
Michael J. Dale*
Abstract

"We have no defense...We are not following our own law, our own rules, our own regulations."

KEYWORDS: right, counsel, waivers
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I. INTRODUCTION

"We have no defense... We are not following our own law, our own
rules, our own regulations." The speaker was Governor Lawton Chiles
explaining why in the spring of 1992 he had agreed to the settlement of

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tance in the preparation of the article.

1. Tim Nickens, Legislature's Choice: Fix HRS or the Feds Will, MIAMI HERALD, June
1, 1992, at 1B (quoting Governor Lawton Chiles).
several lawsuits charging the State of Florida with inadequacies in foster care, institutional care, and therapeutic services in its child welfare and juvenile justice systems.\(^2\)

The fiscal battle over funding Florida’s juvenile justice and child welfare systems is now being fought both in the courts and in the state legislature. Responding to the lawsuits, the governor requested funding from the legislature to solve what have been described repeatedly over a number of years as serious and ongoing problems.\(^3\) The legislature responded only in part to the suits during a special legislative session in the spring of 1992 appropriating $208 million for child welfare, $176.4 million for juvenile justice, and $11.7 million for children and families in need of services.\(^4\) It remains to be seen whether the funding will prove to be adequate.

Meanwhile, the state appellate courts were quite active in responding to the needs of Florida’s children. Florida’s Supreme Court made several significant rulings. It approved a plan to institute a family court system, limited the use of contempt against juveniles, and decided several cases involving the separation of powers doctrine. In addition, the intermediate appellate courts continued a two-fold tradition. First, they maintained a high level of activism to appeals involving interpretations of Chapter 39. Second, they continued their long standing policy of holding trial courts accountable for strict compliance with the statutory mandates of Chapter 39.

After a brief discussion of the funding situation and the systemic lawsuits which produced the executive and legislative responses, this article reviews the caselaw of the past year.\(^5\) It focuses on substantive and procedural matters in the delinquency, dependency, and termination of parental rights areas. Finally, it discusses the first reported appellate case involving Part IV of the Juvenile Code relating to children and families in need of supervision (CINS/FINS) which was enacted with virtually no funding five years ago.

II. SYSTEMIC LITIGATION

Four separate lawsuits formed the backdrop for the special spring 1992 legislative session which addressed funding for the state’s child welfare and juvenile justice systems. The first case, *Bobby M. v. Chiles*,\(^6\) is a long-standing federal court civil rights class action which resulted in a settlement agreement by consent decree in the spring of 1987. The agreement authorized substantial changes in the state’s training schools and other programs for adjudicated delinquents. For five years, under the supervision of a court monitor negotiations went on to develop a continuum of services for delinquent children. A supplemental agreement establishing the continuum was ironed out in January 1992.\(^7\) As of this writing, the legislature has only funded a portion of the agreement.

The second case, *E.M. v. Martinez*\(^8\) was also a section 1983 class action civil rights lawsuit. It challenged the failure of the state of Florida to provide therapeutic treatment to emotionally disturbed and developmentally handicapped children in state custody. In this lawsuit, the plaintiffs asserted that the state failed to provide appropriate treatment and forced youngsters to wait for therapeutic services to become available in appropriate placements which worsened their mental and emotional conditions. The lawsuit was based upon claimed violations of Title 4 of the Social Security Act,\(^4\) section 504 of the Rehabilitation Act of 1973,\(^5\) section 6403 of the Omnibus Budget Reconciliation Act of 1989,\(^6\) and the Fourteenth Amendment. Plaintiffs sought an injunction direction the state to implement a plan which would immediately guarantee that the children received the out-of-

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3. Pat Wiegert & Eloise Salboto, Irreconcilable Differences, NEWSWEEK, Sept. 21, 1992, at 84 (Florida is in the top third of the states in per capita income. However, because it has no state income tax, it is in the very bottom in social spending for children. Additionally, there are 11,300 wards of the state, two-thirds of whom have been in foster care longer than 18 months).
4. Telephone Interview with Casey Morton, State Office of Planning and Budget (Oct. 13, 1992) (Ronald Stroud, Interviewer). These figures are a composite of various line items in Florida’s fiscal 1992 state budget. (July 1, 1992 - June 30, 1993). The $11.7 million for CINS/FINS are disbursed by contract to Florida Network of Youth and Family Services, a coalition of the private service providers which also receives federal grants.
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several lawsuits charging the State of Florida with inadequacies in foster care, institutional care, and therapeutic services in its child welfare and juvenile justice systems. The fiscal battle over funding Florida’s juvenile justice and child welfare systems is now being fought both in the courts and in the state legislature. Responding to the lawsuits, the governor requested funding from the legislature to solve what has been described repeatedly over a number of years as serious and ongoing problems. The legislature responded not only in part to the suits during a special legislative session in the spring of 1992 appropriating $208 million for child welfare, $176.4 million for juvenile justice, and $11.7 million for children and families in need of services. It remains to be seen whether the funding will prove to be adequate.

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home therapeutic services they needed. An interim settlement was worked out in that case.

The third and fourth lawsuits are companion cases. Chiles v. Children is a state court action which attempted to stop dramatic reductions in child welfare programming resulting from Florida's budget shortfall. The suit sought declaratory and injunctive relief against the governor and other state officials to hold sections 216.011(1)(II) and 216.221 of the Florida

13. 589 So. 2d 260 (1991); see supra note 3, at 84 n.1 (discussing the litigation).
14. Section 216.011(1)(II) of the Florida Statutes provides:

   (I) For the purpose of fiscal affairs of the state, appropriations acts, legislative budgets, and approved budgets, each of the following terms has the meaning indicated:

   (II) "State agency" or "agency" means any official, officer, commissioner, board, council, committee, or department of the executive branch, or the judicial branch, as herein defined, of state government.


Section 216.221 provides:

   (1) All appropriations shall be maximum appropriations, based upon the collection of sufficient revenues to meet and provide for such appropriations. It is the duty of the Governor, as chief budget officer, to ensure that revenues collected will be sufficient to meet the appropriations and that no deficit occurs in any state fund.

   (2) If, in the opinion of the Governor, after consultation with the revenue estimating conference a deficit will occur in the General Revenue Fund, he shall certify to the commission. The commission may, by affirmative action, reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund. However, notwithstanding the provisions of s. 215.16(2), the commission shall implement any provision or priority provided in the General Appropriations Act related to this section as a method for eliminating the deficit in the General Revenue Fund. In the absence of any direction by the Legislature in the General Appropriations Act, the commission, pursuant to the provisions of s. 14.202, may reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund or may authorize the use of the Working Capital Fund.

   (3) The Comptroller also has the duty to ensure that revenues collected will be sufficient to meet the appropriations and that no deficit occurs in any fund of the state.

   (4) If, in the opinion of the Comptroller, after consultation with the revenue estimating conference, a deficit will occur, he shall report his opinion to the Governor in writing. In the event the Governor does not certify a deficit within 10 days form the Comptroller's report or in the event the commission does not act within 10 days from certification of a deficit by the Governor as provided by subsection (1), the Comptroller shall report his findings and opinion to the commission. The commission may, by majority vote, take sufficient action to ensure that no deficit will occur. In eliminating the deficit, the actions of the commission are limited to those provided in subsection (2).

   (5) Any action taken pursuant to this section shall be reported to the legislative appropriations committees, and the committees may advise the Governor, the Comptroller, or the commission concerning such action.

   (6) Once a deficit is determined to have occurred and action is taken to reduce approved operating budgets and release authority, no action may be taken by the commission to restore the reductions.

FLA. STAT. § 216.221 (1989).

17. Children, 589 So. 2d at 262.
18. Id. at 263.
19. Id. at 266.
home therapeutic services they needed. An interim settlement was worked out in that case.

The third and fourth lawsuits are companion cases. *Chiles v. Children* is a state court action which attempted to stop dramatic reductions in child welfare programming resulting from Florida's budget shortfall. The suit sought declaratory and injunctive relief against the governor and other state officials to hold sections 216.011(1)(l) and 216.221 of the Florida Statutes unconstitutional. It also sought to enjoin the executive office of the governor (which is comprised of governor and cabinet), also known as the Administration Commission, from restructuring the 1991 Appropriations Act.

The companion case, *Children v. Chiles*, was filed in 1990 in federal court against state officials seeking to compel them to operate the foster care system in compliance with appropriate laws so that children did not spend excessive time in foster care placement, that appropriate group homes and licensed foster homes be made available, and that timely proceedings were initiated for termination of parental rights. The plaintiffs and the defendant state officials agreed to a stipulation in January 1992 staying litigation pending the voluntary implementation of a state plan entitled "Building Futures for Florida's Children," including good faith effort by the Governor and Secretary of HRS to pursue appropriate funding.

The state court litigation came about as a result of the decision by the governor to have all state agencies reduce operating budgets in light of the unexpected short-fall in the fiscal 1991 budget. The two sections of the statute in issue provide the governor with discretionary authority to appropriate the state budget. The key issue in the case was whether the legislature violated the separation of powers doctrine by passing legislation which gives the Governor discretion to reapportion the budget. The Florida Supreme Court held that the delegation of authority to the executive branch under section 216.221 was unconstitutional. Thus, the legislature could not vest authority in the governor to redraft the appropriation bill once by subsection (1), the Comptroller shall report his findings and opinion to the commission. The commission may, by majority vote, take sufficient action to ensure that no deficit will occur. In eliminating the deficit, the actions of the commission are limited to those provided in subsection (2).

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17. Children, 589 So. 2d at 262.

18. Id at 283.

19. Id at 266.
it passed the legislature. It remained for the legislature to reduce appropriations or raise revenues to satisfy appropriations necessary to run the government. 20 The court further held that section 216.011(1)(l) was unconstitutional by including the judiciary within the term "state agencies" who were directed to reduce their budgets. 22 Thus, the court ruled that any portion of Chapter 216 which subjected the judicial branch to executive oversight were also unconstitutional. 23 The result of the Chiles litigation was to send the entire issue of funding children's programs back to the legislature.

The lower appellate courts have come to a similar conclusion about adequate funding of children's services, albeit in individual cases. For example, in Department Health and Rehabilitative Services v. State 24 the issue was whether a trial court could hold the Department of Health and Rehabilitative Services (HRS) in contempt for failure to place a child in an appropriate child care facility and for failure to assume financial responsibility for the child. Citing earlier appellate opinions, the Fifth District Court of Appeal, 25 said:

While we share the frustration of the trial court, we also recognize that the solution to these funding problems is legislative in nature, not judicial. We have held that it is not the judiciary's role to revise legislative appropriations or to interfere with an agency's discretionary budgetary decisions. 26

The combination of the Chiles opinion, the intermediate appellate court opinions in H.R.S. v. State, and earlier cases raises an interesting and indeed perplexing problem. The cases suggest on the one hand that the judiciary may not override legislative appropriations and executive department discretionary budgetary decisions to dictate placement of children and payment for services in the juvenile and child welfare systems. On the other hand, Chiles teaches that it is unconstitutional for the legislature to pass on to the executive department appropriations decisions. What legal remedy then remains to force the legislature to appropriate funds adequate to support statutorily enacted programs for children. And furthermore, does this conundrum leave the legislature and executive branches subject to claims of violations of civil rights by children whose liberty has been denied them based upon a promise of services? 27

A separate but equally important issue before the Florida Supreme Court involved a plan to develop family courts. In re Report of the Commission on Family Courts, 28 is a late 1991 opinion accepting recommendations of the Commission on Family Courts to develop a family court division of the circuit court. 29 The Commission, which was established by the legislature in 1990, 30 was authorized to draft guidelines and recommendations for the development of a family law division and support services. Significantly, the recommendations included a suggestion that each circuit consider inclusion of dependency and juvenile delinquency matters at least for administrative purposes within the division. 31 The Florida Bar Commission for Children and the Governor's Constituency for Children had proposed full inclusion of substantive juvenile delinquency and dependency jurisdiction. 32 The Commission only urged that each circuit consider inclusion for administrative purposes. 33 The court approved the recommendations holding that:

Each judicial circuit should develop a local rule establishing a family division in its circuit or a means to coordinate family law matters that affect one family if the circuit or part of the circuit is of such a limited size that it is unable to administratively justify such a division, and

20. Id. at 267.
21. Id. at 265.
22. Children, 589 So. 2d at 268.
23. Id.
24. 593 So. 2d 328 (Fla. 5th Dist. Ct. App. 1992).
25. See Department of Health & Rehab Serv. v. V.L., 583 So. 2d 765 (Fla. 5th Dist. Ct. App. 1991); review denied, 591 So. 2d 185 (Fla. 1991) (citing State Dep't of Health & Rehabilitative Serv. v. Brooke, 575 So. 2d 363 (Fla. 1st Dist. Ct. App. 1991)); see also In re J.C., 548 So. 2d 1161 (Fla. 2d Dist. Ct. App. 1989); 1989 Survey, supra note 5, at 81-83.
26. 593 So. 2d at 328.
29. Id. at 586; see also Court Guide to the Creation of Family Court Plans, Fla. BAR NEWS, Oct. 1991, at 18 (discussing the opinion); Daniel Neil Helfer, A Separate Family Court Would be in Public's Worst Interest, MIAMI HERALD, Apr. 24, 1991, at 19A (discussing opposition to the development of a family court in Dade County based in part on a three year study ending in January 1981, and focusing on matrimonial but not juvenile matters); Donna Gehlke & Peggy Rogers, Divorce Court Speaks Dade Debate, MIAMI HERALD, Apr. 28, 1991, at 13 (discussing the debate over a family court in the context of matrimonial matters).
32. Id. at 588.
33. Id. at 590.
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32. Id. at 586.
33. Id at 590.
II. DELINQUENCY

A. Constitutional Issues

1. Right to Counsel

Twenty-five years ago the United States Supreme Court applied the Fourteenth Amendment due process rights to juveniles in In re Gault when it held that a child had a right to counsel, notice and an opportunity to be heard and other protections in a delinquency case. Subsequently, the Supreme Court applied most but not all constitutional rights applicable to adult defendants to the juvenile delinquency setting. The guiding principle in Gault was the right to counsel. Yet, after a quarter of a century, Florida's appellate courts continue to rule on issues of the trial court's denial of the right of counsel to children in delinquency cases.

J.G. v. State, is a typical case. The child appealed from an order adjudicating him delinquent for violation of community control, failure to pay restitution to the victim of an auto theft, and commission to HRS custody. The child alleged that an unrepresented was no contest plea to the charges where there had only been a short time to confer with the public defender who had been assigned to the courtroom, constituted denial of the due process right to counsel. The Fourth District Court of Appeal agreed. It held that the right to counsel is guaranteed in Article I, section 16 of the Florida Constitution as well as in the United States Constitution. It found that the child's actions in entering the plea may have been coerced given the courtroom setting. Therefore, the brief colloquy with the public defender was deemed inadequate because it was not meaningful.

J.G. leaves unresolved the question of when counsel ought to first consult with prospective client children in delinquency cases. In some jurisdictions the public defender cannot talk with the child in advance of the actual formal arraignment proceeding when counsel is assigned. In parts of Florida, as in other jurisdictions such as New York, the Office of the Public Defender actually interviews children at the courthouse before the formal appearance. In other parts of Florida, there is absolutely no discussion between the public defender and the child until after the court analyzes the child's status and offers the child the opportunity to plead to the charge.

A rather disturbing denial of counsel case is N.E.R. v. State. In a per curiam opinion, the Second District Court of Appeal reversed a delinquency adjudication and a commitment to HRS on the ground that the child had requested counsel, had never expressly waived the right at any stage of the proceedings, and yet was only first appointed counsel on the appeal. The rule in Florida clearly sets forth that a child is entitled to counsel as of right at every stage of the proceeding. It is unclear why no notice of the right to counsel was given at any of the appropriate stages at the trial level. The court of appeal reversed.

The requirement that a child's waiver of counsel be knowing, voluntary, and intelligently made was before the appellate courts again in In re J.M. J.M., a fourteen year-old, had been charged with the theft of a bicycle with a value of less than $300, a petit theft. He entered a plea

34. Id. at 591.
35. Id.; see also Joe Kolvin, County Commissioners Oppose Family Court Proposal, Ft. LAUDERDALE SUN SENTINEL, May 26, 1991, at 7B (reporting on opposition in Broward County). Implementation of the divisions began in January 1992. See also New Court Division to Deal Exclusively with Families, MIAMI HERALD, Dec. 1, 1991, at 3B.
37. Id. at 35-35.
40. Id.
41. Id. at 257.
42. Id. at 258.
43. Id.
44. 588 So. 2d 289 (Fla. 2d Dist. Ct. App. 1991).
45. Id.
50. Id. at 605.
direct that such a local rule be filed with this Court on or before January 6, 1992. 34

The court also recognized the financial difficulties involved in developing family courts and thus asked each circuit to develop a plan in accordance with available local resources. 35

II. DELINQUENCY

A. Constitutional Issues

1. Right to Counsel

Twenty-five years ago the United States Supreme Court applied fourteenth amendment due process rights to juveniles in In re Gault 36 when it held that a child had a right to counsel, notice and an opportunity to be heard and other protections in a delinquency case. 37 Subsequently, the Supreme Court applied most but not all constitutional rights applicable to adult defendants to the juvenile delinquency setting. 38 The guiding principle in Gault was the right to counsel. Yet, after a quarter of a century, Florida's appellate courts continue to rule on issues of the trial courts' denial of the right of counsel to children in delinquency cases.

J.G. v. State, 39 is a typical case. The child appealed from an order adjudicating him delinquent for violation of community control, failure to pay restitution to the victim of an auto theft, and commission to HRS custody. The child alleged that an unconsented no contest plea to the charges where there had only been a short time to confer with the public defender who had been assigned to the courtroom, constituted denial of the due process right to counsel. 40 The Fourth District Court of Appeal agreed. It held that the right to counsel is guaranteed in Article I, section 16 of the Florida Constitution as well as in the United States Constitution. 41 It found that the child's actions in entering the plea may have been coerced given the courtroom setting. 42 Therefore, the brief colloquy with the public defender was deemed inadequate because it was not meaningful. 43 J.G. leaves unresolved the question of when counsel ought to first consult with prospective child clients in delinquency cases. In some jurisdictions the public defender cannot talk with the child in advance of the actual formal arraignment proceeding when counsel is assigned. In parts of Florida, as in other jurisdictions such as New York, the Office of the Public Defender actually interviews children at the courthouse before the formal appearance. In other parts of Florida, there is absolutely no discussion between the public defender and the child until after the court analyzes the child's status and offers the child the opportunity to plead to the charge.

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34. Id. at 591.
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37. Id. at 33-55.
40. Id.
41. Id. at 257.
42. Id. at 258.
43. Id.
44. 588 So. 2d 289 (Fla. 2d Dist. Ct. App. 1991).
45. Id.
48. N.E.R., 588 So. 2d at 289.
49. Id. at 257.
50. Id. at 258.
51. Id.
of no contest at the arraignment, and at the subsequent disposition and restitution hearing, the court asked him whether he had a lawyer to represent him. When the child said "no," the court stated:

Okay. You have the right to have an attorney represent you at this point in time for the hearing and your disposition and if you can't afford one you can have one appointed free. Do you want to have a lawyer with you?

Appellant: No, sir. 50

There was no further colloquy.

The appellate court held that the discussion was "insufficient for the court to make a proper determination regarding appellant's ability to appreciate his rights and the consequences of waiving legal representation." 51 The court explained, as the appellate courts have regularly held in Florida, 52 that the inquiry must be at least equal to that given to an adult, that the court should be even more cautious when taking a waiver from a child, and that in fact even when a waiver is accepted at one stage of a proceeding, the court must renew the offer of counsel at each subsequent stage. 53

Finally, in In re J.H., 54 the Supreme Court cleared up a problem concerning the representation of indigent children by certified law students which had been creating problems in the past. 55 The court dealt with the problem by amending rule 11-1.2(a) of the Rules Regulating The Florida Bar. The rule continues to allow eligible law student interns to appear in court if the client indicates in writing that he or she consents and a supervising attorney also approves the appearance. 56 The court changed the supervision, however. Previously, the supervising attorney would be present only when required by the court. 57 Now, when the client is

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50. Id.
51. Id.
54. 396 So. 2d 453 (Fla. 1982).
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57. Id. at 454.
58. Id.
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Appellant: No, sir. 50

There was no further colloquy.

The appellate court held that the discussion was "insufficient for the court to make a proper determination regarding appellant's ability to appreciate his rights and the consequence of waiving legal representation." 51 The court explained, as the appellate courts have regularly held in Florida, 52 that the inquiry must be at least equal to that given to an adult; that the court should be even more cautious when taking a waiver from a child, and that in fact even when a waiver is accepted at one stage of a proceeding, the court must renew the offer of counsel at each subsequent stage. 53

Finally, in In re J.H., 54 the Supreme Court cleared up a problem concerning the representation of indigent children by certified law students which had been creating problems in the past. 55 The court dealt with the problem by amending rule 11.1.2(a) of the Rules Regulating The Florida Bar. The rule continues to allow eligible law student interns to appear in court if the client indicates in writing that he or she consents and a supervising attorney also approves the appearance. 56 The court charged the supervision, however. Previously, the supervising attorney would provide only when required by the court. 57 Now, when the client is indigent and has the right to appointed counsel in a delinquency case, the supervising attorney shall be personally present at all critical stages of the case. 58 In addition, the supervising attorney shall also be personally present when requested by the court. 59

2. Double Jeopardy

Almost twenty years ago, the United States Supreme Court held in Breed v. Jones, 60 that the equivalent of the Sixth Amendment right to protection against double jeopardy applied to juveniles through the Fourteenth Amendment procedural due process clause. The issue arose recently in R.M. v. State. 61 The facts in the R.M. case dictated the outcome that there had been no double jeopardy violation. R.M. and a second youngster were tried together. During the course of the trial, a mistrial was granted although it was not clear whether it went to the co-defendant or both juveniles. Only minutes later, both youngsters appeared before a second judge. When the first judge arrived in the second judge's courtroom, the first judge agreed to immediately complete R.M.'s trial, and R.M. was found to have committed the charged acts. The appellate court found no double jeopardy problem, concluding that there was but one trial. In a non-jury trial, jeopardy attaches when the judge begins to hear evidence. 62 Without referring to the Breed v. Jones opinion, the appellate court appears to have applied the Florida constitutional protection in Article I, section 9 against double jeopardy to the child, albeit finding no violation in the case at bar. 63

3. Waiver Hearings

A case in which due process interests were involved, although never mentioned by the appellate court, was Iglesias v. State. 64 The issue was whether after a waiver hearing in the juvenile court on a charge of vehicular homicide, a third degree felony, a child could be processed as an adult on charges of two counts of manslaughter. 65 The child argued that the criminal division of the circuit court lacked jurisdiction to try him as an

50. Id.
51. Id.
54. 596 So. 2d 453 (Fla. 1992).
56. Id. at 454.
57. Id.
adult on the manslaughter charge, a second degree felony, because the waiver proceeding under Chapter 39 only vested jurisdiction in the adult court to try him on the third degree felony of vehicular homicide. In a brief per curiam opinion, the Third District held that the juvenile court did not have authority to tell the State what charge to file, that the manslaughter charge included the lesser included offense of vehicular homicide, and that the sentence imposed would be less or the same as that of vehicular manslaughter with the result that the error would be harmless. Judge Baskin concurred on the ground that the state attorney had the ability to file an information charging the child with manslaughter which obviated the need for a waiver by the juvenile division.

The problem with the court's reasoning, including that of the concurrence, is that the outcome appears to run roughshod over the waiver statute. It is true that under Florida law the prosecutor has the choice, under certain circumstances, to either seek transfer of the child through a waiver hearing or to file directly against the child in adult court. There are public policy reasons for giving the prosecutor the choice to seek a waiver through a court hearing as opposed to filing against the child directly in adult court. For example, it may be that the prosecutor wants judicial approval that the child not be treated as a juvenile. Once the prosecutor makes the choice to use the waiver procedure in juvenile court, due process dictates that the system be fair and that the child not be charged as an adult with a separate offense. Such a process would negate the statutory purpose of the waiver hearing enacted by the legislature.

4. Speedy Trial

The constitutional right to a speedy trial in an adult criminal case finds its genesis in the Sixth Amendment. Although the United States Supreme Court held in In re Gault that not all of the constitutional requirements that protect adults in criminal proceedings apply to juveniles in delinquency cases, the Court did recognize in Gault, and later cases, that the due process clause of the Fourteenth Amendment guarantees most of the rights afforded adults to children charged with acts of juvenile delinquency. The question of a child's constitutional right to a speedy trial came before the Florida Supreme Court this past year in R.J.A. v. Foster. Significantly, the supreme court never addressed the application of Fourteenth Amendment rights to juveniles in R.J.A. Rather, it uncritically relied on the Sixth Amendment analysis contained in the United States Supreme Court opinion in Barker v. Wingo. The specific issue was whether the legislature by enacting section 39.048 which gave juveniles an absolute right to be tried within ninety days, overruled the Supreme Court's speedy trial rule which allowed the state an additional ten day window to try cases that did not come within the ninety day period. In a 4-3 opinion by Justice Overton, the court upheld its own rule.

First, the court held that it had the right to adopt speedy trial time periods as procedural rules. If its rule were substantive, the Court explained, it would violate the separation of powers doctrine. In order to demonstrate that its rule was procedural and not substantive, the majority relied upon Barker v. Wingo. In Wingo, the United States Supreme Court held that while the right to a speedy trial is a matter of constitutional entitlement involving the defendant's right to a fair procedure, the right has an "amorphous quality" to it. Thus, there is no bright line rule governing when the violation occurs. The court has discretion to evaluate when the violation occurs. In fact, the Florida Supreme Court rejected a specific time

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66. Id.
67. Id.
71. 603 So. 2d 1167 (Fla. 1992).
73. R.J.A., 603 So. 2d at 1167.
74. Id. Section 39.048(7)(e) of the Florida Statutes provides in relevant part:
   If a petition has been filed alleging that a child has committed a delinquent act or violation of law, and no demand for speedy trial has been made pursuant to paragraph (d), the adjudicatory hearing on the petition must be commenced within 90 days after the earlier of:
   (1) The date the child is taken into custody; or
   (2) The date the petition was filed.
   However, Florida Rule of Juvenile Procedure 8.090(c) "contains a 10-day savings window." R.J.A., 603 So. 2d at 1169; see FLA. R. JUV. P. 8.090(j). In a case interpreting Juvenile Rule of Civil Procedure 8.180, which was the predecessor to Rule 8.090, the Third District Court of Appeal held that the motion to extend the period allowed by the rule to bring a child to an adjudicatory hearing on a showing of good cause must be made before the speedy trial time period has expired and a motion for discharge has been filed. The court made its ruling by analogizing to the criminal law context. See J.T. v. State, 601 So. 2d 283, 284 (Fla. 3d Dist. Ct. App. 1992).
76. Id. at 522.
adult on the manslaughter charge, a second degree felony, because the waiver proceeding under Chapter 39 only vested jurisdiction in the adult court to try him on the third degree felony of vehicular homicide. In a very brief per curiam opinion, the Third District held that the juvenile court did not have authority to tell the State what charge to file, that the manslaughter charge included the lesser included offense of vehicular homicide, and that the sentence imposed would be less or the same as that of vehicular manslaughter with the result that the error would be harmless. Judge Baskin concurred on the ground that the State attorney had the ability to file an information charging the child with manslaughter which obviated the need for a waiver by the juvenile division.

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The two dissents rejected each of these assertions. Justice Barkett concluded that the statutory authority was substantive in nature and therefore, superseded the court's rule making authority. In her opinion, the legislature specifically delineated individual rights in section 39.048(7) making the law substantive. In his dissent, Justice Kogan made the additional arguments that first, a liberty interest was involved and as such the rule of statutory construction is one of strict construction. Second, he viewed the statute as clearly substantive in nature in that it "creates, defines, and regulates rights, including those rules and principles that fix and declare the primary rights of individuals with respect to their persons and property." His argument amplified the position of Justice Barkett.

B. Detention Issues

As previous survey articles in this law review have discussed, Florida has changed its approach to juvenile detention several times over the last ten years. The legislature's current approach to detention, and most specifically secure detention, is to narrowly define its use.

77. R.J.A., 603 So. 2d at 1171-72. 82. R.J.A., 603 So. 2d at 1174.
78. Id. at 1171; see also Fla. CONST. art. II, § 3. 83. Id. (citing Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991)).
79. Id. 84. See supra note 5.
80. Id. 85. See supra note 5.
81. Id. at 1172. 86. See Fla. STAT. § 39.042-044(2) (1991); see also Department of Health & Rehabilitative Servs. v. State, 599 So. 2d 123, 124 (Fla. 5th Dist. Ct. App. 1992), A.A. v.

Despite the legislature's effort, large numbers of children remain in secure detention in Florida under conditions which in many instances may be unconstitutional. An example of this problem is found in a recent Fifth District Court of Appeal case, H.R.S. v. State. In H.R.S., the HRS brought a series of seven writs of certiorari brought by HRS in an effort to reverse lower court orders which had placed juveniles in detention in Orlando. HRS complained that the statutory detention Risk Assessment Instrument (RAI) did not provide for detention under the facts of each case. The appellate court ultimately held that HRS failed to establish that the lower court orders departed from the RAI statutory provisions, that HRS correctly scored the juveniles under the statute, that HRS failed to provide a record to support the writs, and that HRS may not even have had requisite standing to seek certiorari. For all those reasons, the writs were denied. However, in coming to its conclusion, the court discussed the fact that Orlando had the state's highest number of dependent children placed in secure detention for contempt and the second highest home and non-secure caseloads in the state. Further, the regional detention center was reported to be the most overcrowded center in the state at 150 percent of capacity with 122 assaults in 1991 and 6,390 hours of unbudgeted overtime.

Two specific issues were before the court in H.R.S. v. State. The first was whether a juvenile who has had an adjudicatory hearing and has been placed on community control (Florida's term for probation) can be placed in secure detention when the new offense constitutes the violation of community control does not meet one of the predicate criteria for detention.

Rolle, 17 Fla. L. Weekly S561, S564 n.9 (1992) (referring to a quarterly report of the Annie E. Casey Foundation describing the deleterious effects of secure detention on children.


86. See State of Florida Office of the Auditor General, Performance Audit of the Secure Detention Program (Aug. 13, 1991) (in which the initial finding was that "the secure detention program has experienced several operational problems in recent years, including chronic overcrowding, escapes and violent incidents involving detained youth, delays in obtaining court hearings and placement for juveniles, and staff high turnover and overtime exposure"); see also In re G.C. v. Coler et al., No. 87-6220-CIV-Gonzalez (S.D. Fla.) (memorandum dated Jan. 27, 1989, involving conditions in the Broward County Regional Juvenile Detention Center); Michael J. Dale & Carl Sanetti, Litigation as an Instrument for Change in Juvenile Detention: A Case Study, 39 CRIME & DELinqu. 49 (Jan. 1993) (discussing the Broward litigation).

87. 599 So. 2d 123 (Fla. 5th Dist. Ct. App. 1992).
88. Id.
89. See supra note 5.
90. H.R.S., 599 So. 2d at 127.
91. Id. at 124.
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The entire area of contempt and the use of secure detention to enforce the contempt power of the juvenile court subsequently came before the Florida Supreme Court in the case of A.A. v. Rolle.61 At issue was the extent of the court's contempt power over dependent children, status offenders and delinquents. In an opinion by Justice Barkett with Justice Harding concurring and Justice Overton dissenting, the court limited the use of contempt. It held that the legislature precluded the use of secure detention facilities to hold juveniles for contempt, and that the legislature in fact had such limiting power.62 The court actually reviewed six consolidated cases going back to 1990 involving a conflict among the districts over the extent of contempt power over juveniles,63 and specifically, overruled 90 earlier decisions in A.O. v. State,64 and R.M.P. v. Jones.65

The court's decision is statutory in nature. It spent little time discussing the underlying constitutional separation of powers question. While it recognized that the court has inherent power to make a finding of contempt, without further explanation it held that "[i]t is beyond question that the legislature has the power to determine how and to what extent the courts may punish criminal conduct, including contempt."66 It never discussed the source of this power and its relationship to the separation of powers doctrine.

The court then undertook a detailed examination of statutory changes enacted by the Florida Legislature which it found prohibited the use of secure detention to punish delinquent children.67 In 1990, the court explained, the legislature revisited Chapter 39 and specified that dependent children could not be placed in secure detention either.68 Under both statutes, secure detention was defined as a secure detention center or facility.69

The court also rejected an argument made earlier in L.M. v. State70 that a separate change in the 1990 statute specifically allowed for placement of contemptuous juveniles in secure detention. L.M. had relied upon section 39.044(10) which provides for due process protections to a child who might be placed in detention for contempt of court including the right to counsel.71 The supreme court said one could not infer from this section of the law that secure detention for contempt was permissible under Chapter 39. Rather, the supreme court said, the due process language in the 1990 amendment was aimed at protecting a child against any such restriction on his or her liberty. Thus, due process protections would apply to a placement in any kind of detention, albeit home, non-secure or secure. The court concluded that the purpose of the amendment was to "afford basic 39.044(10) (1990) allowed for the placement of contemptuous juveniles in secure detention). 90. 456 So. 2d 1173, 1175 (Fla. 1984). 91. 419 So. 2d 618, 620 (Fla. 1982). For a discussion of these cases and the earlier opinions on contempt in Florida, see 1992 Survey, supra note 5, at 341-43. 92. A.A., 604 So. 2d at 815. For differing views on this see the Supreme Court decisions in Colorado, California and Illinois in In re J.E.S., 817 P.2d 508 (Colo. 1991); In re Michael G., 747 P.2d 1152 (Cal. 1988); In re R.R., 417 N.E.2d 237 (Ill. 1987). 93. A.A., 604 So. 2d at 815-16 (citing Fla. STAT. § 39.0321(1)). 94. Id. at 816 (citing Fla. STAT. § 39.043(2) (Supp. 1990)). 95. FLA. STAT. § 39.041(45) (1991). 96. 592 So. 2d 1210, 1211 (Fla. 2d Dist. Ct. App. 1992). 97. FLA. STAT. § 39.044(10) (1991).
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Chapter 39 on the ground that the newly enacted Florida Statute § 39.044(10) (1990) allowed for the placement of contemptuous juveniles in secure detention.

92. Id. at 126.
94. H.R.S. § 599 So. 2d at 127. It is also interesting to note that the court recognized that contempt "is apparently a key device used by the juvenile court to access detention for juveniles who are under court supervision for prior offenses." Id. at 126.
96. Id. It is also significant that the Florida intermediate appellate courts have held that the circuit court lacks the power to sentence a juvenile to county jail for contempt. See N.E. v. State, 597 So. 2d 919, 920 (Fla. 2d Dist. Ct. App. 1992); L.M. v. State, 592 So. 2d 1210, 1211 (Fla. 2d Dist. Ct. App. 1992).
constitutional safeguards to juveniles and specifically to assure legal counsel to all children, including indigents, who are charged with contempt of court and thereby facing any underlying restriction on their liberty.106

At the heart of the supreme court’s majority ruling in A.A. v. Rolle is its recognition of the irony of incarcerating dependent children and children in need of services in an institution for children who are a threat to public safety.107 The acts for which these children are placed in secure detention are the acts which form the basis of their initial need for services. As the court explained: "It is inconceivable that a system of justice that has removed these children from their parents or guardians, ostensibly [to] provide . . . care, safety, and protection . . . would instead incarcerate them because of resultant behavior attributable to neglect or abuse."108

Recognizing the frustration of the trial court which has to deal with such children, the court explained that the lack of placement alternatives and funding is a legislative problem. As the court put it, "[t]he courts, however, cannot attempt to supply the legislative vacuum in this fashion."109

A final case dealing with S.J. v. State.110 The first issue decided by the Fifth District Court of Appeal, the ability to hold a child in detention on a pending charge of indirect criminal contempt for failure to appear, was superseded by the Rolle case in the supreme court. However, S.J. v. State also dealt with grounds for detention. The specific issue was whether a child could be detained pursuant to section 39.044 prior to an adjudicatory hearing where the child would not be eligible for detention under the RAI, but where the only reason to hold the child was his failure to appear at the arraignment with a resulting charge of indirect criminal contempt.111 The court held first that the purpose of the detention hearing was to decide probable cause and the need for continued detention.112 At that hearing, the court is obligated to apply the RAI prepared by HRS personnel.113 Those criteria determine the need for continued detention. It is only when the court orders placement more restrictive than indicated by the RAI that detention may be allowed. Even then, the court is obligated

to state in writing "clear and convincing reasons" for the placement.114 The court reversed on that ground.

C. Adjudicatory Issues

A variety of statutory issues related to Florida’s speedy trial rules in juvenile court continue to appear in the case law.115 For example, Chapter 39 provides that when a youngster is held in detention, an adjudicatory hearing shall take place within twenty-one days.116 The statute provides for an extension for "good cause."117 In Z.R. v. State,118 the trial court extended the detention period for good cause because the judge was ill, although no application had been made by the child, his counsel, or the state. The appellate court held that unless such an application is made, the child is entitled to immediate release in the absence of new charges filed against him.119

Chapter 39 also requires the state to file a petition against a child within forty-five days of the time the child is taken into custody.120 The courts continue to hear appeals involving how to interpret the forty-five day rule.121 This year the supreme court cleared up some of the controversy in M.P. v. State.122 The issue was whether the state could amend a timely filed petition more than forty-five days after the youngster had been taken into custody by changing the allegations from sale of cannabis to sale of cocaine.123 The court held that the amendment was proper. It recognized that the Florida Legislature had "imposed a firm layer of protection for

106. A.A., 604 So. 2d at 817-18.
107. Id. at 818.
108. Id. (citation omitted).
109. Id. at 819.
110. 596 So. 2d 1181 (Fla. 5th Dist. Ct. App. 1992).
111. Id. at 1182.
113. See id. § 39.042(3)(a).
114. S.J., 596 So. 2d at 1182.
115. See supra notes 7–9 for a discussion of constitutional issues. The level of crime that must be charged in order to allow the court to consider the past record is a serious property crime, an offense involving use of a firearm, or any second or third degree felony involving a violation of § 39.044(2)(d) of the Florida Statutes. Fla. Stat. § 39.044(2)(d)(1) (1991).
117. Id. § 39.044(5)(d). For cases analyzing "good cause" see P.R. v. Johnson, 541 So. 2d 791 (Fla. 4th Dist. Ct. App. 1989) (holding that absent new charges the court lacks jurisdiction to extend the original detention); T.W.C. v. Pate, 369 So. 2d 361 (Fla. 1st Dist. Ct. App. 1979) (holding that new grounds for detention constitute "good cause").
118. 596 So. 2d 723 (Fla. 5th Dist. Ct. App. 1992).
119. Id. at 724.
120. Section 39.048(6) of the Florida Statutes provides: "On motions by or in behalf of a child, a petition alleging delinquency shall be dismissed with prejudice if it is not filed within 45 days after the date the child is taken into custody." Fla. Stat. § 39.048(6) (1991).
122. 583 So. 2d 1383 (Fla. 1991).
123. Id. at 1384.
constitutional safeguards to juveniles and specifically to assure legal counsel to all children, including indigents, who are charged with contempt of court and thereby facing any underlying restriction on their liberty.

At the heart of the supreme court’s majority ruling in A.A. v. Rolle is its recognition of the irony of incarcerating dependent children and children in need of services in an institution for children who are a threat to public safety. The acts for which these children are placed in secure detention are the acts which form the basis of their initial need for services. As the court explained: "It is inconceivable that a system of justice that has removed these children from their parents or guardians, ostensibly [to provide ... care, safety, and protection] ... would instead incarcerate them because of resultant behavior attributable to neglect or abuse."

Recognizing the frustration of the trial court which has to deal with such children, the court explained the lack of placement alternatives and funding is a legislative problem. As the court put it, "[t]he courts, however, cannot attempt to supply the legislative vacuum in this fashion." A final case dealing with detention is S.J. v. State. The first issue decided by the Fifth District Court of Appeal, the ability to hold a child in detention on a pending charge of indirect criminal contempt for failure to appear, was superseded by the Rolle case in the supreme court. However, S.J. v. State also dealt with grounds for detention. The specific issue was whether a child could be detained pursuant to section 39.044 prior to an adjudicatory hearing where the child would not be eligible for detention under the RAI, but where the only reason to hold the child was his failure to appear at the arraignment with a resulting charge of indirect criminal contempt. The court held first that the purpose of the detention hearing was to decide probable cause and the need for continued detention. At that hearing, the court is obligated to apply the RAI prepared by HRS personnel. Those criteria determine the need for continued detention. It is only then when the court orders placement more restrictive than indicated by the RAI that detention may be allowed. Even then, the court is obligated to state in writing "clear and convincing reasons" for the placement.

The court reversed on that ground.

C. Adjudicatory Issues

A variety of statutory issues related to Florida’s speedy trial rules in juvenile court continue to appear in the case law. For example, Chapter 39 provides that when a youngster is held in detention, an adjudicatory hearing shall take place within twenty-one days. The statute provides for an extension for "good cause." In Z.R. v. State, the trial court extended the detention period for good cause because the judge was ill, although no application had been made by the child, his counsel, or the state. The appellate court held that unless such an application is made, the child is entitled to immediate release in the absence of new charges filed against him.

Chapter 39 also requires the state to file a petition against a child within forty-five days of the time the child is taken into custody. The courts continue to hear appeals involving how to interpret the forty-five day rule. This year the supreme court cleared up some of the controversy in M.F. v. State. The issue was whether the state could amend a timely filed petition more than forty-five days after the youngster had been taken into custody by changing the allegations from sale of cannabis to sale of cocaine. The court held that the amendment was proper. It recognized that the Florida Legislature had "imposed a firm layer of protection for
juveniles by requiring courts to dismiss with prejudice delinquency petitions filed more than forty-five days after the juvenile had been taken into custody. 124 However, the court explained, the narrower question presented in M.F. was "whether prejudice to the juvenile should be considered when the state fails to properly allege every essential element in a timely-filed initial petition and amends the petition after the filing period elapses." 125

The court recognized that an exception had been carved out in the adult context where a clerical error produced an improper allegation of the elements of the offense in a timely filed charging document. 126 The court then looked at the intermediate appellate cases in the juvenile context and found two lines of authority. In one, the petitions were amended after the State failed to properly allege each essential element of the charge. In the other, the petition was amended to alter the kind of violation alleged. 127 After analyzing nine cases in the two categories, the court concluded that the State is entitled to amend a timely filed delinquency petition after forty-five days have elapsed under certain circumstances. The amendment made prior to the adjudicatory hearing must be aimed at correcting a "good faith clerical type error." 128 It may not change the substantive allegations for any other reason. 129 If it changes the substantive allegations for any other reason it circumvents the child's substantive rights to be properly charged within the statutorily articulated time period. 130 Under these circumstances, the court concluded, the court may not inquire any further concerning prejudice to the juvenile, because by definition the child is prejudiced when he or she is denied substantive rights. 131 Finally, the court explained that the amendment can never prejudice a child's rights to prepare a defense and receive a full and fair adjudicatory hearing and that such hearing must be held in an expedited fashion. Under the facts of the M.F. case, the amendment merely corrected a clerical error and the child made no showing that the amendment prejudiced his rights to prepare a defense and receive a full and fair adjudicatory hearing. 132

124. Id. at 1386 (citing FLA. STAT. § 39.05(6) (1987), amended by, FLA. STAT. § 39.048(6) (1991)).
125. Id. at 1386-87.
126. Id. at 1386.
127. M.F., 583 So. 2d at 1388.
128. Id. at 1389.
129. Id.
130. Id. at 1388 (citing FLA. STAT. § 39.048(h) (1991)).
131. Id. at 1389.
132. Id.
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\textsuperscript{124} Id. at 1386 (citing FLA. STAT. § 39.05(6) (1987), amended by, FLA. STAT. § 39.048(6) (1991)).
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\textsuperscript{128} Id. at 1389.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 1388 (citing FLA. STAT. § 39.048(b) (1991)).
\textsuperscript{131} Id. at 1389.
\textsuperscript{132} Id.
motion for discharge, and under the facts of the case more than five days had passed exclusive of the date of filing of the motion and weekends and holidays. On motion for rehearing after its initial order, the appellate court held that it could not order the trial court to apply Florida Rule of Juvenile Procedure 8.180(e)(3) which provides for extension of time for a speedy trial in the event of an interlocutory appeal by the state.149 Indeed, in this case the state had filed an interlocutory appeal. The appellate court held that when this occurs, the trial court has discretion to decide whether to extend the speedy trial rule, a rather odd provision, which had been upheld by the Florida Supreme Court in Jacobs v. State.150 Thus, the teaching of J.M. appears to be that if the speedy trial time runs, and the child makes a motion for discharge which itself is not heard in timely fashion, the trial court may still extend the time of the running of the speedy trial rule if it finds "exceptional circumstances."151

Finally, in a series of cases, children recently challenged the constitutionality of section 39.061 which governs criminal liability for escape. The first case, K.A.N. v. State,145 involved an escape from Duval House, a juvenile residential detention facility. The juveniles raised two issues on appeal. First, they asserted that the evidence was legally insufficient to sustain the finding of guilt under the escape statute. Second, they claimed the escape statute was unconstitutional because it violated the separation of powers clause of the Florida Constitution and violated due process under both the United States Constitution and Florida Constitution because it was void for vagueness.146 The First District Court of Appeal reversed on the first ground finding the state never presented sufficient evidence to show that the youngster escaped from lawful custody as defined by section 39.0561 which describes confinement as "any secure detention or any residential commitment facility of restrictiveness level VI or above."147 At trial, the state had been unable to prove there was any HRS rule defining Duval House as a restrictive level VI facility as provided in the statute.148 In fact HRS had promulgated an emergency rule after the child committed

140. In re J.M., 588 So. 2d at 622.
141. 396 So. 2d 1113 (Fla. 1981).
142. Id. at 1116.
144. K.A.N., 582 So. 2d at 58.
145. Id. at 59.
146. Id. at 60.
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\item\textsuperscript{140} In re\textit{I.M.}, 588 So. 2d at 622.
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\item\textsuperscript{142} Id. at 1116.
\item\textsuperscript{144} \textit{K.A.N.}, 582 So. 2d at 58.
\item\textsuperscript{145} Id. at 59.
\item\textsuperscript{146} Id. at 60.
\end{itemize}

the charged offense and in so doing admitted that it enacted the rule because the statute did not address specific standards relating to the restrictiveness level of the delinquency commitment programs. There being no rule in effect, the court remanded with directions to dismiss the charge.\textsuperscript{147}

Then, in\textit{D.P. v. State},\textsuperscript{148} the First District Court of Appeal reached the question of whether the statute violated the separation of powers clause, although it did not reach the void for vagueness argument.\textsuperscript{149} In\textit{D.P.}, two youngsters had escaped, one from the Leon County Start Center residential and one from the Crisswell Halfway House, both residential commitment facilities.\textsuperscript{150} At the time of these escapes, a Florida administrative code rule had been promulgated by HRS to set up a regulatory scheme for residential commitment facilities establishing four restrictiveness levels.\textsuperscript{151} The issue was whether the legislature could delegate the authority to set the restrictiveness levels to HRS. As discussed earlier in this article, the Florida Constitution prohibits one branch of government from conferring authority within its domain to another branch of government.\textsuperscript{152} However, as the court explained in\textit{D.B.}, the legislature can grant enforcement power to an administrative agency, but must do so by clearly setting forth adequate standards to guide the agency in the execution of the authority.\textsuperscript{153} The court of appeal ruled that sections 39.061 and 39.011(61), read in\textit{in pari materia}, do not contain sufficient standards to limit the discretion of HRS. Finding no statutory language which would distinguish one restrictiveness level from another, the court held that the statute "grants HRS the unbridled, unadvised discretion to say what the law of juvenile escape from residential facilities shall be."\textsuperscript{154} Finally, the court concluded that where the statute deals with fundamental personal rights—here criminal penalties—exciting standards for legislative guidance should be employed.\textsuperscript{155}

\begin{itemize}
\item\textsuperscript{147} Id.
\item\textsuperscript{149} \textit{D.P.}, 597 So. 2d at 953.
\item\textsuperscript{150} Id.
\item\textsuperscript{151} Id. at 954;\textit{FLA. ADMIN. CODE R.} 10M-32-001.
\item\textsuperscript{152} See\textit{FLA. CONST. art. II, § 3, D.B.}, 597 So. 2d at 954; see also supra pp. 4-6.
\item\textsuperscript{153} \textit{D.B.}, 597 So. 2d at 954.
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D. Dispositional Issues

Chapter 39 provides for a variety of dispositional alternatives both for children adjudicated as juvenile delinquents and juveniles convicted as adults who were previously transferred from juvenile court or who had been filed against directly in adult court.

Community control or probation is an often used dispositional alternative. In L.M. v. State, the First District Court of Appeal held that the court may not delegate the determination of what particular program properly meets the child’s rehabilitative needs to others. Further, in the context of the case which involved an order of the court that the child “get help from the Pastor” of the boy’s mother’s church, the court ruled that the child could not be obligated to submit to a course of religious instruction because such an activity would violate the First Amendment.

In C.F. v. State, the court concluded that an order placing a juvenile on community control for an indeterminate period of time and without an expiration date was proper under Chapter 39. The juvenile argued that the order must state that the period of community control cannot exceed the time provided by law for the crime involved if committed by someone before the adult court or past the juvenile’s nineteenth birthday whichever came first. The court compared two statutes. The first, section 39.054(1)(a) requires that an order placing a child on community control shall be until the youngest’s nineteenth birthday unless sooner released by the court on motion. A second provision, section 39.054(4) states that commitment to HRS shall be for an indeterminate period not to exceed the time of imprisonment for which an adult may serve for the same offense. In the C.F. case, the court held that the language of the two statutes demonstrates that the legislature provided a distinction between a community control disposition and a commitment to HRS.

However, in A.R. v. State, the First District Court of Appeal decided differently. There, the court held that section 39.054(4) must apply to a community control disposition. Thus, the indeterminate period may only reach the time provided for the sentence of imprisonment of an adult. The cases are obviously inconsistent, and C.F. is probably wrongly decided. A.R. refers to section 39.054(1)(a), which provides that community control supervision and service may not exceed the term for which a sentence could be imposed upon the child as an adult. C.F. appears to simply misread the law.

Further evidence that the C.F. case is wrongly decided is found in E.J. v. State which made the same finding as A.R., but added a further explanation about the purpose of section 39.054 which came into effect in October 1990. The court in E.J. held that the combination of sections 39.054 requires that the disposition of community service be limited by the maximum adult term or the date of the child’s nineteenth birthday, whichever occurs first. This is the same standard used in a juvenile commitment to HRS.

Among the many dispositional alternatives available to the juvenile court in Chapter 39 is restitution. In J.M.H. v. State, a case discussed earlier in this survey on the issue of the right to counsel, the court

157. Id. at 649.
158. Id.
160. Section 39.054(1)(a) provides "the term of any order placing a child in a community control program shall be until his or her nineteenth birthday unless he is sooner released by the court, on a motion of an interested party or on its own motion." Fla. Stat. § 39.054(1)(a) (1991).
161. Section 39.054(4) provides that "[a]ny commitment of a delinquent child to the department shall be for an indeterminate period of time, but the time shall not exceed the maximum term of imprisonment which an adult may serve for the same offense." Id. § 39.054(4).
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¹⁵⁷. A.R., 593 So. 2d at 1129.
¹⁵⁸. Section 39.054(1)(a)² provides, “[w]hen supervision or a program of community services is ordered by the court, the duration of such supervision or program shall be consistent with any treatment and rehabilitation needs identified for the child and shall not exceed the term for which sentence could be imposed if the child were committed for the offense.” FLA. STAT. § 39.054(1)(a)² (1991).
¹⁵⁹. A.R., 593 So. 2d at 1129.
¹⁶¹. Id. at 283.
¹⁶². Id. The caselaw had been clear prior to the repeal of § 39.11 in 1990. A number of courts had held that § 39.11 limited the maximum term of community service to the maximum term for which an adult could have been sentenced. See also C.F.R.D. v. State, 564 So. 2d 590 (Fla. 1st Dist. Ct. App. 1990); 1990 Survey, supra note 5.
¹⁶⁵. See also 1990 Survey, supra note 5, at 1188-84; 1989 Survey, supra note 5, at 874-77 (discussing other malice cases).
¹⁶⁷. Section 39.054(4) provides that “[n]o commitment of a delinquent child to the department shall be for an indeterminate period of time, but the time shall not exceed the maximum term of imprisonment which an adult may serve for the same offense.” Id. § 39.054(4).
held that an unemployed or incarcerated delinquent child may be ordered to pay restitution in the absence of a showing of a present ability to pay so long as the court conditions the restitution on the child finding a job which pays enough to ensure that the child can comply with the court order. The court recognized that Chapter 39 clearly requires the order to be in an amount which the child can reasonably be expected to pay. The First District Court of Appeal took its holding in J.M.H. one step further in J.A.M. v. State. There it held that while a child who is unemployed may be ordered to pay restitution without a showing of present ability to pay, the commencement of restitution payments may not be ordered until such time as the child actually obtains employment. The court added that the child must make all reasonable efforts to obtain employment. Finally, in Snyder v. State, the Second District ruled on what would seem obvious—that the amount of restitution must be determined by the trial court and it may not delegate this duty to a probation officer, or as in L.M. v. State, to a minister.

Another dispositional alternative is commitment to HRS. As part of the dispositional process, the court shall receive a pre-disposition report from HRS which shall include a multi-disciplinary assessment of the child. If the court determines that the child is suitable for adjudication and commitment to the Department, the court shall evaluate six enumerated criteria under the statute, and shall make such a determination in writing or on the record at the hearing. The determination shall include the specific findings of the reasons for the court’s decision to adjudicate and to commit the child to the Department.

In R.G.S. v. State, the Second District Court of Appeal recognized that compliance with the predecessor to the specific findings statute meant

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171. Id. at 395.
172. Id. at 396.
174. Id. at 279.
175. Id.
177. Id. at 385.
180. Id. § 39.052(3)(a).
181. Id. § 39.052(3)(c).
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strict compliance. The court found that HRS sufficiently detailed the basis for its recommendation and the trial court specifically adopted the recommendation. The appellate court viewed this as compliance with the statute. While the issue itself may be quite technical, the court’s opinion is nonetheless a bit cavalier. The trial court never made the specific findings required by statute. The court simply committed the child to the custody of HRS for a determinate period of time. Despite the appellate court’s unsupported statement, this ruling was not in strict compliance with the statute.

E. Transfer Issues

The appellate courts continue to be faced with a number of cases involving the transfer to and handling of juveniles in adult court. Florida law provides that a child may be tried in adult court under certain circumstances. Moreover, the circuit court may decide whether a child shall receive adult or juvenile sanctions when tried as an adult regardless of whether the proceeding commenced in adult court under the direct file provisions of Chapter 39 or the child was transferred to adult court after a juvenile court waiver hearing. The decision to enforce adult or juvenile sanctions is based upon the court’s consideration of six criteria. This provision of the law is binding on the court. As the court held in Troutman v. State, in so doing, the court’s decision must be supported by a written order or a transcript containing the requisite findings of facts and reasons for imposing adult sanctions. In Troutman, the six factors were addressed briefly but appropriately in the written order with reference to the factual context of the case. The court looked at the sentencing transcript and the written order and found compliance with the six criteria provision of Chapter 39.
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In R.G.S. v. State, the Second District Court of Appeal recognized that compliance with the predecessor to the specific findings statute meant strict compliance. The court found that HRS sufficiently detailed the basis for its recommendation and the trial court specifically adopted the recommendation. The appellate court viewed this as compliance with the statute. While the issue itself may be quite technical, the court’s opinion is nonetheless a bit cavalier. The trial court never made the specific findings required by statute. The court simply committed the child to the custody of HRS for a determinate period of time. Despite the appellate court’s unsupported statement, this ruling was not in strict compliance with the statute.

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In the past year trial courts, through defiance or ignorance, have consistently sentenced children as adults in contravention of the specific statutory requirements of section 39.059. As a result, the district courts of appeal have had to reverse these adult sentences in a long line of cases that consistently and emphatically mandate compliance with the section.

Suitability or unsuitability for adult sanctions shall be determined by the court before any other determination of disposition. The suitability determination shall be made by reference to the following criteria:

1. The seriousness of the offense to the community and whether the protection of the community requires adult disposition.
2. Whether the offense was committed in an aggressive, violent, premediated, or willful manner.
3. Whether the offense was against persons or against property, greater weight being given to offenses against persons, especially if personally injured resulted.
4. The sophistication and maturity of the child.
5. The record and previous history of the child, including:
   a. Previous contacts with the department, the Department of Corrections, other law enforcement agencies, and courts;
   b. Prior periods of probation or community control;
   c. Prior adjudications that the child committed a delinquent act or violation of law; and
6. Prior commitments to institutions.

The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child if he is assigned to services and facilities for delinquent children.

**FLA. STAT. § 39.059(7)(c) (1991).**

192. See Hill v. State, 596 So. 2d 1210 (Fla. 1st Dist. Ct. App. 1992) (holding that a waiver of right to juvenile jury trial must be knowing and intelligent and manifested in the record, and absent such waiver the trial court must make specific written findings in compliance with Chapter 39); Bell v. State, 598 So. 2d 203 (Fla. 4th Dist. Ct. App. 1992) (holding that the trial court erred in sentencing the child as an adult for failure to address each of the statutory criteria in its written order); Horn v. State, 593 So. 2d 309 (Fla. 5th Dist. Ct. App. 1992) (holding that the trial court must render a specific finding of fact and state reasons for imposing an adult sentence on a juvenile); Myers v. State, 593 So. 2d 609 (Fla. 5th Dist. Ct. App. 1992) (reversing an adult sentence imposed on a juvenile because the trial court failed to render specific findings of fact and state the reasons for the adult sentence); Taylor v. State, 593 So. 2d 1147 (Fla. 1st Dist. Ct. App. 1992) (holding that adult sentencing cannot be sustained where one of the six criteria is missing even though the other five were complied with and supported in the trial record); Toussaint v. State, 592 So. 2d 770 (Fla. 5th Dist. Ct. App. 1992) (holding that a negotiated plea is not a waiver of the right to a juvenile sentence, that trial courts non-compliance with specific written findings is fundamental error and can be raised for first time on appeal, and that requirement of specific findings by trial court applies to juvenile tried by direct information as well as transfer from juvenile division); McCray v. State, 588 So. 2d 298 (Fla. 2d Dist. Ct. App. 1991) (waiver of right to be sentenced as juvenile must be knowing and intelligent and the right is not waivered where the defense counsel suggested the juvenile be sentenced as an adult, and therefore, the trial is required to make specific written findings supporting an adult sentence); Koller v. State, 588 So. 2d 698 (Fla. 4th Dist. Ct. App. 1991) (vacating the juvenile’s adult sentence on the ground that the trial court did not make all the specific written findings to support the adult sanction); Jackson v. State, 588 So. 2d 1085 (Fla. 5th Dist. Ct. App. 1991) (mandating for further consideration of facts surrounding the juvenile’s “home environment situation” because defense counsel comments that father was incarcerated for probation violation was insufficient to meet the criteria); Sullivan v. State, 587 So. 2d 599 (Fla. 5th Dist. Ct. App. 1991) (holding that written findings of fact and reasons for imposing adult sentences are not waived by a juvenile’s no contest plea and thus, are still required to sustain the adult’s sentence); McDaniel v. State, 583 So. 2d 349 (Fla. 4th Dist. Ct. App. 1992) (holding that an adult sentence for a juvenile must be supported by consideration of each of the criteria in 39.11(1)(d), the predecessor to 39.059, and that the consideration shall be supported by specific findings and reasons for the court sentence).
In the past year trial courts, through defiance or ignorance, have consistently sentenced children as adults in contravention of the specific statutory requirements of section 39.059. As a result, the district courts of appeal have had to reverse these adult sentences in a long line of cases that consistently and emphatically mandate compliance with the section.192

Suitability or nonsuitability for adult sanctions shall be determined by the court before any other determination of disposition. The suitability determination shall be made by reference to the following criteria:
1. The seriousness of the offense to the community and whether the protection of the community requires adult disposition.
2. Whether the offense was committed in an aggressive, violent, premeditated, or willful manner.
3. Whether the offense was against persons or against property, greater weight being given to offenses against persons, especially if personally injured resulted.
4. The sophistication and maturity of the child.
5. The record and previous history of the child, including:
   a. Previous contacts with the department, the Department of Corrections, other law enforcement agencies, and courts;
   b. Prior periods of probation or community control;
   c. Prior adjudications that the child committed a delinquent act or violation of law; and
   d. Prior commitments to institutions.
6. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child if he is assigned to services and facilities for delinquent children.


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194. 528 So. 2d 521 (Fla. 2d Dist. Ct. App.), review denied, 536 So. 2d 243 (Fla. 1988).
196. 566 So. 2d 1354 (Fla. 5th Dist. Ct. App. 1990).
197. Davis, 528 So. 2d at 188.
199. Lang, 566 So. 2d at 1357.
200. 448 So. 2d 1013, 1016 (Fla. 1984).
such sanctions considered under Chapter 39.201 Thus, the court receded from Davis to the extent that Davis failed to recognize the need for an intelligent and knowing waiver.202

F. Appeals

Juvenile delinquency proceedings are a hybrid form of action falling somewhere between civil and criminal proceedings. The United States Supreme Court recognized this in its seminal decisions in Kent v. United States203 and In re Gault.204 In C.L.S. v. State,205 the First District Court of Appeal was recently asked to decide whether a delinquency proceeding is civil or criminal. Specifically, it was asked what appellate rules and procedure will apply.

C.L.S. was an appeal by a number of juveniles who had been charged with escape from HRS commitments and who were challenging the constitutionality of section 39.061 of the Florida Statutes. Although the constitutional issue raised was one of substance and indeed was subsequently dealt with in a separate case, D.P. v. State,206 the court in C.L.S. never reached the substantive issue. It held that it could not as a matter of appellate procedure decide the escape issue because the appeal was not from a final order. Rather, the court was compelled to transfer the case before disposition to the child’s home county pursuant to section 39.022(3)(a) (1990).

The court held that it was obligated to transfer the case and not hear the appeal because the order before it was not a final one. It came to its conclusion by analyzing the nature of an appeal in a delinquency proceed-

201. Crook, 601 So. 2d at 1327-28; see also McCray v. State, 588 So. 2d 298 (Fla. 2d Dist. Ct. App. 1991).

202. Crook, 601 So. 2d at 1328. In light of the more recent decision in Crook, the earlier Second District Court of Appeal in Snyder v. State, 597 So. 2d 384 (Fla. 2d Dist. Ct. App. 1992) appears to be invalidated. Snyder relying on C.L.S. never reached the substantive issue. It held that it could not as a matter of appellate procedure decide the escape issue because the appeal was not from a final order. Rather, the court was compelled to transfer the case before disposition to the child's home county pursuant to section 39.022(3)(a) (1990).

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204. 387 U.S. 1 (1967).


206. 597 So. 2d 952 (Fla. 1st Dist. Ct. App. 1992); see supra text accompanying notes 139-46.
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204. 387 U.S. 1 (1967).
206. 597 So. 2d 952 (Fla. 1st Dist. Ct. App. 1992); see supra text accompanying notes 139-46.
207. C.L.S., 586 So. 2d at 1174.
208. Id. (citing FLA. STAT. § 39.069(1) (Supp. 1990)).
209. Id. at 1175.
210. See § 39.069(1) which provides that: "An appeal from an order of the court affecting a party to a case involving a child pursuant to this part may be taken to the appropriate district court of appeal within the time and in the manner prescribed by the Florida Rules of Appellate Procedure ...." FLA. STAT. § 39.069(1) (1991).

The court also concluded that the appeal was not criminal in nature relying upon earlier cases. See G.C. v. State, 560 So. 2d 1186 (Fla. 3d Dist. Ct. App. 1990); affd, 572 So. 2d 1380 (Fla. 1991); see also State v. C.C., 476 So. 2d 144 (Fla. 1985) (in which the supreme court ruled that although delinquency matters are criminal in nature, they are separate proceedings controlled by Chapter 39 with the result that the court refused to apply Chapter 924 effectively precluding the state from taking plenary interlocutory appeals in juvenile cases); C.L.S., 586 So. 2d at 1176.
211. C.L.S., 586 So. 2d at 1177.
IV. DEPENDENCY

A. Procedural Issues

The resolution of dependency proceedings often involves the provision of both medical and mental health counseling services to the parties. Several cases before the courts this past year raised questions of who pays for such services. For example, in In re J.W.,212 the court was faced with an appeal from an order requiring HRS to pay counseling costs for the parents of a child who had been adjudicated dependent and was in the protective custody of HRS. The court reversed. It held first that there was no statutory authority to require the state to pay, and second, that there is no constitutional right to counseling service.213 Indeed, the court relied upon In re D.B.214 in which the Florida Supreme Court held that while there was a right to counsel for parents in dependency proceedings, indigent parents’ rights to counsel free of charge only attached when the proceedings could result in permanent loss of parental rights.215 Because the parents could not show an absolute constitutional right to an attorney, they could not show an absolute right to counseling services, and thus the state was not required to pay for the services.216

A second case involving the question of who pays for services is In re J.P.217 In J.P., HRS appealed from a non-final order which required it to pay medical expenses of a child who had not yet been adjudicated dependent, although a petition was pending.218 Like the J.W. court, the court in J.P. ruled that the state may be held responsible when there is statutory authority or when the individual receiving the services has a constitutional right to them.219 The court rejected the parents’ claim that sections of Chapter 39 relating to families and children in need of services were applicable, for the obvious reason that the proceeding was one of

dependency and not a proceeding under Part IV of Chapter 39.220 The court did note, however, that there is statutory authority for relieving parents from financial responsibility for medical expenses. Section 39.407 provides that the court may order medical and psychological evaluations and services when the child is in the physical custody of HRS.221 The court found that physical custody included a situation where a child had been placed in a treatment facility or home operated by or under contract with HRS, as was the situation in the case at bar.222 The court then concluded that the parents are obligated to bear the costs, but that the trial court must conduct an evidentiary hearing to determine whether the parents have the resources to pay. If they do not, the court will order the parents to repay HRS for those expenses which they can assume. The justification for payment by the parents is that the need for psychological and medical treatment was occasioned by the actions or inaction of the parents.223

Based both on public policy grounds and compliance with the Federal Adoption Assistance and Child Welfare Act of 1980,224 in dependency proceedings Florida seeks to reunite families as soon as possible, keep children out of extended foster care, and where reuniting is impossible, to free children for adoption as soon as possible.225 Florida’s law is written in such a way that, upon a finding of dependency, HRS shall develop a performance in each case to ensure that the child is returned home as quickly and safely as possible. If that is not possible, HRS shall seek the permanent commitment of the child to the department for the purposes of finding a permanent adoptive home.226

213. Id. at 1048.
214. 385 So. 2d 83 (Fla. 1980).
215. See 1991 Survey, supra note 5, at 355 (collecting earlier articles on the subject);
216. In re D.B., 385 So. 2d at 92.
218. Id. at 486.
219. Id.
220. Id. at 486-87. Indeed, the allegation was that the parents had abused the child and the petition was filed pursuant to Fla. Stat. § 39.404 (1989).
221. Section 39.407(11) of the Florida Statutes provides:
The parents or guardian of a child in the physical custody of the department remain financially responsible for the cost of medical treatment provided to the child even if either one or both of the parents or if the guardian did not consent to the medical treatment. After a hearing, the court may order the parents or guardian, if found able to do so, to reimburse the department or other provider of medical services for treatment provided.
222. In re J.P., 586 So. 2d at 487 n.1.
223. Id. at 487; see also 1988 Survey, supra note 5, at 1175-76 (discussing prior case law on this issue).
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In *In re S.H.P. III*, the question on appeal was whether an order awarding permanent custody of a dependent child to his paternal grandparents is an option available under Chapter 39. The court held that it was, although it was not an explicit statutory alternative. Rather, the court held that the legislative intent expressed in Part V of Chapter 39 governing dependency demonstrates that permanent placement with an adult relative is an available option. Under the facts of the case, the court concluded that the appropriate procedural steps had not been taken, including the development of a performance agreement or permanent placement plan. Nor was it determined that termination of parental rights and subsequent adoption was in the best interest of the child. However, S.H.P. III should not be understood to hold that a dependency proceeding is the same as a custody proceeding. While determining that the best interests of the child may be the test for custody, it is not the test for a finding of dependency.

Discovery is a central concern in dependency proceedings because fundamental liberty interests are at stake. The issue of a parent’s right to discovery in the form of examination of children by a psychologist or psychiatrist retained by the parents in order to protect their fundamental association with their children was raised recently in *In re S.M.B.* The specific issue was whether the trial court abused its discretion in denying the parents the right to have their children examined by an expert witness retained by them. The allegation was that the appellant mother had emotionally abused her two children by dressing inappropriately and yelling at the children. The First District Court of Appeal recognized that the trial court had broad discretion in discovery matters which includes physical or mental examination. However, relying upon the constitutionally protected familial rights doctrine articulated in *Santosky v. Kramer*, *Stanley v. Illinois*, and the Florida Supreme Court in *Peters v. Department of Health & Rehabilitative Services*, the court concluded in S.M.B. that the state through HRS could not make out a prima facie case with the testimony of its own psychologist, and therefore, the only way the appellant mother could present a meaningful defense was to have access to an expert to rebut the charges made against her. The court therefore reversed and remanded.

A significant, albeit technical, issue of appellate practice in dependency cases was raised recently in *In re M.A.* The issue was whether a non-final order in a dependency proceeding may be taken up on an interlocutory basis. The courts are split over whether the appellate court allowing interlocutory appeals only applies to domestic relations matters. The court therefore certified the question of whether a non-final order in a dependency proceeding which transfers custody of a minor from HRS may be reviewed under Florida Rule of Appellate Procedure 9. From time to time, the Florida appellate courts are faced with cases where parties to custody disputes arising out of divorces seek to use the dependency statute to effectuate modifications of custody. In *In re L.S.*, the Fourth District Court of Appeal rejected this approach. Relying upon the decision of the Florida Supreme Court in *In re: Report of the Commission on Family Courts* discussed earlier in this article, the court held that "public policy and considerations of judicial economy support the trial court's decision recognizing that the appropriate forum in this case is a modification proceeding. To hold otherwise only encourages conflicts and duplication of proceedings.""
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B. Right to Counsel Issues

A child does not have an absolute constitutional right to counsel in a
dependency proceeding. Because Florida participates in the federal Child Abuse Prevention Act of 1974, it is obligated to provide a guardian ad litem to act on behalf of children in dependency proceedings.

The issue of payment of guardian ad litem attorney's fees has come up several times in the past and was again before the appellate court this year. The Supreme Court's unpublished Guardian Ad Litem Program Minimal Standards of Operation promulgated in 1985, provides that the trial court shall use volunteer guardians ad litem. At the request of the local guardian ad litem program, a lawyer may be appointed as a guardian ad litem or may be appointed in addition to the guardian ad litem to represent the guardian whose obligation it is to act in the best interests of the child. Of course, the court may appoint an attorney for a child in a dependency proceeding when it becomes clear that the child also faces delinquency charges.

In Brevard County v. Lanford, the court appointed an attorney guardian ad litem for two minor children in a dependency case and upon the conclusion of the case, ordered the county to pay fees and costs. The appellate court reversed on the ground that there was no statutory authority to appoint the attorney and then to award fees where the guardian ad litem program did not request the appointment and there was no showing that the children had delinquency or other matters pending which required independent representation apart from the guardian ad litem.

Marion County v. Johnson is a second guardian ad litem attorney's fees case. The case is unusual in that the trial court appointed appellate counsel to act as attorney and guardian ad litem for a minor child in a dependency proceeding when the child could not be found. The lawyer was also ordered to represent the child in subsequent proceedings as well as being assigned the additional duty of custodian of the child while the case was pending despite the fact that primary protective services responsibility rested with HRS. The appellate court was essentially looking for a way to pay the lawyer. The lawyer could not be paid as guardian ad litem because authority for the appointment of a guardian ad litem is governed by the administrative order of the supreme court which prohibits the trial court from appointing the guardian ad litem. Under the administrative order, the local guardian ad litem program chooses the individual. The court simply notifies the Program that it needs a guardian.

The court also held that the child had no constitutional right to counsel in a dependency proceeding, although, as the court explained, "loose language exists in caselaw, statute, and rules that would lead one to believe that in some circumstances counsel for a child can be provided in a dependency proceeding." However, the court concluded that such language was not adequate to support appointment of an attorney ad litem, and in any event provided no guidance on the question of who should pay for the services of the lawyer.

The court in Johnson ruled that the means to pay the lawyer was through HRS because the agency had failed to perform its legislatively mandated duties. As a result, HRS should bear the expense of "substitute personnel" carrying out its obligations. The court concluded that this was highly unusual and should not constitute precedent for the proposition that trial judges are able to appoint attorneys or guardians ad litem.

A third case, Brevard County v. H.R.S. essentially follows the holding in Marion County v. Johnson, although it never cites that case.

251. See id. at 1.7, 1989 Survey, supra note 237, at 888-89.
253. See id. at 1.7, 1989 Survey, supra note 237, at 888-89.
255. Id. at 1165.
256. Id. at 1168 (citing GUARDIAN AD LITEM PROGRAM MINIMAL STANDARDS OF OPERATION 1.7(3)).
257. Id. at 1165 (citing statutes and caselaw).
258. Id. at 1167.
259. Marion County, 586 So. 2d at 1168. The court computed the amount of attorney's fees on the basis of Fla. Stat. § 39.415 (1991), and caselaw in Makemson v. Martin County, 49 So. 2d 1109 (Fla. 1988), cert. denied, 479 U.S. 1043 (1987); Board of County Comm'n's v. Scrogg, 545 So. 2d 910 (Fla. 2d Dist. Ct. App. 1988); White v. Board of County Comm'n's, 524 So. 2d 428 (Fla. 2d Dist. Ct. App. 1988), quashed on other grounds, 557 So. 2d 1376 (Fla. 1989); see also 1988 Survey, supra note 5, at 1172-73; 1989 Survey, supra note 5, at 885-86 (discussing these cases).
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The issue of payment of guardian ad litem attorney's fees has come up several times in the past and was again before the appellate courts this year. 249 The Supreme Court's unpublished Guardian Ad Litem Program Minimal Standards of Operation promulgated in 1985, provides that the trial court shall use volunteer guardians ad litem. 250 At the request of the local guardian ad litem program, a lawyer may be appointed as a guardian ad litem or may be appointed in addition to the guardian ad litem to represent the guardian whose obligation it is to act in the best interests of the child. 251 Of course, the court may appoint an attorney for a child in a dependency proceeding when it becomes clear that the child also faces delinquency charges.

In Brevard County v. Landford, 252 the court appointed an attorney guardian ad litem for two minor children in a dependency case and upon the conclusion of the case, ordered the county to pay fees and costs. The appellate court reversed on the ground that there was no statutory authority to appoint the attorney and then to award fees where the guardian ad litem program did not request the appointment and there was no showing that the children had delinquency or other matters pending which required independent representation apart from the guardian ad litem. 253

Marion County v. Johnson 254 is a second guardian ad litem attorney's fees case. The case is unusual in that the trial court appointed appellee Johnson to act as attorney and guardian ad litem for a minor child in a dependency proceeding when the child could not be found. The lawyer was also ordered to represent the child in subsequent proceedings as well as being assigned the additional duty of custodian of the child while the case was pending despite the fact that primary protective services responsibility rested with HRS. 255 The appellate court was essentially looking for a way to pay the lawyer. The lawyer could not be paid as guardian ad litem because authority for the appointment of a guardian ad litem is governed by the administrative order of the supreme court which prohibits the trial court from appointing the guardian ad litem. 256 Under the administrative order, the local guardian ad litem program chooses the individual. The court simply notify the Program that it needs a guardian.

The court also held that the child had no constitutional right to counsel in a dependency proceeding, although, as the court explained, "loose language exists in caselaw, statute, and rules that would lead one to believe that in some circumstances counsel for a child can be provided in a dependency proceeding." 257 However, the court concluded that such language was not adequate to support appointment of an attorney ad litem, and in any event provided no guidance on the question of who should pay for the services of the lawyer.

The court in Johnson ruled that the means to pay the lawyer was through HRS because the agency had failed to perform its legislatively mandated duties. As a result, HRS should bear the expense of "substitute personnel" carrying out its obligations. 258 The court concluded that this case was highly unusual and should not constitute precedent for the proposition that trial judges are able to appoint attorneys or guardians ad litem.

A third case, Brevard County v. H.R.S. 259 essentially follows the holding in Marion County v. Johnson, although it never cites that case.

251. See id. at 1.7, 1989 Survey, supra note 237, at 888-89.
253. Id. at 670.
255. Id. at 1165.
256. Id. at 1168 (citing GUARDIAN AD LITEM PROGRAM MINIMAL STANDARDS OF OPERATION 1.7(3)).
257. Id. at 1165 (citing statutes and caselaw).
258. Id. at 1167.
259. Marion County, 586 So. 2d at 1168. The court computed the amount of attorney's fees on the basis of FLA. STAT. § 39.415 (1991), and caselaw in Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987), Board of County Com'n v. Senega, 545 So. 2d 910 (Fla. 2d Dist. Ct. App. 1988), White v. Board of County Com'n, 524 So. 2d 428 (Fla. 2d Dist. Ct. App. 1988), quashed on other grounds, 557 So. 2d 1376 (Fla. 1989); see also 1988 Survey, supra note 5, at 1172-73, 1989 Survey, supra note 5, at 888-86 (discussing these cases).
Brevard County v. H.R.S. is slightly different on the facts, however. It was an appeal from an order denying the county's motion to vacate or modify a trial court order authorizing payment of attorney's fees for lawyers appointed as guardians ad litem in a series of thirteen consolidated dependency cases.261 The appellate court ruled that the trial court erred because, pursuant to the Supreme Court's administrative order, the guardian ad litem can only be appointed by the county or the guardian ad litem program itself unless there are matters which require legal representation independent of the guardian ad litem program.262 None was found by the appellate court. Second, without citing to Marion County v. Johnson, the court ruled much more emphatically than it had in Marion that a dependent juvenile has no substantive right to appointed counsel in a dependency proceeding.263

Finally, without making the analysis contained in Marion, the court ruled that HRS was responsible for paying attorney's fees in two cases where HRS requested that the trial court appoint the guardian ad litem.264 In all the other cases, the attorneys were not appointed at the request of the county or the guardian ad litem program and it was questionable whether they were appointed at the request of HRS.

The Brevard County court's rationale for obligating HRS to pay attorney's fees is more troublesome. The court found, on the basis of section 415.509(1) and In re M.P.,265 that not only is the appointment of a guardian ad litem a legislative requirement, but the primary responsibility for carrying out the requirement is placed in HRS. In fact, this interpretation misstates the law. In re M.P. was decided before the supreme court issued its administrative order concerning guardians ad litem and section 415.509(1) is simply a general enabling type statute. Nonetheless, the court found that HRS had failed to object to the appointment of the guardian ad litem and instead requested the appointment of an attorney in two instances. Therefore it could be held responsible for the attorney's fees.266

The last and most recent case concerning attorney's fees in guardian ad litem situations is HRS v. Coskey.267 In that case, HRS appealed the assessment against it of attorney's fees to a court appointed counsel representing the children in a series of eight dependency cases consolidated for appeal.268 According to the appellate court, for some reason the standard procedure in Brevard County was to appoint both a lawyer and a guardian ad litem in dependency proceedings with a fee award assessed against the county. This practice was halted by the Fifth District in Brevard County v. HRS,269 and Brevard County v. Lanford.270 Thereafter, fees were assessed against HRS when no other funds were available. The court in Coskey held first that Brevard County was not responsible for payment of the fees on the basis of both the Brevard County and Marion County cases.271 Second, because HRS had not requested that counsel be appointed, HRS was not responsible for payment.272 Thus, the lawyer was out of luck.273

In dicta, the court discussed the question of the appointment of an attorney in addition to a guardian ad litem, because there was some indication in the record that the guardian ad litem program had requested the appointment of counsel.274 The court surveyed the various sources of a right to counsel. Standard 1.7 of the supreme court administrative order provides that the guardian ad litem program may request that an attorney be appointed. The court can appoint counsel when the child has a delinquency or other matter pending which requires representation independent of the guardian ad litem. However, the trial court is not obligated to appoint counsel but may exercise independent judgment to review the need.275 The court noted that standard 1.7 allows the local guardian ad litem program itself to employ legal counsel to provide services. Thus, the court could not see how further legal services would be necessary to the guardian ad litem in protecting the best interests of the child given the access to counsel through the guardian ad litem program attorney. The court also could find no reason for the appointment of counsel in addition to the guardian ad litem in cases on appeal. However, it noted that in unusual circumstances, it would not be inappropriate to notify the agency upon whom the payment

261. Id. at 398.
262. Id. at 399-400.
263. Id.
264. Id.
265. 453 So. 2d 85 (Fla. 5th Dist. Ct. App. 1985), review denied, 472 So. 2d 722 (Fla. 1985).
266. Brevard County, 589 So. 2d at 401.
268. Id. at 154.
269. 589 So. 2d at 398.
270. 588 So. 2d 669 (Fla. 5th Dist. Ct. App. 1991).
271. Coskey, 599 So. 2d at 156.
272. Id.
273. The court suggested that perhaps the parents or the guardian ad litem program might pay. Id. at 157-58.
274. Id. at 156-58.
275. Id. at 156.
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261. Id. at 398.
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263. Id.
264. Id.
265. 453 So. 2d 85 (Fla. 5th Dist. Ct. App. 1985), review denied, 472 So. 2d 721 (Fla. 1985).
266. Brevard County, 589 So. 2d at 401.
268. Id. at 154.
269. 589 So. 2d at 398.
270. 588 So. 2d 669 (Fla. 5th Dist. Ct. App. 1991).
271. Coskey, 599 So. 2d at 156.
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274. Id. at 156–58.
275. Id. at 156.
of fees would ultimately be placed and give it an opportunity to attend and be heard at a hearing at which the appointment of independent counsel is contemplated. Interestingly, the court made no reference to the agency about which it was talking.

Dependency proceedings are usually confidential in nature.79 That fact runs contrary to the public’s constitutional right to know what is going on in judicial proceedings.77 Several cases have arisen in Florida concerning these conflicting interests. Most recently, in Investigation: Florida Statute 27.04 v. State,78 a subpoena was issued requiring a reporter to give testimony about disclosure of the contents of a court order in a dependency proceeding in apparent violation of state law. The appeal arose from the court reporter’s refusal to comply with an order that he reveal the identity of the person who provided him with a copy of the trial judge’s confidential order.79

The court began its analysis by recognizing that under both the First Amendment of the federal and state constitutions, a reporter has a qualified privilege not to disclose sources.80 The court was faced with the reporter’s argument that the privacy interest of the child had long since been destroyed by other proceedings including the earlier criminal case against her stepfather for killing her sister.81 The reporter argued that the privacy interest was outweighed by the First Amendment rights. Applying a balancing test,82 the court rejected this argument finding that protecting the rights of children has always been a primary concern and is given preferential treatment by the courts.83 It thus affirmed the order.84

279. Id. at 979. The relevant statute provisions requiring that proceedings terminating parental rights are not subject to public scrutiny are Fla. STAT. §§ 39.411, 467 (1991).
280. Investigation: Florida Statute 27.04, 589 So. 2d at 979 (citing C.B.S., Inc. v. Cole, 536 So. 2d 1067 (Fla. 2d Dist. Ct. App. 1989)).
281. Id. at 979, 981.
282. See also Miami Herald Publishing Co. v. Morejon, 561 So. 2d 277 (Fla. 1990) (setting out the balancing test).
283. Investigation: Florida Statute 27.04, 589 So. 2d at 981.
284. The court also relied upon In re H.Y.T., 458 So. 2d 1127 (Fla. 1984), for the proposition that even though there had already been widespread publicity, the child does not have the burden of continuing to prove the need which the people of the state of Florida outweighs press rights, court says, 18 FLA. B. NEWS, Dec. 1, 1991, at 5 (discussing Id.).

V. TERMINATION OF PARENTAL RIGHTS

A. Procedural Issues

By statute, Florida has set up a detailed due process based procedure for termination of parental rights that is separate and distinct from the procedure for finding dependency.285 In In re D.P.,286 the First District Court of Appeal dealt with several due process issues in the context of a termination case. On appeal from a trial order terminating parental rights, the natural parents argued first that the notice by publication was untimely and second, that they had not been notified of their right to counsel in the original dependency proceeding. Two sections of Florida law regarding notification were in issue. Section 39.462 provides that the Rules of Civil Procedure and Service of Process shall apply in termination of parental rights cases. The law governing service of process, contained in section 49.08, provides that the date for hearing shall not be less than twenty-eight days after the first publication of notice. The appellate court applied the twenty-eight day rule and found that the statute was not followed because the hearing was held twenty-four days after the first date of publication.

On the parents’ second claim, the court affirmed the proposition of the court in re D.P. that parents must be informed of their right to counsel in a dependency proceeding prior to the termination of parental rights proceeding.287 The parental right in this state is replete with references to this obligation and the
of fees would ultimately be placed and give it an opportunity to attend and be heard at a hearing at which the appointment of independent counsel is contemplated. Interestingly, the court made no reference to the agency about which it was talking.

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277. See 1991 Survey, supra note 5, at 361 (discussing Brown v. Pate, 577 So. 2d 645 (Fla. 1st Dist. Ct. App. 1991)).
279. Id. at 979. The relevant statute provisions requiring that proceedings terminating parental rights are not subject to public scrutiny are Fla. Stat. §§ 39.411, 467 (1991).
280. Investigation: Florida Statute 27.04, 589 So. 2d at 978 (citing C.B.S., Inc. v. Cobb, 536 So. 2d 1067 (Fla. 2d Dist. Ct. App. 1988)).
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286. Id. at D1817.
289. Id. at 6; see also Gelatt v. State Dept. of Health & Rehabilitative Servs., 585 So. 2d 477 (Fla. 3d Dist. Ct. App. 1991) (reversing termination of parental rights for failure to hold present of dispositional hearing).
failure of the trial courts to follow it. Finally, the court noted that even though a parent may not have been properly advised of the right to counsel at the dependency stage, the adjudication of dependency still stands, although it is defective as a basis for termination of parental rights.

The same issue came up in the Fifth District in Williams v. Department of Health & Rehabilitative Services. There the court held that one essential element to be proven by clear and convincing evidence is that the parent was advised of the right to counsel at the dependency hearing. Although it reversed on this ground, the court also held in dicta that the proof of the grounds for termination did not meet the standard of admissible evidence. Apparently no witnesses with any personal knowledge of conduct by the mother testified at the termination hearing. Rather, reports that were clearly hearsay—indeed "compounded to double and triple levels”—were introduced. This, according to the court, did not constitute proof by clear and convincing evidence, the standard necessary in a termination of parental rights proceeding.

Finally, the court in Williams noted that there was no proof that the failure of the mother to comply with a performance agreement was not due to lack of financial resources.

The failure to comply with the statutory obligation of clear and convincing evidence at the trial level continues to create appellate reversals.

292. In re D.P., 595 So. 2d at 64.
293. 589 So. 2d 359 (Fla. 5th Dist. Ct. App. 1991).
294. Id. at 360 (citing Bellflower v. HRS, 578 So. 2d 827 (Fla. 5th Dist. Ct. App. 1991)) and Department of Health & Rehabilitative Serv. v. Zeigler, 587 So. 2d 602 (Fla. 5th Dist. Ct. App. 1991) (also holding that a termination of parental rights petition must be denied for failure to prove by clear and convincing evidence that the parent was informed of his or her right to counsel in the dependency proceeding, but also holding that the denial of the petition does not bring the case back to square one. Rather, the court has the power under § 39.468(2) to determine whether the child should be returned to the natural parent or continued in foster care); see also FLA. STAT. § 39.467(2)(c)1 (1991).
295. Williams, 589 So. 2d at 360.
297. See 1991 Survey, supra note 5, at 2. The court found that there was evidence to suggest that the parent had made an effort to comply. Performance agreements are a methodology for reuniting the family or following a failure to comply, for terminating parental rights. Their genesis is the federal Adoption Assistance and Child Welfare Act of 1980, to which Florida is a signatory.
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293. 595 So. 2d 399 (Fla. 5th Dist. Ct. App. 1991).
294. Id. at 360 (citing Bellflower v. HRS, 578 So. 2d 827 (Fla. 5th Dist. Ct. App. 1991)) and Department of Health & Rehabilitative Serv. v. Zeigler, 587 So. 2d 602 (Fla. 5th Dist. Ct. App. 1991) (also holding that a termination of parental rights petition must be denied for failure to prove by clear and convincing evidence that the parent was informed of his or her right to counsel at the dependency proceeding, but also holding that the denial of the petition does not bring the case back to square one. Rather, the court has the power under § 39.46(2)(d) to determine whether the child should be returned to the natural parents or continued in foster care.); see also Fla. STAT. § 39.467(6)(e1) (1991).
295. Williams, 589 So. 2d at 360.
297. See 1991 Survey, supra note 5, at 2. The court found that there was evidence to suggest that the parent had made an effort to comply. Performance agreements are a method for reuniting the family or following a failure to comply with them, for terminating parental rights. Their genesis is the federal Adoption Assistance and Child Welfare Act of 1980, to which Florida is a signatory.

A.L.W. v. HRS is such a case. There a child was twice removed from her home, initially because of physical abuse by the stepfather and on a second occasion because the odor of marijuana was detected in the home and it appeared that a next door neighbor had been smoking in the parents' bedroom. The trial court conducted an evidentiary hearing to determine whether termination and placement for adoption should occur, although there was a difference of opinion between HRS and the guardian ad litem over whether termination was appropriate. The appellate court applied the clearly erroneous standard of review, that is, whether as a matter of law one could reasonably find the evidence to be clear and convincing. The court found it could not. It then dealt with the parents' second contention, that the child's preferences as to future residence and living environment had not been taken into account. The court agreed with the appellee because the trial court below did not state whether the seven-year-old child possessed sufficient intelligence and understanding to express a preference based upon the relevant Florida statute. The court therefore remanded to determine whether the child had the capacity to state a preference and to allow further evidence on termination of parental rights.

In re K.C. & T.C. raises an important variation on the termination of parental rights by clear and convincing evidence standard. K.C. and T.C., nine and six years old respectively, were found dependent upon evidence of a significant history of abuse. Two weeks after the trial court denied a petition for termination of parental rights filed by HRS for lack of clear and convincing evidence that the parties failed to substantially comply with a performance agreement, the guardian ad litem filed a petition to terminate. The guardian argued that there is no need to prove lack of substantial compliance with a performance agreement or permanent placement plan

299. Id. at 985.
300. Id.
301. Id.
302. See Fla. STAT. § 39.467(2)(i). Section 39.467(2)(i) states in relevant part:
(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: (i) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
303. A.L.W., 590 So. 2d at 986.
where the petition alleges severe and continuing abuse.\textsuperscript{305} While the court found that the statutory language was confusing, it held that there was no clear evidence of legislative intent to eliminate the requirement of substantial compliance with a performance agreement in the recent statutory revision. Thus, the guardian’s petition had been previously determined in favor of the parents on the basis of a failure to show lack of substantial compliance.

On the second issue, the appellate court ruled that the trial court was mistaken in assessing attorney’s fees against the guardian ad litem. The court held that because the argument made by the guardian ad litem created a justiciable issue, the court was precluded from awarding attorney’s fees under Florida law.\textsuperscript{306}

One of the most difficult issues in termination of parental rights cases arises when the parents’ failures are the result of lack of financial resources or when HRS fails to make reasonable efforts to reunite the family. Indeed, Florida law provides such defenses to the natural parent.\textsuperscript{307} The current statute, however, no longer contains a reference to factors beyond a parent’s control as grounds to avoid termination of parental rights. In \textit{In re E., Children},\textsuperscript{308} the Fourth District Court of Appeal applied the new statute. It found that the mother’s drug and alcohol addiction, if it resulted from factors beyond her control, may no longer be considered. The court concluded that an illness beyond the parent’s control can support termination of parental rights when accompanied by a finding of abuse, neglect or abandonment which is likely to continue in the future.\textsuperscript{309} However, even if it were, the court stated that that fact alone does not compel reversal.\textsuperscript{310}

Finally, the appellate courts regularly hold that there must be strict compliance with section 39.467(7) which provides that a termination of parental rights must be accompanied by a written order with finding of facts and conclusions of law.\textsuperscript{311} This issue arose in \textit{In re B.T.}\textsuperscript{312} in which the court held that the order stated in conclusory fashion that it was in the best interests of the child that there be termination and that the father was guilty of continuing abuse and neglect.\textsuperscript{313} The appellate court remanded the case because the order simply tracked the language of the subsections of the law without setting out facts. The court held that an order beyond parental control can form the basis for termination of parental rights if accompanied by abuse, abandonment, and neglect and proof that it will continue in the future.\textsuperscript{314} The court concluded that there was clear and convincing evidence to terminate parental rights in that prospective neglect was real despite its recognition of her “heart-breaking history of personal survival.”\textsuperscript{315}

B. Appellate Issues

Because termination of parental rights cases involve such sensitive and fundamental issues, the question of whether an untimely appeal can be corrected is an important one. The First District Court of Appeal faced this issue in \textit{In re E.H.}\textsuperscript{316} The appellant mother filed a motion for reconsideration in the appellate court from an order dismissing her appeal for lack of jurisdiction because the notice of appeal was not filed in a timely fashion.\textsuperscript{317} The motion for reconsideration argued that the mother was indigent and counsel had been appointed; therefore, a belated appeal should

\textsuperscript{305} Fla. Stat. § 39.467 (1991) (which does not require clear and convincing proof of lack of substantial compliance with performance agreement or permanent placement plan and § 39.464(3) of the Florida Statutes (1991) which states that the basis for termination of parental rights is severe and continuing abuse).

\textsuperscript{306} In re K.C., 603 So. 2d at 99 (citing Fla. Stat. § 57.105 (1990).

\textsuperscript{307} See § 39.467(3)(e) of the Florida Statutes, stating that a termination of parental rights shall be based upon its finding that the following is proven by clear and convincing evidence:

\(\ldots\)

(e) the parent who is alleged to have a performance agreement or permanent placement plan has failed to substantially comply with the agreement or plan. This failure to substantially comply is evidence of abuse, abandonment, or neglect, unless the court finds that the failure to comply with the performance agreement is due to the lack of financial resources of the parent or parents or due to the failure of the department to make reasonable efforts to reunite the family.


\textsuperscript{309} Id. at 1132.

\textsuperscript{310} Id. at 1132.

\textsuperscript{311} See In re C.K., 601 So. 2d 1331 (Fla. 2d Dist. Ct. App. 1992); In re R.J., 586 So. 2d 496 (Fla. 1st Dist. Ct. App. 1991); In re A.T. v. HRS, 400 So. 2d 155 (Fla. 1st Dist. Ct. App. 1986) (holding that it might excuse a lack of factual findings where there was overwhelming evidence supporting the court’s decision).

\textsuperscript{312} 597 So. 2d 398 (Fla. 1st Dist. Ct. App. 1992).

\textsuperscript{313} Id. at 399.

\textsuperscript{314} Id.; see also In re J.L.P., 416 So. 2d 1250 (Fla. 4th Dist. Ct. App. 1982).

\textsuperscript{315} In re B.T., 597 So. 2d at 399. The court described physical and sexual abuse from two stepfathers, the fact that she ran away from her natural father when she was 14 and that her mother died when she was eight.

\textsuperscript{316} 591 So. 2d 1097 (Fla. 1st Dist. Ct. App. 1992).

\textsuperscript{317} Id. at 1097.
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On the second issue, the appellate court ruled that the trial court was mistaken in assessing attorney’s fees against the guardian ad litem. The court held that because the argument made by the guardian ad litem created a justiciable issue, the court was precluded from awarding attorney’s fees under Florida law. 306

One of the most difficult issues in termination of parental rights cases arises when the parents’ failures are the result of lack of financial resources or when HRS fails to make reasonable efforts to reunite the family. Indeed, Florida law provides such defenses to the natural parent. 307 The current statute, however, no longer contains a reference to factors beyond a parent’s control as grounds to avoid termination of parental rights. In In re R., Children, 309 the Fourth District Court of Appeal applied the new statute. It found that the mother’s drug and alcohol addiction, if it resulted from factors beyond her control, may no longer be considered. The court concluded that an illness beyond the parent’s control can support termination of parental rights when accompanied by a finding of abuse, neglect or abandonment which is likely to continue in the future. 309 However, even if it were, the court stated that that fact itself does not compel reversal. 308

Finally, the appellate courts regularly hold that there must be strict compliance with section 39.467(7) which provides that a termination of parental rights must be accompanied by a written order with finding of facts and conclusions of law. 311 This issue arose in In re B.T. 313 in which the court held that the order stated in conclusive fashion that it was in the manifest best interests of the child that there be termination and that the mother was guilty of continuing abuse and neglect. 313 The appellate court remanded the case because the order simply tracked the language of the subsections of the law without setting out facts. The court held that an illness beyond parental control can form the basis for termination of parental rights if accompanied by abuse, abandonment, and neglect and proof that it will continue in the future. 314 The court concluded that there was clear and convincing evidence to terminate parental rights in that prospective neglect was real despite its recognition of her “heart-breaking history of parental survival.” 315

3. Appellate Issues

Because termination of parental rights cases involve such sensitive and fundamental issues, the question of whether an untimely appeal can be corrected is an important one. The First District Court of Appeal faced this issue in In re E.H. 315 The appellant mother filed a motion for reconsideration in the appellate court from an order dismissing her appeal for lack of jurisdiction because the notice of appeal was not filed in a timely fashion. 317 The motion for reconsideration argued that the mother was adjudged and counsel had been appointed; therefore, a belated appeal should

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305. Fla. Stat. § 39.467 (1991) (which does not require clear and convincing proof of lack of substantial compliance with performance agreement or permanent placement plan and § 39.466(3) of the Florida Statutes (1991) which states that the basis for termination of parental rights is severe and continuing abuse).
306. In re K.C., 603 So. 2d at 99 (citing Fla. Stat. § 57.105 (1990)).
307. See § 39.467(3)(e) of the Florida Statutes, stating that a termination of parental rights shall be based upon its finding that the following is proven by clear and convincing evidence:
   (e) the parent who is offered a performance agreement or permanent placement plan has failed to substantially comply with the agreement or plan.
   This failure to substantially comply is evidence of abuse, abandonment, or neglect, unless the court finds that the failure to comply with the performance agreement is due to the lack of financial resources of the parent or parents or due to the failure of the department to make reasonable efforts to reunite the family.
308. 591 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1992).
be granted.\textsuperscript{318} The appellate court noted that the right to such an appeal is "very" limited and, in general, requires a demonstration that the attempt to appeal was thwarted by the state or in a criminal case by failure of counsel to timely file a notice of appeal.\textsuperscript{319} The court recognized that the rationale for granting a belated right of appeal in a criminal case stems from the constitutional right to counsel and such right exists to some degree in the termination of parental rights case, albeit on the basis of the due process clause of the Fourteenth Amendment and the Florida Constitution as opposed to the Sixth Amendment right in a criminal case.\textsuperscript{320} Further, the court correctly recognized that the child's rights are also before the court in that a child might be improperly denied parental association based upon ineffectual assistance of counsel to the parent.\textsuperscript{321}

However, without an order from the supreme court, the appellate court felt constrained to deny the motion, although it certified the issue to the Supreme Court as one of great public importance.\textsuperscript{322} The right to seek affirmative relief based upon ineffectual assistance of counsel exists in the criminal sector. Similar relief ought to be available to a parent in a termination of parental rights proceeding where the lawyer fails to carry out a fundamental obligation. In Stanley v. Illinois,\textsuperscript{323} the United States Supreme Court recognized the right to the maintenance of the family unit as a fundamental right. Thus, a procedural error by an appointed lawyer acting on behalf of an indigent parent should not serve as the basis for the termination of family relations. The termination, if it occurs, should be based upon the trial court's proper evaluation of the facts of the family circumstances and the best interests of the child.\textsuperscript{324}

The question of what evidence is legally sufficient to terminate parental rights was before the Second District Court of Appeal in In re J.A.T. v.

\textsuperscript{325} State.\textsuperscript{325} A mother appealed from an order terminating her parental rights on the ground that insufficient evidence of neglect had been presented at the termination of parental rights adjudicatory hearing.\textsuperscript{326} The evidence was that the children had been adjudicated dependent in an earlier proceeding, that a dispositional order had been made, and that the mother failed to substantially comply with both performance and permanent placement plans after the dependency adjudication. Thus, the court concluded, the termination order did comply with sections 39.046(1) and (3).\textsuperscript{327} However, the court held that the order failed to demonstrate the existence of an additional element not contained explicitly on the face of the statute but existing by virtue of the Florida Supreme Court's 1986 opinion in In re R.W.\textsuperscript{328} In In re R.W. the supreme court held that "before parental rights can be permanently terminated, the state must show abandonment, abuse, or neglect by clear and convincing evidence."\textsuperscript{329}

In In re J.A.T., the trial court had simply held that the mother's failure to comply with the performance agreement was evidence of neglect which gave rise to the initial dependency proceeding, that it was continuing, and that it would continue prospectively.\textsuperscript{320} This finding was held insufficient by the appellate court for two reasons. First, while failure to comply with a performance agreement may be evidence of abuse, abandonment, or neglect, the court in R.W. had held that such failure to comply cannot be the sole basis for permanently terminating parental rights.\textsuperscript{321} Second, the standard for determining whether to terminate parental rights is by clear and convincing evidence under the substantive due process clause of the Fourteenth Amendment.\textsuperscript{322} Thus, the court held in J.A.T. that the trial court lacked the ability to evaluate the evidence presented at the dependency proceeding to decide whether or not the degree of neglect justified the termination of parental rights. Proving the dependency adjudication and disposition simply showed that the state had proved dependency initially by a preponderance of the evidence.\textsuperscript{330} Without a showing by clear and

\begin{itemize}
  \item 318. Id. at 1098.
  \item 319. Id.
  \item 320. Id. at 1098 n.1.
  \item 321. Under Florida law the child has no right to counsel in a dependency or termination of parental rights case. In re M.P. (State Dept. of Health & Rehab. Serv. v. Lake County), 472 So. 2d 732, 733 (Fla. 1985).
  \item 322. In re E.H., 591 So. 2d at 1098. The two issues are: (1) in a case involving the termination of parental rights is the parent entitled to belated appeal based on the ineffectual assistance of counsel in failing to timely file a notice of appeal; and (2) if the parent is entitled to belated appeal, by what procedure and in what court should the right be sought? See also In re A.W., 591 So. 2d 1099 ( Fla. 1st Dist. Ct. App. 1992) (a companion case to In re E.H.).
  \item 323. 405 U.S. 645 (1972).
  \item 324. Id. at 653.
  \item 325. 590 So. 2d 524 (Fla. 2d Dist. Ct. App. 1991).
  \item 326. Id. at 525.
  \item 327. Id.
  \item 328. Id. (citing In re R.W., 495 So. 2d 133 (Fla. 1986)).
  \item 329. In re R.W., 495 So. 2d at 135. The standard in the dependency proceeding is a preponderance of the evidence. See In re J.A.T., 590 So. 2d at 525-26 (citing Santosky v. Kramer, 455 U.S. 745 (1982)).
  \item 330. In J.A.T., 590 So. 2d at 525.
  \item 331. In re R.W., 495 So. 2d at 135.
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be granted.318 The appellate court noted that the right to such an appeal is "very" limited and, in general, requires a demonstration that the attempt to appeal was thwarted by the state or in a criminal case by failure of counsel to timely file a notice of appeal.319 The court recognized that the rationale for granting a belated right of appeal in a criminal case stems from the constitutional right to counsel and such right exists to some degree in the termination of parental rights case, albeit on the basis of the due process clause of the Fourteenth Amendment and the Florida Constitution as opposed to the Sixth Amendment right in a criminal case.320 Further, the court correctly recognized that the child's rights are also before the court in that a child might be improperly denied parental association based upon ineffective assistance of counsel to the parent.321

However, without an order from the supreme court, the appellate court felt constrained to deny the motion, although it certified the issue to the Supreme Court as one of great public importance.322 The right to seek affirmative relief based upon ineffective assistance of counsel exists in the criminal sector. Similar relief ought to be available to a parent in a termination of parental rights proceeding where the lawyer fails to carry out a fundamental obligation. In Stanley v. Illinois,323 the United States Supreme Court recognized the right to the maintenance of the family unit as a fundamental right. Thus, a procedural error by an appointed lawyer acting on behalf of an indigent parent should not serve as the basis for the termination of family relations. The termination, if it occurs, should be based upon the trial court's proper evaluation of the facts of the family circumstances and the best interests of the child.324

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convincing evidence, the appellate court was required to reverse.

Finally, the appellate courts continue to regularly review the failure of the trial courts to explicitly comply with the provisions of section 39.467.344 This section of Chapter 39 requires the trial court to consider and evaluate all relevant factors upon which termination may be based. For example, in In re R.J.,345 the court reversed because, inter alia, the trial court did not specifically find that the mother failed to substantially comply with the performance agreement, nor did it find facts which would have constituted abuse, abandonment, or neglect.346

In re D.F.,347 represents a blatant failure to comply with the provisions of section 39.467. In that case, the trial court entered an order at the conclusion of the dependency proceeding to the effect that at a subsequent termination of parental rights proceeding to be held within sixty days, HRS need only prove the manifest best interests of the child.348 The appellate court agreed with the mother, that in effect, the trial court had sought to relieve HRS of its obligation to prove the elements of section 39.467 without prior notice to her. In essence, this was an attempt to "shortcut the proof required at the upcoming termination hearing which far exceeded the limited authority given trial judges in rule 8.333(a)."349 The appellate court quite properly reversed finding that the appellant was entitled to the process set out in the Florida statutes as well as to have all the elements upon which a termination of parental rights is based proven by clear and convincing evidence.350 The court also found error in the part of the court's order which directed that the children be returned to the custody of their mother. The court ruled that by so doing the trial court had decided the dispositional issue without benefit of a pre-disposition study required by section 39.408(3).351

In In re B.T.,352 a case which relied upon the earlier opinion in R.J., the court also reversed a termination of parental rights order from the trial court on the ground that the order failed to comply with section 39.467. Here, the order terminating parental rights, like the order in R.J., was

condescatory in nature. There was no demonstration that the court had considered or evaluated the factors contained in section 39.467.353 The trial court merely concluded that the mother was guilty of continued abuse and neglect by tracking the statute without setting out facts. The appellate court noted that the absence of factual findings might be excused if there was overwhelming evidence to support the court's decision.354 However, it could not characterize the evidence in the B.T. case as overwhelming.355 Thus, it reversed.

VI. FAMILIES AND CHILDREN IN NEED OF SERVICES

Part IV of Chapter 39 governs families and children in need of services. Passed in 1987, Part IV provides families "with an array of services designed to preserve the unity and the integrity of the family."356 The legislature, in passing this section of the juvenile code, sought to distinguish runaways, truants, and children who are beyond the control of their parent from dependent (abused, neglected and abandoned) children and juvenile delinquents. The statute sets up both judicial and non-judicial systems for responding to the problems of families and children in need of services. The non-judicial proceedings are the responsibility of HRS. Court jurisdiction is limited to cases involving continued placement of a child from a family in need of services in shelter357 and proceedings in which a child is alleged to be a child in need of services.358 Essential to the non-judicial system is the provision of services for the family and child including shelter care, an array of protective and supportive services in the community359 and family mediation and arbitration.360 Court intervention is meant to take place only in circumstances where other efforts have been attempted in a diligent manner but have failed to resolve the problems and conflicts.361

336. Id. at 500.
338. Id. at 971.
339. Id. at 977; see Fla. R. Juv. P. 8.330(a).
341. Id.
343. Id. at 399.
344. Id. (citing In re A.T. v. H.R.S., 400 So. 2d 155 (Fla. 1st Dist. Ct. App. 1980)).
345. In re B.T., 597 So. 2d at 399.
347. Id. § 39.42(4).
348. See id. § 39.42(5) (the court shall retain jurisdiction until a child reaches the age of 18).
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336. Id. at 498.
338. Id. at 971.
339. Id. at 972; see FLA. R. JUV. P. 8.330(a).
340. In re D.F., 602 So. 2d at 972.
341. Id.
343. See id. § 39.42(4).
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The first reported appellate case involving the CINS/FINS statute is a very limited one. In Wolf v. Department of Health and Rehabilitative Services, 353 parents of a child who had been before the court as a child in need of services because of continued truancy from school, 354 appealed from an order requiring them to pay $30 a day to HRS as support and maintenance in a children’s home. 355 The appellate court found that the parents were not parties to the juvenile proceedings and had received no due process notice or an opportunity to defend on the claim. Therefore, the court struck that part of the order which dealt with payment by the parents. The court did note, however, that parents may be responsible for payment for support of their child pursuant to various Florida statutes. 356 The court referred to section 39.11(2), since recodified at section 39.054(2), and section 402.33(2) governing HRS’s authority to charge fees for various services. 357 The court referred in general to some other possible authority without mentioning that among the court’s powers of disposition under section 39.442 in a family and child in need of supervision case is the power to order parents to pay for the care and support of CINS/FINS children.

VII. CONCLUSION

Florida's appellate courts have been extremely active this year. The Florida Supreme Court demonstrated a generally moderate approach to children's issues supporting the concept of a family court, limiting the lower courts' contempt power with regard to secure detention of juveniles, and upholding its speedy trial rules while rendering unconstitutional recent amendments to Chapter 39 in which the legislature violated the separation of powers doctrine by transferring discretionary appropriations authority to the executive branch.

The intermediate appellate courts continued their high degree of responsiveness to statutory arguments as well as enforcement of a policy of holding trial courts strictly accountable to compliance with Chapter 39 mandates. The courts have been less successful, however, in their relations with the legislature over the issue of adequate funding of juvenile justice and child welfare systems. The fiscal issue remains an obvious and significant one for the state because of the well documented evidence of severe shortages in children's services.
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