florida’s appellate courts. In *Metrecodified at FLA. STAT. § 39.059(7) (Supp. 1990), prior to accepting the child’s plea and imposing adult sanctions was reversible error).*

151. 561 So. 2d 423 (Fla. 3d Dist. Ct. App. 1990).
152. 556 So. 2d 409, 410 (Fla. 1st Dist. Ct. App. 1989).
153. 560 So. 2d 409 (Fla. 5th Dist. Ct. App. 1990).
154. Id.; see also T.D.L. v. Chinault, 570 So. 2d 1335 (Fla. 2d Dist. Ct. App. 1990)(holding that the six criteria are applicable in the context of a contempt proceeding where the court contemplates sanctioning the child by placement in the county jail); Lang v. State, 566 So. 2d 1354 (Fla. 5th Dist. Ct. App. 1990) (holding that a check list of the six criteria which is initialed by the court does not satisfy the statutory requirement of a specific finding of fact and the reason for the decision)(citing Keith v. State, 542 So. 2d 440, 441 (Fla. 5th Dist. Ct. App. 1989)). The court in Lang also held that a child could waive rights under the six criteria test, but the waiver must be manifest either in the plea agreement or on the record. *See also Dale, 1989 Survey, supra note 12, at 881-83 (reviewing Keith and other earlier cases articulating the obligations under the sanctions provision).*

155. *See Dale, 1988 Survey, supra note 9, at 1171-74; Dale, 1989 Survey, supra note 12, at 885 (discussing cases decided in prior years together with a basic analysis of the issue of right to counsel for parties in dependency cases).*
the Third District Court of Appeal certified to the Supreme Court the question of the availability of reasonable attorneys' fees for court appointed lawyers in dependency and termination proceedings. The issue involved an order by a trial court that the lawyer for the mother in a dependency and termination case be paid fees in a reasonable amount in excess of the $1000.00 maximum, which is provided for in section 39.415, Florida Statutes. The Second District Court of Appeal had ruled a year earlier in Board of County Commissioners v. Scruggs,157 that there was a constitutional right to counsel, and that the fee limitation was an impermissible legislative encroachment on the power of the judiciary. The Scruggs court ruled that if the facts showed extraordinary circumstances, an award in excess of the statutory maximum would be allowed. The court in Faber explicitly agreed with the reasoning in Scruggs.158

One possible source of representation of parents in dependency cases is the Office of the Public Defender. However, in Yacucci v. Hershey,159 the Fourth District Court of Appeal ruled that the public defender had no obligation to represent indigent parents in dependency cases. The case arose because there had been an unwritten policy in the Office of the Public Defender in Martin County to represent defendants in both criminal cases and dependency proceedings. When the successor public defender objected to the practice, and was still appointed, the defender filed a writ of prohibition and subsequent appeal.160 The court granted the petition and reversed. First, it found that section 27.51, Florida Statutes, which describes the functions of the public defender, is silent as to any authorization to represent parents in dependency proceedings. Similarly, the juvenile code does not allow for such representation.

Second, the court relied upon an earlier decision in Public Defender v. Baker161 which held that neither Chapter 27 nor Chapter 39 of the Florida Statutes gives the court power to appoint the public defender to represent children in dependency proceedings. The court re-

156. 564 So. 2d 185 (Fla. 3d Dist. Ct. App. 1990).
157. 545 So. 2d 910 (Fla. 2d Dist. Ct. App. 1989) (holding that a fundamental constitutional right was involved in such a case, albeit, not a sixth amendment criminal law right, but a due process right).
158. Faber, 564 So. 2d at 186; see also Dale, 1989 Survey, supra note 12, at 885-86 (providing a more detailed discussion of Scruggs and the underlying issues).
159. 549 So. 2d 782 (Fla. 4th Dist. Ct. App. 1989).
160. Id. at 783.
jected the argument that Rule 3.111 of the Rules of Criminal Procedure provides authority for the court to appoint the public defender.\(^{162}\) The rule states only that lawyers may be provided to indigent individuals in all proceedings arising from the initiation of a criminal action against the defendant which may result in imprisonment. It lists certain proceedings as examples, although it does not include dependency matters. The court avoided the rule by saying that it gave no indication that counsel can be from the public defender’s office. This argument is problematic because the section of the rule refers to counsel as a general matter and could just as easily have been interpreted expansively to include the office of the public defender. The court’s third argument appears to be that counsel need not be appointed because a liberty interest is not a stake. This argument is problematic because indeed the parent does have a liberty interest in a dependency proceeding.\(^{163}\) Finally, the court did not address the fact that under Florida law the parent does have an absolute right to counsel in a termination of parental rights proceeding.\(^{164}\)

A separate issue, the appropriateness of HRS non-lawyer staff representing the Department in uncontested dependency proceedings, has finally been resolved. The matter had been presented to the Florida Supreme Court two years ago by the Florida Bar, which sought an advisory opinion.\(^{165}\) Last year the supreme court ruled that HRS must

\(^{162}\) **FLA. RULE CRIM. P. 3.111(c)** states:

(c) Duty of Booking Officer. In addition to any other duty, the officer who commits a defendant to custody has the following duties:

(1) He shall immediately advise the defendant:

(i) of his right to counsel;

(ii) that if the defendant is unable to pay a lawyer, one will be provided immediately at no charge.

(2) If the defendant requests counsel or advises the officer he cannot afford counsel, said officer shall immediately and effectively place said defendant in communication with the (office) Public Defender of the circuit in which the arrest was made.

\(^{163}\) **See Stanley v. Illinois,** 405 U.S. 645, 651 (1972) (explicitly finding a liberty interest referring specifically to the “interest of a parent and the companionship, care, custody, and management of his or her children”); **Lassiter v. Dep’t of Social Services,** 452 U.S. 18 (1981) (holding that while due process applied in termination of parental rights cases, counsel as of right was not an element of the process to which the parent was entitled. This analysis differs from the statement of the court in *Yacucci*).

\(^{164}\) **See FLA. STAT. § 39.465(1)(a)** (1989).

\(^{165}\) **See Florida Bar Re: Advisory Opinion HRS Non-Lawyer Counselor,** 518 So. 2d 1270 (Fla. 1988).
be represented by counsel. The Florida Supreme Court has now promulgated an amendment to the Florida Rules of Juvenile Procedure, which addresses the unlicensed practice and provides that “the Department of Health and Rehabilitative Services must be represented by an attorney at every stage of these proceedings.”

B. Evidentiary Issues

Florida Statutes, section 39.409, provides that the court must briefly state the facts upon which the finding of dependency is made. An issue about which there appears to be some confusion is whether a finding of dependency must be reversed when the court fails to recite the relevant facts supporting the adjudication of dependency pursuant to the statute, but where the record is sufficient to support the adjudication. In *I.T. v. State*, the parents appealed from an order adjudicating their son dependent. The Third District Court of Appeal ruled that the trial court’s failure to state the facts upon which its finding of dependency was made, relying instead on the reasons set forth within the petition, was clearly reversible error. However, the appeals court also evaluated the evidence in the record and found that the state had failed to show by preponderance of the evidence that the child was dependent and for that reason reversed the order of adjudication.

In *Interest of K.S.*, the parents also appealed from a dependency adjudication. They argued the court’s order omitted a recitation of the specific facts upon which the determination was based and the record was insufficient to support a finding of dependency. The appellate court held that when a court fails to make the appropriate recitation of facts supporting the adjudication, and a sufficient factual basis cannot be discerned, reversal may be required. However, in *K.S.*, the First District Court of Appeals found the necessary evidence in the rec-
ord and thus affirmed.\textsuperscript{174}

Similarly, in \textit{T.S. v. State},\textsuperscript{175} parents appealed an order of dependency on the grounds that the evidence was insufficient and that the court failed to state the factual basis. The Second District Court of Appeal found that an examination of the record of the proceedings disclosed sufficient evidence to support the finding of dependency.\textsuperscript{176} However, the court also held that the specific factual basis stated by the court—the children were found to be living in the conditions set forth in the dependency petition—was insufficient to support an adjudication of dependency under the mandate of section 39.409 of the Florida Statutes.\textsuperscript{177} Because, under the facts of this case, the trial court could have withheld an adjudication of dependency, the appellate court remanded and ruled that the adjudication be stricken.\textsuperscript{178} Thus, it is unclear from \textit{T.S.} what the court would have done if it had been faced with a situation where the record had proven the dependency, the findings had not been made under section 39.409, and further intervention had appeared necessary.

The court’s reliance in \textit{T.S.} on three earlier intermediate appellate opinions in support of its conclusion that the court order failed to state the facts upon which the finding was made as required by section 39.409(3) of the Florida Statutes, does not clarify matters. The three cases are \textit{I.T.},\textsuperscript{179} \textit{Fitzpatrick v. State},\textsuperscript{180} and \textit{Interest of C.S.}.\textsuperscript{181} In two of the cases, \textit{I.T.} and \textit{C.S.}, the courts ruled that failure to make the order specifying the facts upon which the dependency was based was clearly reversible error.\textsuperscript{182} In \textit{Fitzpatrick}, on the other hand, the appellate court held that the trial court erred by simply resolving the petition without making the necessary factual findings, but it never concluded that this alone was reversible error.\textsuperscript{183} All three courts also evaluated the evidentiary record. In \textit{I.T.} and \textit{C.S.}, the appellate courts determined the state had failed to prove dependency.\textsuperscript{184} In \textit{Fitzpatrick}, the

\begin{center}
\textsuperscript{174} \textit{Id.} at 159.
\textsuperscript{175} 557 So. 2d 676 (Fla. 2d Dist. Ct. App. 1990).
\textsuperscript{176} \textit{Id.} at 677.
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} 532 So. 2d 1085.
\textsuperscript{180} 515 So. 2d 319 (Fla. 3d Dist. Ct. App. 1987).
\textsuperscript{181} 503 So. 2d 417 (Fla. 1st Dist. Ct. App. 1987).
\textsuperscript{182} \textit{I.T.}, 532 So. 2d at 1088; \textit{C.S.}, 503 So. 2d at 418.
\textsuperscript{183} 515 So. 2d at 320-21.
\textsuperscript{184} \textit{I.T.}, 532 So. 2d at 1088; \textit{C.S.}, 503 So. 2d at 418.
\end{center}
court remanded with directions to make appropriate factual findings because the evidence before the appellate court was in conflict.\textsuperscript{185} Finally, in \textit{Fitzpatrick}, the court also noted that the reason for reviewing a facially insufficient dependency order is to provide an early resolution of the child's placement.\textsuperscript{186}

What these cases teach is that Florida courts will look beyond the statutory authority to determine whether, despite the failure to make factual findings, there was evidence in the record to substantiate the determination of dependency. While they may be practical resolutions, the decisions seem contrary to the clear statutory language of section 30.409, Florida Statutes. It does not seem at all difficult for the appellate courts to do with section 39.409 what they have done in the delinquency area with section 39.111, Florida Statutes. In other words, if the factual findings are not stated on the record, the court simply remands the case to the trial court for a recitation of the factual bases for the decision. Proper findings will provide the parties and the appellate court a clear record against which to argue the legal significance of the underlying facts.\textsuperscript{187}

\textsuperscript{185}. \textit{Fitzpatrick}, 515 So. 2d at 321.
\textsuperscript{186}. \textit{Id.}.
\textsuperscript{187}. What is interesting about the development of the seeming exception to section 39.409, Florida Statutes, based upon a review of the facts, is the process of reliance on prior cases until one reaches the seminal case. \textit{See generally} A.T. v. State, 409 So. 2d 155 (Fla. 1st Dist. Ct. App. 1986) (its assertion is unsupported by statute or doctrine). A.T. is a termination of parental rights case involving the failure of the trial court to comply Rule 8.810 of the Florida Rules of Juvenile Procedure which required that a final order granting a petition for permanent commitment include a statement of the facts upon which the court based its order. Despite the failure to comply with the rule, the court upheld the determination based upon "overwhelming evidence supporting the permanent commitment, as well as the need for an early resolution of this case in order to provide a stable, emotional environment for the children." \textit{Id.} at 156.

The problem with this conclusion is that there is no support for it in either the rule or the statute. One might argue that where there is a failure to comply with the factual findings, affirmance may be justified on grounds of harmless error. But none of the cases uses this argument. Even so, the problem with the harmless error argument is that significant rights are in issue. \textit{See e.g.}, Stanley v. Illinois, 405 U.S. 645 (1972). Furthermore, the statute is otherwise meaningless. It was clearly written for a purpose and that purpose was to obligate the court to set out the factual basis for its opinion. To do otherwise is to force the appellate court on a cold record to carry out what is in effect a de novo review of the underlying facts. The trial court is in a much better position to evaluate credibility and demeanor of witnesses. It may well be that the appellate court upholds a finding of dependency in a case based upon facts which the trial court, had it entered an order listing the factual basis for the opinion, would have
The matter of proof in dependency cases is constantly litigated on the appellate level. In *C.C. v. HRS*, the First District Court of Appeal was faced with a question of whether the facts of the underlying dependency amounted to a significant impairment of the child's physical, mental or emotional health as is required under the statutory definition of abuse. In this case, the court held that the mother's act of loudly and angrily scolding a child, shaking the youngster by the shoulders and striking the child's face and legs at the courthouse amounted to an isolated event. There simply was no further evidence to support the finding, although the court noted that uncontrolled and hysterical behavior is to be condemned. Based upon a preponderance of the evidence, the court could find no evidence of repeated activities and so reversed and remanded the finding.

The difficulty of proving child abuse is demonstrated in *In Interest of N.W.*, where, despite evidence of severe physical abuse of the child, the state could not prove who was the perpetrator. The court of appeal reversed the finding that the father was the perpetrator. There was testimony that both parents had access to the child and that the child became rigid and exhibited hysterical behavior at the appearance of the father. However, all staffing participants believed that identification of the perpetrator was impossible, and the child had been cared for by various family members at the relevant point in time. The trial court had also relied upon the father's personality type and potential for cruel behavior as well as his institution of a paternity action prior to the alleged abuse. According to the appellate court, such evidence amounted to "little more than innuendo and speculation concerning the father's surmised superior ability to abuse in the tragic manner to which he was abused."

In *Paquin v. HRS*, the court was faced with the question of whether a finding of dependency as to one child can be used as the
basis for a finding as to second child. In the *Paquin* case, the court found three children dependent. The facts demonstrated that the father sexually abused one son and that the abuse occurred in the presence of a second son. The court ruled that there was no competent evidence that the third youngster, who did not live in the same household with the two brothers, had witnessed any abuse or might be subjected to abuse in the future. On that basis, the court ruled that there could be no transfer of dependency. Thus, as to the single child the finding of dependency was reversed.\(^\text{196}\)

C. *Procedural Matters*

The question of whether a child may see his file at the end of a dependency case was before the Fourth District Court of Appeal in *C.E.B. v. Birken*.\(^\text{197}\) Reported in local newspapers, this case involved pro se actions by a youngster to obtain the contents of his court file. The circuit court judge had refused to unseal the social section of the youngster's file and to turn the information over to him.\(^\text{198}\) The district court of appeal reversed the lower court and held that under Florida law the petitioner had the right to review the official records. Originally, the court reasoned that under section 39.411(3), Florida Statutes, the child is one person who has the right to inspect and copy the official record.\(^\text{199}\) HRS had argued that providing the material was discretionary based upon the court's determination of the child's best interests. The court rejected this argument on the ground that the use of

\(^{196}\) *Id.* at 1287.

\(^{197}\) 566 So. 2d 907 (Fla. 4th Dist. Ct. App. 1990).

\(^{198}\) *Id.* at 908.

\(^{199}\) FLA. STAT. § 39.411(3) (Supp. 1990) provides:

\(\text{(3) The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, subject to the provisions of s. 63.162, a child and the parents or legal custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and disposition the court may deem proper, and punish by contempt proceedings any violation of those conditions.}

Published by NSUWorks, 1991

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the word “shall” made this statutory provision mandatory. The court then decided what constitutes the total record given that there is a “social section” of the juvenile file. It found that the official record must be turned over. The court found that whether HRS and other agency reports constitute part of the official record is based upon whether the court relied upon them or considered them in reaching its determination. If it did, the documents from the social file are part of the official record.

A difficult question of discovery was raised in In Interest of C.W. In that case, the trial court granted a motion filed by the father requiring a 4-year old child, alleged to be the victim of sexual abuse, to undergo a physical and psychological examination. On appeal, the court quashed the trial court’s order on the basis that there was no compelling reason advanced by the father to support the intrusion. The court relied upon State v. Drab, which held that in the context of a criminal charge of sexual battery on a child, the defendant must show the presence of extreme and compelling circumstances such that the denial of the examination will deprive the defendant of due process.

Dependency proceedings continue to be entwined with custody matters. In Ammons v. Hathaway, the trial court ruled on a peti-

200. 566 So. 2d at 909. The court in dicta determined that if the child was mature enough to persuade the court on the law, he was old enough to “handle” the disclosure of his own juveniles records on remand. Id.
201. Official records are defined at section 39.411(2), Florida Statutes:

   (2) The court shall make and keep records of all cases brought before it pursuant to this chapter and shall preserve the records pertaining to a dependent child until 10 years after the last entry was made, or until the child is 18 years of age, whichever date is first reached, and may then destroy them, except that records of cases where orders were entered permanently depriving a parent of the custody of a juvenile shall be preserved permanently. This court shall make official records, consisting of all petitions and orders filed in a case arising pursuant to this part and any other pleadings, certificates, proofs of publication, summonses, warrants, and other writs which may be filed therein.

202. C.E.B., 556 So. 2d at 910.
204. Id. at 293.
205. 546 So. 2d 54 (Fla. 4th Dist. Ct. App. 1989).
206. Id. at 55-56. Rule 8.750 of the Florida Rules of Juvenile Procedure provides for examinations of children, guardians and other persons when custody is in issue. The discovery rule, 8.770, is silent on the issue of physical examinations.
207. See Dale, 1989 Survey, supra note 12, at 891 (discussing In Re F.B., 534
tion for permanent custody filed by a mother. The children, who had previously been declared dependent, were placed in the custody of their paternal aunt and uncle where they remained after the mother filed her petition. She alleged that she was now able to provide sufficient financial and emotional support to the youngsters. After a hearing, the trial court entered an order providing that the children be permanently placed with the aunt and uncle. The order also gave the mother visitation rights based upon the best interests of the child. The appellate court ruled that the permanent status of dependency is not an option available under Chapter 39 of the Florida Statutes. The court explained that its primary obligation is to return the children to their natural parents, and only when such efforts are exhausted is permanent placement, with the aim of adoption, appropriate. The court noted that custody in the natural parents "is an important interest which should generally not be terminated absent certain circumstances constituting abandonment or an unfitness which impacts the child's welfare."

The First District seems to have understood clearly the distinction between the test for dependency and custody. The best interests of the child is not the test in a dependency case, but may be proper when the issue is one of custody. Clearly Chapter 39 of the Florida Statutes does not allow a dependency matter to be turned into a custody case. In Ammons, the court also quite properly pointed out that the court should not rely principally on material and economic benefits as opposed to personal, emotional and social welfare and stability as the basis for a custody determination.

The rather technical matter of who can commence a dependency proceeding was raised in the Fourth District Court of Appeal in In

So. 2d 899 (Fla. 5th Dist. Ct. App. 1988); Dale, 1988 Survey, supra note 9, at 1182 (discussing In re A.W., 519 So. 2d 114 (Fla. 2d Dist. Ct. App. 1988)).


209. Id. at 146.

210. Id.

211. Id. (citing Interest of K.H., 444 So. 2d 547 (Fla. 1st Dist. Ct. App. 1984)).

212. Id.


214. 550 So. 2d at 146; see also In re J.H., 535 So. 2d 669 (Fla. 2d Dist. Ct. App. 1988)(setting out the same proposition in the context of a dependency proceeding).
Interest of J.M.: In this case, maternal grandparents appealed the trial court's dismissal of their petition for dependency on the motion of HRS, who desired dismissal. The court of appeals held that section 39.404(1), Florida Statutes, provides that any person with knowledge of the facts may file the petition for dependency. HRS is not the only agency or party who can commence a proceeding. Thus, the appellate court reversed.

A technical issue of appellate practice in dependency cases came before the Fifth District Court of Appeal this past year. In HRS v. C.G., HRS sought to challenge by certiorari a court order adjudicating a child dependent and ordering the youngster to be placed in the first available opening at a particular facility. The appellate court held that the appropriate remedy was not certiorari but plenary appeal. Although the Florida Supreme Court had previously held that under certain circumstances the appellate court has jurisdiction to review a case even when the form of appellate relief is misstated, the difficulty in the particular case was that the 30-day time frame within which to file a notice of appeal had expired. The Fifth District Court of Appeal refused to follow the holding of the Fourth District, which declined jurisdiction over an appeal where the party incorrectly sought relief by certiorari. Rather, the Fifth District agreed with the dissent, which viewed the timely filing of the application for certiorari as sufficient to invoke appellate court jurisdiction.

Florida, like many other states, has recently developed a statewide child abuse reporting system. It includes an abuse registry which receives reports and pursuant to which HRS conducts investigations. When a report is received and HRS conducts an investigation, the in-

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217. 560 So. 2d at 343 (citing Interest of J.R.T., 427 So. 2d 251 (Fla. 5th Dist. Ct. App. 1983)).
218. 556 So. 2d 1243 (Fla. 5th Dist. Ct. App. 1990).
219. The issue on the merits appears to be governed by Interest of K.A.B., 483 So. 2d 898 (Fla. 5th Dist. Ct. App. 1986) and Fla. Stat. § 39.41(5) (Supp. 1990), which conclude that HRS determines when and with whom a dependent child shall live. C.G., 556 So. 2d at 1244.
220. Id. at 1244; see Johnson v. Citizen State Bank, 537 So. 2d 96 (Fla. 1989).
222. 556 So. 2d at 1244; Skinner, 541 So. 2d at 176.
vestigator must determine whether abuse or neglect has occurred and identify the perpetrator.\textsuperscript{224} When the report stems from corporal punishment as occurred in \textit{B.R. v. HRS},\textsuperscript{226} the question is one of whether the punishment was "excessive." HRS had an internal policy to confirm reports of excessive corporal punishment in those cases where the bruises remained visible for least 24 hours.\textsuperscript{226} In \textit{B.R.}, two school officials had paddled a student. The next day the student's mother reported the incident to HRS which confirmed abuse under the 24-hour rule.\textsuperscript{227} The court ruled on the definition of the term despite the fact that HRS subsequently withdrew the 24-hour rule and conceded reversible error.\textsuperscript{228} The court held that "whether corporal punishment is excessive must be proved in each case by competent, substantial evidence, and all relevant issues presented must be considered without resort to arbitrary presumptions fixed by the passage of time."\textsuperscript{229}

\textbf{IV. TERMINATION OF PARENTAL RIGHTS}

In 1981, the United States Supreme Court held that the due process clause of the fourteenth amendment did not give natural parents an absolute right to counsel in every termination of parental rights case, although the court did suggest that generally a lawyer ought to be provided.\textsuperscript{230} By statute, Florida authorizes the appointment of counsel for parents in all termination of parental rights cases and further provides that the court shall appoint counsel for insolvent persons.\textsuperscript{231} In

\begin{itemize}
  \item \textsuperscript{224} See \textsc{Fla. Stat.} § 415.503(5) (Supp. 1990).
  \item \textsuperscript{225} 558 So. 2d 1027 (Fla. 2d Dist. Ct. App. 1989).
  \item \textsuperscript{226} \textit{Id.} at 1028.
  \item \textsuperscript{227} \textit{Id.}
  \item \textsuperscript{228} \textit{Id.}
  \item \textsuperscript{229} \textit{Id.} at 1029. The court also noted that corporal punishment is authorized in the public school system. \textit{Id.} (citing \textsc{Fla. Stat.} §§ 231.085, 232.227 (1989)). See \textit{Ingraham v. Wright}, 430 U.S. 651 (1977) (discussing the constitutionality of corporal punishment in schools); see also Dale, \textit{Children Before the Supreme Court: In Whose Best Interests?}, 53 ALB. L. REV. 513, 552-557 (1989) (analyzing \textit{Ingraham}); Rosenberg, \textit{A Study in Irrationality: Refusal to Grant Substantive Due Process Protection Against Excessive Corporal Punishment in the Public Schools}, 27 Hous. L. REV. 399 (1990) (analyzing constitutional claims for damages based upon corporal punishment in schools).
  \item \textsuperscript{230} \textit{Lassiter v. Dep't of Social Services}, 452 U.S. 18 (1981).
  \item \textsuperscript{231} \textsc{Fla. Stat.} § 39.465(1)(a) (1989); see also Dale, \textit{1989 Survey, supra} note 12, at 899.
\end{itemize}
Interest of M.R.,\textsuperscript{232} the court vacated an order terminating parental rights on the ground that the record failed to reveal that the insolvent parents were afforded meaningful assistance of counsel. In M.R., the trial court appointed counsel pursuant to the statute, but the appellate court found that the lawyer failed to appear at the adjudicatory hearing and acted in other ways which raised doubts about his competence. The court recognized the severity of this loss, stating that the right of impoverished parents to a lawyer is a basic right guaranteed by the due process clause of both the United States and Florida Constitutions.\textsuperscript{233} The opinion is imprecise in its interpretation of the federal constitutional guarantee in light of the holding in \textit{Lassiter v. Department of Social Services}, in which the Supreme Court said that due process does not require a court to appoint counsel for an indigent parent in all termination proceedings.\textsuperscript{234} However, while there is no constitutional right to counsel per se, the First District is correct in its ruling that once counsel is provided - and in Florida by statute it must be - the parents' right to be protected is lost when there is no meaningful assistance. The court did not articulate the exact contours of the principle of meaningful assistance.\textsuperscript{235} However, the United States Supreme Court did say

\begin{enumerate}
\item 565 So. 2d 371 (Fla. 1st Dist. Ct. App. 1990).
\item \textit{Id.} at 372.
\item 452 U.S. at 26-27. The Court concluded that:
\begin{quote}
In some, the court's precedent speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.
\end{quote}
\textit{Id.} There being no deprivation of liberty to the parent, the Court held that there was no absolute right to counsel. However, perhaps in an effort to ameliorate the impact of its decision, the Court went on to say:
\begin{quote}
In its Fourteenth Amendment, our Constitution imposes on the State the standards necessary to ensure the judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be opted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well . . . The Court's opinion today in no way implies that the standards increasing the urge by informed public opinion and now widely followed by the states are other than enlightened and wise.
\end{quote}
\item 565 So. 2d at 372; see Richardson & Smith, \textit{States Differ Over Compensation for Lawyers for Indigent Parents}, Nat'l L. J., Oct. 22, 1990, at 16 (survey of the
\end{enumerate}
that counsel has to be present at critical stages of the proceedings and that performance might otherwise fail to afford the most basic services to be reasonably expected by competent counsel.\textsuperscript{236}

Because Florida participates in the Federal Child Abuse Prevention Act of 1974, it appoints guardians ad litem in dependency proceedings.\textsuperscript{237} In \textit{In Interest of C.B.},\textsuperscript{238} a court appointed guardian ad litem appealed from an order dismissing her petition for termination of parental rights. The trial court had ruled that the termination statute was unconstitutional because it permitted any person who had knowledge of the facts justifying the termination to file the petition.\textsuperscript{239} The section in question states that "any other person who has knowledge of the facts alleged or is informed of them and believes they are true,"\textsuperscript{240} may file a petition. The court held that neither the privacy rights of the parent nor the suggested limitation that only HRS or licensed child care agencies could initiate the proceedings, was a valid basis for finding the statute unconstitutional.\textsuperscript{241} However, the court, without citation, then defined the phrase "any other person who has knowledge" as "someone who is in peculiar position so that such knowledge can reasonably be inferred; for example, the judge familiar with the file, the guardian or attorney for the child, neighbors or friends of the parties who, because of their proximity could be expected to have knowledge, etc."\textsuperscript{242} Perhaps the concern of the appellate court was that the action might be commenced by someone with improper motives. However, this dicta does not appear to be based on authority in the appellate courts or the language of the statute. The matter should properly be handled by the legislature.

Florida, like other states, has passed legislation aimed at guaranteeing either speedy return of the child to his or her parents or termina-

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\textsuperscript{236} 452 U.S. at 372.
\textsuperscript{237} 42 U.S.C. § 5101 et seq. (1989); Fla. Stat. § 415.508 (1989); Fla. R. Juv. P. 8.590(c); \textit{see also} Dale, 1989 Survey, supra note 12, at 888.
\textsuperscript{238} 561 So. 2d 663 (Fla. 5th Dist. Ct. App. 1990).
\textsuperscript{239} \textit{Id.}
\textsuperscript{240} Fla. Stat. § 39.461(1) (1989). Interestingly, HRS challenged the constitutionality of the statute. The appellate court then raised the issue of whether HRS had standing to do so. \textit{C.B.}, 561 So. 2d at 665.
\textsuperscript{241} \textit{Id.} at 666.
\textsuperscript{242} \textit{Id.}
tion of parental rights. In compliance with federal legislation, after a finding of dependency, HRS will either provide the parent with a performance agreement or a permanent placement plan, dependent on whether the agency concludes that the child should go home or be placed out ultimately for adoption. However, under certain circumstances HRS may move to terminate parental rights without requiring a performance agreement or permanent placement plan.

In *In Interest of D.J.*, the mother of four minor children appealed from the final order terminating her parental rights, arguing that the circumstances did not require this extraordinary procedure. The court held that there was no requirement that HRS participate in a performance agreement or permanent placement plan if evidence is presented showing either abandonment or severe or continuous abuse. The court found that the extraordinary procedures applied because there was clear evidence of severe abuse of two of the mother's children. Significantly, the court terminated parental rights to each of the children, although the opinion only described physical injury to two of the youngsters. Although the court did not speak to the issue of transferred neglect, it held that two physical manifestations of abuse had the effect of threatening the life and well being of each of the children.

In *In Interest of J.A.*, the court was faced with the difficult question of whether it could terminate parental rights where the patients' inability to comply with the performance agreement was caused by chronic mental illness. The trial court had concluded that it was in the best interests of the child to terminate parental rights but ruled that

247. Id. at 379.
249. 553 So. 2d at 379. The childrens' injuries included a fractured skull as a result of one youngster's head being struck against a door and the other suffering vigorous shaking.
251. *D.J.*, 553 So. 2d at 379; see infra notes 271-274 and accompanying text (analyzing transferred neglect).
section 39.467(2)(c), Florida Statutes, prevented the termination. The facts of the case indicated that the mother suffered from chronic mental illness, and it was quite unlikely that she would ever be able to safely raise her son. The appellate court concluded that the legislature did not intend to preclude termination of parental rights when chronic mental illness of the parent prevents return of the child. The court relied upon the legislative enactment, which refers to the location of a permanent stable placement for children resulting either in the return home or adoption. The appellate court also concluded that a condition which is beyond the parent’s control cannot be used to categorically preclude the termination of parental rights and placement for adoption; to do so would be to frustrate the statute. The court explained that there might be circumstances beyond the parent’s control which are of a temporary nature. In situations unlike J.A. where prompt safe return of the child to the parent is a realistic possibility, the protection makes sense.

The issue of prospective neglect continues to appear in the appellate case law, although the legislature amended Chapter 39 of the Florida Statutes in an effort to define the concept. In Caso v. HRS, the appellate court affirmed a judgment terminating parental rights of a mother with long standing and significant psychiatric problems. Relying upon earlier case law upholding termination of parental rights

253. Id. at 357. Fla. Stat. § 39.467(2)(c) (Supp. 1990) states:
   (2) For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors, including, but not limited to:
   (c) The present mental and physical health needs of the child and the future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.
254. J.A., 561 So. 2d at 357.
255. Id. at 359-60.
256. Id. (relying upon the decision in Interest of T.D., 537 So. 2d 173 (Fla. 1st Dist. Ct. App. 1989) (holding that parental rights should not ordinarily be terminated on the basis of a temporary deficiency beyond the parent’s control)); see also Interest of R.D.D. Jr., 518 So. 2d 412 (Fla. 2d Dist. Ct. App. 1988).
258. 569 So. 2d 466 (Fla. 3d Dist. Ct. App. 1990).
259. Id. at 471.
based upon the concept of prospective neglect, the court applied both past factual information and its own projection about what would occur in the future to uphold the termination. Specifically, the appellate court found that the mother had failed to get medical care for her son, failed to provide medication, failed to adequately supervise him, failed to comply with a performance agreement, and failed to complete counseling. Additionally, the court found that the mother's psychiatric history and past behavior would create a potentially significant impairment of the child's mental and physical condition. The court concluded that the mother had deprived the child of a physically and emotionally safe environment in the past and that such deprivation would appear certain to occur in the future.

Chief Judge Schwartz dissented and, while bluntly recognizing there were serious shortcomings in the mother, concluded that there was no demonstration that the mother had forfeited parental interest as defined under the Florida termination of parental rights statute. Chief Judge Schwartz applied the same standards set out in a series of dissenting opinions written over the past several years by Judge Coward of the Fifth District Court of Appeal.

In In Interest of D.J.S., decided this past year in the First District, can itself serve as an outline of the many issues confronting the courts in matters of termination of parental rights. It is an en banc reversal of a decision which had reversed a trial court order terminat-


261. Caso, 569 So. 2d at 468.

262. Id. at 471.

263. According to the Chief Judge, "the court's opinion conclusively demonstrates in agonizing detail that [the child] would have been far better off with the mother different from the early-flawed and seriously ill woman who gave him birth." Id.

264. See Letts v. HRS, 547 So. 2d 328, 330 (Fla. 5th Dist. Ct. App. 1989); Manuel v. HRS, 537 So. 2d 1022, 1024 (Fla. 5th Dist. Ct. App. 1988); Gunter v. HRS, 531 So. 2d 345 (Fla. 5th Dist. Ct. App. 1988); Fredrick v. HRS, 523 So. 2d 1164, 1167 (Fla. 5th Dist. Ct. App.), review denied, 531 So. 2d 1353 (Fla. 1988); see also Dale, 1989 Survey, supra note 12, at 895-99 (discussing the issue of prospective neglect).

ing parental rights. The major issues concern the standard of review for the termination of parental rights, the tests for child abuse and child neglect, whether abuse and neglect can be applied prospectively, when a finding of dependency may be transferred from one child to the other, and what constitutes compliance with performance agreements under Florida law.\footnote{266}

Before analyzing the majority and minority views on these issues, it is necessary to discuss two procedural matters which appear in the opinion. First, the dissents argue that \textit{en banc} rehearing was predicated in part on the ground that this was a case of exceptional importance involving the application of the United States Supreme Court holding in \textit{Lehr v. Robinson}\footnote{267} and the Florida Supreme Court opinion in \textit{Doe v. Roe}\footnote{268}. In \textit{Lehr}, the Supreme Court held that a putative father who had not developed a substantial relationship with his child had no constitutional right to challenge his child’s adoption.\footnote{269} The Florida Supreme Court ruled similarly in \textit{Doe}. Careful reading of both the majority and minority opinions in \textit{D.J.S.} demonstrates that the issue decided in \textit{Lehr} and \textit{Doe} was not dealt with in the \textit{en banc} redetermination. There is no explanation as to why this was the case.

The second procedural issue related to the content of the record on appeal. The dissent argued that a number of documents, which it viewed to be crucial, were missing from the record.\footnote{270} Apparently missing were the performance agreements with which the department claimed the father failed to comply, prior proceedings, motions, orders and reports which the trial court judicially noticed, as well as the order of adjudication of dependency of July, 1986, reports from the guardian ad litem, and other reports. The majority concluded that these documents were not crucial to its determination.\footnote{271}

\textit{D.J.S.} involved the termination of parental rights of two children of a man who was the putative father of one child (J.S.G.) and who, while not the natural father of the second youngster (D.J.S.), raised that child for some period of time while living with the child’s mother.

\begin{footnotes}
266. \textit{Id.} at 661-69. \\
268. 543 So. 2d 741 (Fla. 1989). \\
270. \textit{D.J.S.}, 563 So. 2d at 684. \\
271. \textit{Id.} at 668 n.16.
\end{footnotes}
When D.J.S. was 18 months of age, the appellant struck the child causing physical injury. He was subsequently charged with aggravated child abuse and pleaded nolo contendere.272 Approximately 16 months after the incident, D.J.S.'s mother gave birth to J.S.G. Appellant and the mother voluntarily placed the child with HRS. Thus, J.S.G. was never in appellant's custody and D.J.S. was in his custody for a short period of time prior to the beating.273 Based upon a variety of assertions, including physical assaults, alcohol and drug abuse, incarceration, and failure to comply with performance agreements, HRS eventually sought to terminate parental rights. After a hearing with 16 witnesses over a four day period, the trial court terminated parental rights.274 On rehearing en banc, the majority held that the standard of review of a termination proceeding, is that "a trial court's determination that evidence is clear and convincing will not be overturned unless it may be said as a matter of law that no one would reasonably find such evidence to be clear and convincing."275 The appellate court noted that it is not a matter of de novo review but rather, whether the decision is clearly erroneous or lacking in evidentiary support.276

On the matter of child abuse, the issue was whether the proven criminal offense against D.J.S. could be used to support evidence of child abuse and subsequently a termination of parental rights as to J.S.G. The majority opinion, relying upon a series of majority opinions in other cases, concluded that it could.277 The court further held that the evidence of abuse as to one child could be used together with other evidence to predict abuse against the other child, in other words employing the tests of transferred intent and prospective neglect.278 The majority held that the battery of the child was not an isolated act and that the law did not require the child to continue to be at risk. As the majority rhetorically put it, "'how much more should this child be forced to endure?'... That question and response, 'no more,' fits here

272. Id. at 658.
273. Id. at 657-58.
274. Id. at 659.
276. Id. at 662 (citing The Florida Bar v. Hooper, 509 So. 2d 289, 290-91 (Fla. 1987)).
277. Id. at 663 (citing Interest of W.D.N., 443 So. 2d 493 (Fla. 2d Dist. Ct. App. 1984)).
278. Id. (citing the various cases discussed earlier in this survey article); see supra note 260.
as well."

On the issue of child neglect, the court held that despite the fact that the father never had legal or actual custody of the child he fathered, he could nonetheless be held accountable for neglect because a duty is imposed upon him regardless of the child's circumstances. The appellate court recognized that the appellant had made some efforts on behalf of the children, but concluded that the trial court was in the best position to determine whether the concern was genuine.

The court next ruled on the performance agreement. It held first, as have other courts, that failure to comply with the performance agreement cannot be the sole basis for a ruling terminating parental rights. However, it recognized that failure to comply can be considered as one of a number of factors. Taken together with other evidence, it found that the lack of compliance was an element to be considered in terminating parental rights. The majority found that under Florida law when there is no prospect that the parent can ever assume parental responsibilities, it is appropriate to terminate parental rights.

The dissent disagreed vigorously about the facts in a detailed opinion. Its stated purpose was to demonstrate that the evidence was legally insufficient. Therefore, in its view there was no question of exceptional importance to allow an en banc review. On the issue of abuse, the dissent argued that the single episode of child abuse involving the child D.J.S. and persistent aggressive and violent action toward the mother, were not sufficient to prove that the father had abused J.S.G. and that he was likely to abuse him in the future. According to the dissent, the facts of this case did not match those of other cases where abuse of one child could be transferred to another. On the issue of neglect, the dissent again disagreed with the majority over the facts. The dissent argued that the father did what he should have under the circumstances to protect his children by contacting HRS. The dis-

279. *Id.* at 664 (citing J.M. v. HRS, 479 So. 2d 826, 828 (Fla. 2d Dist. Ct. App. 1985)).
280. *D.J.S.*, 563 So. 2d at 667.
281. *Id.* at 668 (citing Interest of P.A.D., 498 So. 2d 1342 (Fla. 1st Dist. Ct. App. 1986)).
282. *Id.* at 669-70 (citing FLA. STAT. § 409.168(1)(a) (Supp. 1986).
283. *Id.* at 672-81 (Zehmer, J., dissenting).
284. *Id.* at 686.
286. *Id.* at 688.
287. *Id.*
288. *Id.*
sent agreed that the father's failure to comply with the performance agreement cannot be the sole ground to terminate parental rights.\(^{289}\) It concluded that because the performance agreements were not before it, it was impossible to rule on this issue.\(^{290}\) Further, it concluded that the performance agreements were invalid because neither contemplated return of the child to the father's custody as, according to the dissent, Florida law requires.\(^{291}\)

At the heart of the dissent, and apparently independent of its view of the facts and impact of the decision on the individual parties, is its belief that the majority opinion sets bad legal precedent. "The extraordinary length of this dissent alone serves to convey my deep concern that the \textit{en banc} decision will be allowed to stand as bad legal precedent for seriously relaxing, if not judicially overriding, important statutory requirements governing the termination of parental rights."\(^{292}\)

It is not as clear that the majority misinterpreted the law as it is that it applied the law differently to the facts than did the dissent. However, it does seem odd that the case was heard \textit{en banc} in light of the fact that the issue raised in \textit{Lehr v. Robinson} was never discussed in the opinion. The last dissent, that of Judge Barfield, which expresses this view, was never rebutted by the majority.\(^{293}\)

V. CONCLUSION

It remains to be seen what impact the new Justice Reform Act of 1990 will have on delinquency matters in Florida's courts. The state's current fiscal problems will make it more difficult to judge the impact of the law in the near term. Independent of the new statute, the appellate courts continue to chide the trial courts for failure to comply with

\(^{289}\) \textit{Id.} at 689.
\(^{290}\) \textit{D.J.S.}, 563 So. 2d at 689.
\(^{291}\) \textit{Id.} at 690 (describing the statutory provisions in detail).
\(^{292}\) \textit{Id.} at 699.
\(^{293}\) \textit{Id.} at 700. According to Judge Barfield:

No where in the majority opinion is there a statement of the issue of exceptional importance upon which this case was considered \textit{en banc}. Reference is made to the order of supplemental briefing which suggested that the court was concerned about the application of \textit{[Lehr v. Robinson]}, but no suggestion is made that this court passed upon this matter \textit{en banc}. Of course, it could not be because no issue of abandonment was ever present and none could be created.

\textit{Id.}
rudimentary statutory obligations. Undoubtedly, these appellate lectures will continue under the new law.

On the dependency side, in addition to expressing similar concerns about obvious failures to comply with statutory authority, the appellate courts continue to express concern about the right to counsel provided by statute to parents in termination cases. Most of the intermediate appellate courts approve of the doctrine of prospective neglect, although the subject awaits full resolution by the Florida Supreme Court.